BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Date of Hearing : 23.02.2023
Date of Decision : 09.08.2023

Appeal No. 334 of 2019

National Stock Exchange of India Ltd.
Exchange Plaza, Block G, C 1,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. ….. 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. Ravi Kadam, Senior Advocate with Mr. Somasekhar Sundaresan, Mr. Abishek Venkataraman, Ms. Sonali Mathur, Mr. Prabhav Shroff, Ms. Harshit Jaiswal, Advocates i/b AZB & Partners for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

With
Appeal No. 183 of 2019

1. GKN Securities
   414, 4th Floor, Palm Spring Centre,
   Link Road, Malad (West), Mumbai – 400 064.

2. Sonali Gupta
   506, Juhu Oyster Shell Cooperative Housing
   Society Ltd., Juhu Tara Road, Mumbai – 400 049.

3. Om Prakash Gupta
   G-190, Preeth Vihar, Delhi – 110092.

4. Rahul Gupta
   506, Juhu Oyster Shell Cooperative Housing
   Society Ltd., Juhu Tara Road, Mumbai – 400 049. ….. Appellants

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. Ravichandra Hegde, Advocate with Ms. Mitravinda Chunduru, Ms. Shonan Bangera, Advocates i/b Parinam Law Associates for the Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

With
Misc. Application No. 233 of 2019
And
Appeal No. 323 of 2019

Deviprasad Singh
Flat No. 101, Building EMP
12, Jupiter CHS,
Thakur Village, Kandivali East,
Mumbai – 400101. ….. 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. Pesi Modi, Senior Advocate with Mr. Neville Lashkari, Mr. Rashid Boatwalla, Mr. Juan D'Souza, Advocates i/b MKA & Co. for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

With
Misc. Application No. 234 of 2019
And
Appeal No. 324 of 2019

Mr. Ravi Varanasi
A-1401, Mahindra Splendour,
LBS Road, Bhandup West,
Mumbai – 400 078. ….. 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. Pesi Modi, Senior Advocate with Mr. Neville Lashkari, Mr. Rashid Boatwalla, Mr. Juan D'Souza, Advocates i/b MKA & Co. for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

With
Misc. Application No. 235 of 2019
And
Appeal No. 325 of 2019

Mr. Nagendra Kumar
A 501, Sungrace Apartments,
Raheja Vihar, Powai, Mumbai – 400072. ….. 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. Pesi Modi, Senior Advocate with Mr. Neville Lashkari, Mr. Rashid Boatwalla, Mr. Juan D'Souza, Advocates i/b MKA & Co. for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

With
Appeal No. 326 of 2019

Way2wealth Brokers Pvt. Ltd.
Frontline Grandeur, Ground Floor,
No. 14, Walton Road, Bengaluru – 560 001. ….. 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 Ms. Shruti Rajan, Mr. Vivek Shah, Mr. Harishankar Raghunath, Advocates i/b Trilegal for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

With
Appeal No. 327 of 2019

Mr. M. R. Shashibhushan
No. 48, Aadhya, 2nd Circular Road,
Nandini Layout, Bangalore – 560096,
Karnataka. ….. 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 Ms. Shruti Rajan, Mr. Vivek Shah, Mr. Harishankar Raghunath, Advocates i/b Trilegal for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

With
Appeal No. 337 of 2019

Ms. Chitra Ramkrishna
201, Laxmi Habitat,
7th Cross Road, Chembur – 400 071. ….. 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. Sandeep Parikh, Advocate with Mr. Piyush Raheja, Ms. S. Priya, Mr. Dipam Sengupta, Advocates for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per : Justice Tarun Agarwala, Presiding Officer

1. 11 out of 17 noticees through 8 appeals have challenged the common order dated April 30, 2019 passed by the Whole Time Member (hereinafter referred to as 'WTM') of Securities and Exchange Board of India (hereinafter referred to as 'SEBI') issuing various directions. In so far as National Stock Exchange of India Ltd. (hereinafter referred to as 'NSE'), noticee nos. 1, Way2wealth Brokers Pvt. Ltd. noticee nos. 8 (hereinafter referred to as 'W2W') and GKN Securities Pvt. Ltd. noticee nos. 12 (hereinafter referred to as 'GKN') are concerned, a direction to disgorge an amount alongwith interest and other directions have been issued. With regard to other noticees, a restraint order has been passed for different periods restraining the said noticees / appellants directly or indirectly from holding any position or being associated with any listed company.

2. The facts leading to the filing of the present appeals is, that the respondent received various complaints alleging irregularities in

respect of colocation facility in NSE. Another complaint dated October 3, 2015 was received by the respondent alleging that W2W was permitted to utilize Point-2-Point (hereinafter referred to as 'P2P') dark fibre connectivity from Sampark Infotainment Pvt. Ltd. (hereinafter referred to as 'Sampark') noticee nos. 16 who was an unauthorized service provider thereby conferring a latency advantage to W2W which, in turn, resulted in the substantial increase in a turnover during April to August 2015.

3. Based on the said complaint, a Cross Functional Team (hereinafter referred to as 'CFT') was constituted by SEBI. Based on the preliminary findings given by the CFT and thereafter on the basis of the recommendations given by the Technical Advisory Committee (hereinafter referred to as 'TAC') of SEBI, an Expert Committee was constituted to further examine the allegations made in the complaints. The Expert Committee submitted a report which was accepted by the TAC. The recommendations of the TAC was communicated to NSE based on which Deloitte Touche Tohmatsu India LLP (hereinafter referred to as 'Deloitte') was appointed to conduct a forensic investigation.

4. In this backdrop, a detailed investigation was undertaken by SEBI to find out possible violation pertaining to dark fibre connectivity provided by Sampark in connivance / collusion with

employees of NSE, with the stockbrokers and the role of the stockbrokers who allegedly benefited from the preferential access to colo facility by way of P2P connectivity from an un-authorised service provider.

5. The investigation revealed various irregularities, based on which, two show cause notices dated May 22, 2017 and July 3, 2018 were issued in respect of P2P connectivity installed by two brokers of NSE, namely, W2W and GKN between the Colo facility on NSE and Colo centre at BSE Ltd. (hereinafter referred to as 'BSE') during the month of April – May 2015 by engaging an unauthorized service provider i.e. Sampark and, further allowing the aforesaid two stockbrokers to continue to avail the services of Sampark even after getting to know that Sampark did not possess the necessary license from the Department of Telecommunications (hereinafter referred to as 'DoT'). The show cause notices was accordingly issued to show cause as to why suitable directions under Section 11 and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') read with Section 12A of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as 'SCRA') should not be issued for the alleged violations.

6. The basic allegations against the appellants are as under :-

a. The appellant NSE was not transparent to its Trading Members (hereinafter referred to as the "TMs") about which Telecom Service Providers (hereinafter referred to as 'TSPs') were authorized to provide services that could be availed by the TMs for establishing P2P connectivity.

b. Permission was given to an unauthorized service provider Sampark, who did not possess the requisite DoT certificate to install its network equipment and was in violation of the NSE's circular.

c. Preferential treatment given to certain TMs by the NSE with respect to installation of P2P connectivity.

d. Allowing installation of Multiplexer (hereinafter referred to as 'MUX') by Sampark in the NSE Meet Me Room (hereinafter referred to as 'MMR') in the Colo facility without verification of its licenses.

e. Unfair latency advantage conferred to W2W and GKN through the un-authorised P2P connectivity provided by Sampark.

f. Continuation of Sampark connectivity by W2W and GKN even after discovering that Sampark lacked proper license, thereby acting in collusion between W2W / GKN and NSE.

g. Site inspection of brokers' offices at BSE office building conducted for some other brokers, viz: Millennium, GRD and SMC etc. for considering their P2P connectivity requests but waived off for W2W and GKN.

h. Arrangements between Sampark and Reliance Communications Ltd. (hereinafter referred to as 'Reliance') were facilitated by NSE to regularize their irregular Sampark connectivity.

7. The show cause notice further alleged that the application received by NSE from Mansukh Securities and Finance Ltd. (hereinafter referred to as 'Mansukh') and from Millenium Stock Broking Pvt. Ltd. (hereinafter referred to as 'Millenium') were denied P2P connection through Sampark citing that Sampark was not an authorised vendor. On the other hand, the same kind of activity through Sampark was allowed to W2W and GKN and that Sampark was even allowed to provide services to W2W and GKN till

September 2015 even after knowing that Sampark was an unauthorized service provider on July 28, 2015. Consequently, the allegation against NSE was of meting out preferential treatment to some stockbrokers which was unbecoming of the Market Infrastructure Institution. The show cause notice, thus, alleged that NSE failed to provide equal, unrestricted, transparent and fair access to all its TMs.

8. The appellants and other noticees filed their respective replies and raised various objections which were considered. The WTM after considering the submissions of the parties and the material evidence on record passed the impugned orders issuing various directions.

9. Even though the facts are common and interlinked, separate findings have been given against each appellant and, therefore, the case of each appellant will be considered individually in the subsequent paragraphs.

10. We have heard Mr. Ravi Kadam, Senior Advocate and Mr. Somasekhar Sundaresan, the learned counsel and Mr. Pesi Modi, the learned senior counsel and Mr. Janak Dwarkadas, the learned senior counsel and Mr. Sandeep Parikh, the learned counsel with Mr. Ravichandra Hegde, Mr. Abishek Venkataraman, Ms. Sonali Mathur,

Mr. Prabhav Shroff, Ms. Harshit Jaiswal, Ms. Mitravinda Chunduru, Ms. Shonan Bangera, Mr. Neville Lashkari, Mr. Rashid Boatwalla, Mr. Juan D'Souza, Ms. Shruti Rajan, Mr. Vivek Shah, Mr. Harishankar Raghunath, Mr. Piyush Raheja, Ms. S. Priya, Mr. Dipam Sengupta, the learned counsel for the appellants and Mr. Shiraz Rustomjee, the learned senior counsel with Mr. Manish Chhangani, Ms. Samreen Fatima, Mr. Sumit Yadav, the learned counsel for the respondent.

NSE, Noticee Nos. 1

11. The allegations against NSE are as under :-

(i) Two TMs, W2W and GKN were allegedly permitted to avail connectivity through the services of Sampark, a telecom service provider, who was not appropriately licensed by the DoT to service end-customers.

(ii) When NSE discovered that Sampark lacked an appropriate DoT license, it denied Millennium and Mansukh, permission for connectivity from Sampark.

(iii) W2W and GKN were allowed to avail P2P services via a MUX installed by Sampark, while NSE refused Millenium permission to install a MUX via Sampark.

(iv) At the same time, NSE permitted Sampark to continue rendering services despite licensing deficiencies but denied permission to Microscan Computers Pvt. Ltd. (hereinafter referred to as 'Microscan'), who had similar licensing deficiencies.

(v) The cabling arrangement for W2W's connection in NSE's co-location facility and the BSE's co-location facility ('BSE Colo'), was installed by Sampark in a manner that resulted in an alleged unfair latency advantage i.e. it allegedly received data faster than other brokers did.

(vi) SEBI alleged that the modification to the NSE Circular dated August 31, 2009 by which TMs were free to avail P2P connectivity from any telecom service provider of their choice, was effected in a non-transparent manner.

12. After considering the material evidence on record and after considering the submission of the party, the WTM held as under :-

(i) that the mode of communication with brokers allowing the use of all telecom service providers for availing P2P connectivity was not communicated transparently.

(ii) that NSE imparted preferential treatment of certain stock brokers in relation to P2P connectivity (W2W and GKN) and not to others (Millenium and Mansukh).

(iii) NSE wrongly permitted Sampark to continue its connectivity to GKN and W2W.

(iv) NSE had wrongly permitted Sampark to install a MUX at the NSE MMR, while denying the same opportunity to others (Microscan).

(v) The cabling arrangement of W2W's leased line conferred on it a latency advantage.

(vi) The eventual shift of W2W and GKN's Sampark line to Reliance was actively facilitated by NSE such that W2W and GKN's latency advantage remained intact.

(vii) NSE adopted discriminatory policies on site inspections when authorizing P2P connectivity.

13. On the basis of the above, NSE was found guilty of the following :-

(i) Violating Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 (hereinafter referred to as 'SECC Regulations') and Clause 3 of the SEBI Circular CIR/MRD/DP/07/2015 dated May 13, 2015 (hereinafter referred to as 'SEBI Circular dated May 13, 2015').

(ii) Violating Regulation 41(2) of SECC Regulations and Clause 3 of the SEBI Circular dated May 13, 2015 and Clause 4(i) of SEBI Circular CIR/MRD/DP/09/2012 dated March 30, 2012.

(iii) Non implementation of the recommendations of the Secondary Market Advisory Committee in respect of the conduct set out above.

(iv) Violating Regulation 3(d) read with Regulation 4(1) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as 'PFUTP Regulations') read with Section 12A(c) of the SEBI Act.

14. The WTM accordingly passed the following directions :-

a) NSE is directed to deposit a sum of Rs. 62.58 crores alongwith interest calculated at the rate of 12% p.a. from September 11, 2015 till the actual date of payment, to IPEF of SEBI within 45 days from the date of this order.

b) NSE, on completion of every six months (by June 30th and December 31st) for the next three years, shall get its network architecture and infrastructure in its Colo facility and its linkages to the trading infrastructure audited by an independent CISA / CISM qualified and CERT-IN empanelled auditor. The deficiencies / shortcomings observed therein and the corrective steps taken thereon, with the comments of the MD and CEO of the Noticee No. 1 shall be submitted to SEBI after obtaining approval of its Governing Board within 60 days from June 30th and December 31st of the year starting from June 30, 2019.

c) NSE is directed to prepare a comprehensive documented policy which shall, inter alia, include Guidelines, Standard Operating Procedures and

Protocols with respect to its Colo facility including the eligibility criteria for Telecom Service Providers, the norms to be observed by the Stock Brokers and other registered intermediaries. The said documented policy is directed to be issued to the market intermediaries under intimation to SEBI, within three months from the date of this order.

d) NSE is directed to submit to SEBI, a report duly certified by its MD and CEO and with the comments of its Governing Board certifying that the network architecture and connectivity at its Colo facility and its linkages to the trading infrastructure are in conformity with SEBI's regulatory norms to provide fair, equitable, transparent and non-discriminatory treatment to all the market intermediaries registered with the Noticee No. 1. Such report shall be submitted within 30 days after every six months (ending on June 30th and December 31st) for the next three years. First such report shall be filed for the six months ending on June 30, 2019, by July 31, 2019 based on the existing system and practices, pending compliances to directions issued at b) and c) above.

e) NSE 1 is directed not to introduce any new derivative product for next six months from the date of this order.

15. Before proceeding to consider the charges levied against the appellants, it would be appropriate to place the background facts for a proper appreciation of the issues involved in the present appeals.

16. Before 2008, TMs used to place orders for trading through their terminals which were located at their offices. These orders would be transmitted to NSE trading system via fibre optic cables of service providers. The market data would also be transmitted to the TMs through the same optic fibre cables.

17. On April 3, 2008, SEBI allowed Direct Market Access ("DMA" for short) facility which allowed clients to access the market directly i.e. without human intervention, using the software of a trading member and routing the orders through the TMs infrastructure. This paved the way for algorithmic (hereinafter referred to as "algo") trading where the decisions on the trades are executed by computer software. The orders are executed using automated preprogrammed trading instructions. The absence of human intervention steps up the frequency and the speed of the

reactions to market movements, and is called “High Frequency Trading” (hereinafter referred to as “HFT”), using algorithms in trading.

18. After the introduction of algo trading in about 2008, the algo servers of the brokers were placed in their offices and orders and market data was transmitted to the brokers through the same fibre optic cables.

19. Co-location services i.e. (Colo) is a facility provided by Stock Exchanges across the globe for all TMs for a reasonable fee. Interested member-brokers who are engaged in HFT, could avail Colo facility. Access to Colo was fairly and equitably available to all member-brokers. In HFT, faster access to data and price feed helped in swifter execution of a trade. When a member-broker availed Colo, trading or data vending systems of the broker was allowed to be “co-located” i.e. physically located within the very premises of the stock exchange.

20. In 2009-10, in line with international practices, NSE decided to provide Colo facility. This service was available to any desirous member-broker, for a fee. The member-broker would rent a physical rack space within the Colo facility in the premises of NSE, and place their servers therein.

21. The technology for dissemination of data in the Colo facility is through the “Tick–By–Tick (TBT)” mechanism. TBT comprises dissemination of “ticks”. A “tick” is a fundamental unit of data dissemination in the TBT architecture. In other words, ticks comprise order entries, order modifications, order cancellations, trades arising from the orders, and every other piece of data related to the market, on a real-time basis. The dissemination of such data builds for the trading members, their order book (the list of orders that indicates the interest of buyers and sellers in a particular security at any point of time).

22. On account of the growth of the Colo facility and an increase in its demand, in 2013, NSE reviewed the TBT architecture and planned the introduction of Multi-cast Tick-By-Tick (hereinafter referred to as “MTBT”) because MTBT could handle higher volumes and users, more efficiently.

23. Thus, in keeping with the development of technology and the advancement of the market, NSE began upgrading its system architecture to MTBT in April 2014. The architecture was migrated from the TCP/IP-based TBT system architecture to the MTBT system, in a phased transition, and with effect from December 3, 2016 it had completely migrated to the MTBT architecture.

24. The very concept of a co-location facility was to provide “latency advantage” to brokers who paid and subscribed for the service. They were permitted to install their algo servers in the colo “rack” in NSE building itself, so that the algo trading servers would receive data faster and could instantly shoot out orders to the stock exchange trading system faster than brokers who were trading from their offices. If the P2P connection to the brokers office was to be used for trading, it would defeat the entire purpose of subscribing to the colo facility.

25. NSE provides a rack in the colo facility with two connections to the NSE systems. One is for receiving data and the other is for placing orders. These have identical latency to provide a totally equal and fair-trading system to the colo subscribers.

26. The algo servers in the respective racks belong to the respective brokers and are part of their infrastructure. NSE has not prescribed any restrictions or specifications for the same. TMs are free to deploy whatever hardware and software they choose, and there are no “latency” stipulations / restrictions. The algo servers does not have identical latency since brokers can deploy hardware / software as per the trading needs.

27. The dark fibre / P2P is the fibre optic cable which connects the brokers algo server in the colo rack to the brokers office outside the NSE building, so that the broker can receive data in his office and set up the parameters of the algo server in the rack so that the server can automatically shoot orders without human intervention. The P2P connectivity, therefore, provides no latency advantage for trading.

28. The algo server and the P2P are all part of the members infrastructure and responsibility. They are procured by, paid for, and maintained by the TM.

29. Fiber optic cable networks covers the entire world. The P2P connections are taken from the colo facility to all corners of India and even abroad. (eg. Most cities in India and to Singapore, Hong Kong, Dubai, etc.)

30. At the outset, certain technical terms and phrases have been used in this order. It would be appropriate to acquaint ourselves with the meanings of these terms :-

Term/Phrase	**Meaning**
Co-Location Facility	Colo or co-location facility is the data centre facility offered by exchanges to the stock brokers. Co-location facilities provide

	space, for the server, storage and networking equipment of the users and also connect them to network service providers. In the instant case, NSE Co-location allowed stock brokers to take on rent specific racks designated for this purpose and co-locate their servers and systems within the exchange premises, in order to have a low latency connection to the exchange. The servers and systems placed in these racks would receive the live market data feed disseminated by the exchange, process the data, and accordingly place their orders to the exchange.
P2P connectivity	P2P relates to the point-to-point connectivity between two points provided by a telecom service provider whereby a leased line connects two designated points, namely, a) One end is the TMs rack at NSE colo; and b) The other end is a location designated

	by the TM, c) The B end point outside NSE premises.
Dark fibre	A dark fibre or unit fibre, with respect to network connectivity, refers to an already laid but unused / passive optical fibre, which is not connected to active electronics / equipments and do not have other data flowing through them and available for use in fibre-optic communication. DoT recognizes 'Dark Fibre' as part of the telecommunication infrastructure and categorizes it as 'passive' infrastructure or 'inactive elements' of the telecom network. As per DoT, companies which have Infrastructure Provider Category – I (IP-1) registration can provide assets such as Dark Fibres, etc. for the purpose to grant on lease / rent / sale basis to the licensees of Telecom Services licensed under Section 4 of the

	Indian Telegraph Act, 1885 on mutually agreed terms and conditions.
MUX	MUX is the abbreviation of 'multiplexer'. It's an equipment, like a junction box, used in the network system for connecting multiple users to the network line of the service provider (say MTNL or Airtel). For NSE co-location facility, the network line of the service providers usually terminated at the MMR from where it used to be connected to multiple stock broker's facility / racks through MUX. It can also be installed directly in a stock brokers rack to connect multiple servers of the stock broker to a common network line.
MMR	MMR is abbreviation of 'meet-me-room'. MMR is a place where telecommunications companies physically terminate their own infrastructure in the MUX. At NSE MMR, connectivity is provided to stock brokers

	with the network service providers through the MUX installed by the network service providers.
Colo Rack	In the Colo facilities, the exchange provides rack space, called Colo rack, for keeping servers and other allied infrastructure. In the instant case, NSE leased the Colo rack space to the brokers availing Colo facilities on an annual fee basis. The brokers were provided one or more rack space in the Colo as per their request.]
Cross Connect	Cross connect, connects broker's equipment at Colo to the MUX in the MMR. In the instant case, a cross connect was used to connect a broker's rack in colocation to the MMR.
Edge Router	An edge router is a specialized router residing at the edge or boundary of a network. This router provides the

	connectivity with external networks. In the instant case, the edge routers were used by BSE to provide P2P connectivity to the brokers between NSE and BSE. The fibre connections from NSE Colo can terminate at the BSE edge router, from which the brokers get connectivity to the rack in BSE Colo.

31. With regard to the charge of non-transparent mode of communication to stockbrokers by NSE, the background facts are that NSE issued a circular No. 693 dated August 31, 2009 with regard to introduction of co-location services at their premises and algo trading. Amongst other things, TMs were required to note the following :-

> *"Members may take one or more leased line to the co-location facility from MTNL, TATA, Bharti or Reliance for the purpose of setting up or modifying parameters, trading related activities and hardware, software, network related access, software download / upload and monitoring and data downloads."*

32. Subsequently, NSE issued a notification in October 2013. The relevant extracts is quoted hereunder :-

> *"……..Members may take one or more leased line to the Colo facility from different telecom service providers for the purpose of setting up or modifying parameters, trading related activities and hardware, software, network related access, software download / upload and monitoring and data downloads."*

33. The aforesaid circular and notification was posted on the website of NSE. The charge against the appellant on this issue is, that NSE did not follow a uniform practice for bringing a change in its circular dated August 31, 2009. It was alleged that the circular dated August 31, 2009 should have been amended by another circular instead of a notification. The show cause notice alleged that NSE failed to communicate to its members in an unambiguous, transparent and consistent manner and thereby failed to provide an equal, transparent and fair access to the TMs. The charge was that the notification posted on the website did not refer to the earlier circular dated August 31, 2009 and, thus, the TMs were unaware of the amendments made in the circular dated August 31, 2009.

34. The WTM held that the notification of 2013 was not communicated to the TMs of NSE in a transparent manner and further held that any amendment made in the earlier circular should provide a reference to the earlier circular and, in the absence of any cross reference to the 2009 circular, it appeared that they were

standing instructions on the same subject matter which could create an ambiguity in the minds of the TMs. The WTM further came to the conclusion that the subsequent notification of 2013 was not known to many TMs which is clearly demonstrable from the statement of Rima Srivastava, CTO of W2W and Rahul Gupta, partner of GKN. Further, the employees of NSE were also not aware about the changes in the circular of August 31, 2009 and consequently, were unaware of the notification of 2013. The WTM, therefore, came to the conclusion that the mode of communication by notification of 2013 issued by NSE violated the principles of transparency and consistency and, therefore, NSE violated Regulation 41(2) of the SECC Regulations and Clause 3 of the SEBI Circular dated May 13, 2015.

35. In this regards, Regulation 41(2) of the SECC Regulations is extracted hereunder :-

> *"41(2). The recognised clearing corporation and recognised stock exchange shall ensure equal, unrestricted, transparent and fair access to all persons without any bias towards its associates and related entities."*

36. Clause 3 of the SEBI Circular dated May 13, 2015 is also extracted hereunder :-

"3. In order to ensure fair and equitable access to the co-location facility, stock exchanges shall :

3.1. provide co-location / proximity hosting in a fair, transparent and equitable manner.

3.2. ensure that all participants who avail co-location / proximity hosting facility have fair and equal access to facilities and data feeds provided by the stock exchange.

3.3. ensure that all stock brokers and data vendors using co-location / proximity hosting experience similar latency with respect to exchange provided infrastructure.

3.4. ensure that the size of the co-located / proximity hosting space is sufficient to accommodate all the stock brokers and data vendors who are desirous of availing the facility.

3.5. provide the flexibility to avail rack space in the co-location / proximity hosting so as to meet the needs of all stock brokers desirous of availing such facility.

3.6. expeditiously decide on the request of the desirous stock brokers / data vendors for availing co-location / proximity hosting and communicate the decision within fifteen working days from the receipt of the request from the stock brokers / data vendors. In case of a rejection, stock exchanges shall also provide reasons in writing to the stock brokers / data vendors.

3.7. facilitate stock brokers to receive data feeds from other recognised stock exchanges at the co-location facilities and allow routing of orders to other recognised stock exchanges from the co-location facilities.

3.8. make available on their websites description of the co-location / proximity hosting, including requirements to be fulfilled

by stock brokers / data vendors who avail the facility, details on fees / charges associated with the facility, etc.

3.9. publish on their websites suitable quarterly reports on latencies observed at the exchange.

3.10. be able to identify orders emanating from the co-located servers of stock brokers and the resultant trades. Suitable statistics relating to such orders and trades shall be disseminated by the stock exchanges."

37. Regulation 41(2) of the SECC Regulations provides that the stock exchange shall ensure equal, unrestricted, transparent and fair access to all persons. The circular of SEBI dated May 13, 2015 elaborates fair and equitable access to co-location facility. Clause 5 of the circular dated May 13, 2015 further directs the stock exchange to take necessary steps to put in place a system for implementation of the circular including necessary amendments of its circulars, bye-laws, rules and regulations and that the stock exchanges were required to bring these provisions to the notice of its stockbrokers and also disseminate the same on its website.

38. Having heard the learned counsel for the parties and having perused the circular of 2009 and notification of 2013, we find that under the circular of 2009, TMs were put to notice that they can take a leased line to the co-location facility from MTNL, TATA, Bharati or Reliance. Thus, TMs were notified of these service providers

from whom the TMs could avail service facilities. The notification of 2013 indicated that TMs can take a leased line to the co-location facility from different telecom service providers. The notification of 2013 did not amend the circular of 2009 but only provided more information. We are of the view that the finding that since the notification of 2009 did not make any cross reference of the earlier circular of 2009, the notification of 2013 became vague is patently erroneous. We also are of the opinion that the finding that TMs were not aware of the notification of 2013 is patently erroneous. All circulars, notifications, publications, etc. are uploaded on the website of NSE and it is expected that all TMs are aware of such information since it is uploaded on the website. If some TMs did not see or read the circular of 2013 then it is that member's ignorance on the issue for which NSE cannot be blamed. The finding that Rima Shrivastav, CTO of W2W and Rahul Gupta, Partner of GKN were not aware of the circular of 2013 is patently erroneous. On a perusal of their statements, it is apparently clear that there was no mention of the fact that they were unaware of the notification of 2013.

39. We find that SEBI circular dated May 13, 2015 expressly provides that the stock exchange must make available on their website the proximity of co-location facility and the requirements to be made by brokers and data vendors availing colo facility. The

circular as well as the notification of 2013 was admittedly posted on NSE website. There is no requirement that circular / notification are required to be sent physically to the TMs. Therefore, it is for the TMs to access NSE website and acquaint themselves of the circular and notification. Further, the circular of 2015 is prospective in nature and cannot apply retrospectively to a notification which was issued in 2013.

40. We are of the opinion that the notification of 2013 merely widens the pool of vendors which the TMs could avail their services. Regulation 41(2) of the SECC Regulations required a stock exchange to provide equal, fair, transparent and unrestricted access to all persons without any bias towards its associates and related entities. There is no allegation that the 2013 notification was made available selectively or that access to NSE website was offered selectively to some members. The website is available for access to all its TMs and, therefore, it is incorrect to say that there was no equal, fair or transparent access. The mere fact that the notification of 2013 did not have any cross reference to the earlier circular of 2009 is an inadvertent omission which, in our opinion, cannot lead to a finding that NSE has violated the principles of transparency and consistency thereby violating Regulation 41(2) of the SECC Regulations and Clause 3 of the SEBI Circular dated May 13, 2015. The respondent

is stretching the violation too far on a technicality. The findings on this issue cannot be sustained.

41. With regard to the issue of Sampark connectivity and alleged preferential treatment to W2W and GKN and discrimination to Millennium and Mansukh, the factual background is that on March 26, 2015, W2W sought permission from NSE to access the colo facility by laying a P2P connectivity between W2W's rack at NSE colo and their office at the BSE building through Sampark who was a licensed vendor. NSE granted permission to W2W on April 6, 2015 subject to the condition that W2W's connection should terminate at their office at P. J. Towers which is the same building which houses BSE and that the link should not be terminated directly at W2W rack in BSE. An undertaking, in this regard, was given by W2W on April 22, 2015. Based on the aforesaid permission, connectivity was provided by Sampark and W2W started using this connectivity with effect from May 28, 2015.

42. Similarly, GKN applied for permission on April 16, 2015 to avail P2P connectivity from Sampark and to install a MUX in its own rack at the NSE colo. Such permission was granted by NSE on April 22, 2015. An undertaking was given by GKN and connectivity was provided by Sampark. GKN started using this facility with effect from May 7, 2015.

43. On June 22, 2015, Mansukh applied for P2P connectivity through Sampark and on June 23, 2015, Millennium also applied for P2P connectivity through Sampark. While these applications were being processed, NSE realised that there was insufficient duct space to house multiple and separate cables for individual members' servers on the colo racks and, therefore, the request of Millennium and Mansukh for P2P connectivity was not found feasible. Around July 15, 2015, NSE gave approval to Millennium to commence pilot testing of the fibre optic link. In the meanwhile, NSE started getting more requests for similar P2P connectivity from other TMs. NSE started exploring to deploy a MUX in the NSE MMR. Sampark sought permission on June 25, 2015 to host common infrastructure to provide connectivity to multiple TMs, based on which, permission was given to Sampark on July 17, 2015 to commence work of installing a common MUX in the NSE MMR.

44. At this stage, NSE, on July 22, 2015 sought in writing a copy of Sampark's DoT licenses which was supplied by Sampark on July 27, 2015. It was at this stage that NSE realised and discovered that Sampark had an Infrastructure Provider - 1 license (IP-1) which only allowed Sampark to install the P2P connectivity to other telecom service providers but was not authorised to provide P2P connectivity directly to end-use customers, namely, the TMs. Consequently, on

July 28, 2015, NSE directed Sampark not to provide any connectivity through its MUX to any other TM till further notice.

45. In the meanwhile, the TM Shastra Securities introduced Microscan who was another P2P service provider and this TM also sought permission seeking empanelment of this service provider on NSE for the purpose of P2P connectivity through a MUX to be installed by Microscan. On July 29, 2015, NSE noted that Microscan's license was the same as that of Sampark and that the said licensee could not provide direct service to end-use customers and that it could only provide connectivity to other service providers. In the same way, Millennium and Mansukh were also intimated that permission for laying P2P connectivity through Sampark cannot be granted as it did not have the requisite license.

46. On discovering that Sampark lacked requisite license, NSE contended that it weighed various considerations as to whether the P2P connectivity provided to W2W and GKN should be allowed to continue and whether the violation committed by Sampark should be considered by NSE since the violation of license was a matter between Sampark and DoT. However, while all these considerations were going on, NSE took remedial measures to rectify the situation by providing to Sampark a list of service providers through whom it could continue. In this regard, it has come on record that Sampark

had a business relationship with Reliance and, therefore, Sampark volunteered to work with Reliance. A service agreement between Sampark and Reliance was entered into and on August 19, 2015, Reliance confirmed to NSE that Sampark infrastructure installed at NSE MMR had been transferred to Reliance and that W2W had also switched from Sampark to Reliance. Since Reliance came into the picture, the applications of Millennium and Mansukh were processed and Millennium started availing P2P connectivity from Reliance with effect from August 22, 2015. W2W switched to Reliance from Sampark on September 9, 2015 and Mansukh was given P2P connectivity by Reliance on October 9, 2015.

47. The finding that W2W and GKN were given preferential treatment as they were allowed to obtain P2P connectivity from Sampark and, on the other hand, Millennium and Mansukh were denied Sampark services for connectivity is erroneous and a wrong appreciation of the factual position. The finding that NSE adopted a discriminatory approach towards TMs Millennium and Mansukh and consequently failed to provide fair and transparent access to members in an equal manner is patently erroneous.

48. In our view, when the lacunae in Sampark's IP license was discovered by NSE, NSE could have directed disconnection of its connectivity but chose not to make any disconnection and, on the

other hand, sought to rectify the situation by informing Sampark that it should provide services to the license service providers of DoT. Sampark chose Reliance as it had previous business relationship and thereafter handed over the entire infrastructure to Reliance. Reliance thereafter provided P2P connectivity through the MUX installed in MMR to W2W, Mansukh and Millennium at the earliest opportune moment. This sequence of events does not indicate any preferential treatment to W2W or to GKN on one hand or discrimination to Mansukh or Millennium.

49. In this regard, we also find that NSE had immediately asked W2W to shift its P2P connectivity to any other service provider who was entitled to service the end-use customers and eventually Reliance provided P2P connectivity to W2W.

50. We are also of the opinion that NSE did not discriminate Millennium and Mansukh in relation to Sampark because at the relevant moment P2P connectivity could not be given to Millennium and Mansukh due to sheer lack of duct space and a process was adopted to install a MUX in NSE MMR to enable multiple members to get P2P connectivity. While this process was going on, NSE realised that Sampark did not have the requisite license and consequently, Millennium and Mansukh were informed that P2P connectivity cannot be granted through Sampark as it was not an

authorized service provider. Eventually, when Reliance took over the infrastructure of Sampark, P2P connectivity was provided to Millennium and Mansukh.

51. We are further of the opinion that once NSE found that Sampark was an unauthorized service provider, it could not permit Sampark to provide P2P connectivity to Millennium and Mansukh or to any other TM. Allowing Millennium and Mansukh to avail P2P connectivity through Sampark could be viewed seriously as continuing to perpetuate the violation in spite of the discovery that Sampark was not a licensed service provider.

52. Therefore, we are of the opinion that the WTM has committed an error in coming to the conclusion that NSE was providing preferential treatment to W2W and GKN on one hand and discriminated Millennium and Mansukh on the other hand. The charge that there was lack of transparency is also erroneous. In this regard, we are constrained to observe that this issue has been blown out of proportion. A mountain is being made out of a molehill. The entire timeframe of the discovery of the lacunae in Sampark's license from July 27, 2015 to the migration by Sampark to Reliance on August 19, 2015 constitutes only 24 days and, therefore, the central charge in these proceedings is much ado about nothing.

53. The finding of the WTM that NSE could not have allowed continuation of Sampark connectivity to W2W and GKN after NSE discovered the lacunae in Sampark license and should have taken penal measures against Sampark, W2W and GKN is one view which could have been taken but by not taking was not fatal inviting penal consequences. In the first instance, we find that the impugned order alleges NSE of permitting an unauthorized service provider to provide P2P connectivity. Secondly, the impugned order finds fault in NSE for not permitting more brokers to use the same unauthorized service provider. Thirdly, the impugned order finds fault with NSE for remedying the situation within a short span of 24 days. The impugned order, therefore, suffers from an inherent inconsistent and self-destructive finding which cannot be reconciled. If NSE had permitted Sampark to provide connections to Millennium and Mansukh after discovery of its licensing deficiencies, such an act could have been assailed as NSE perpetuating a wrong in the name of equality. Negative equality is no equality. This would not be setting a wrong right but would be perpetuating another wrong.

54. We find that NSE took a conscious and bonafide decision in not disconnecting the connectivity of W2W and GKN and further took remedial steps immediately to correct the irregularities which were rectified within a short span of 24 days. The procedure adopted

by NSE has not been considered nor any cognizance has been taken by the WTM. Thus, without considering the aforesaid, the WTM has fallen in error in penalizing NSE in coming to a one sided conclusion that NSE ought not to have allowed continuation of Sampark connectivity without considering the cascading effect it could have had to that TM by stopping the P2P connectivity. The WTM has ignored various factors such as consideration of feasibility and practicality in exercise of choosing the service provider, addressing the problem of multiple cables being drawn through limited duct space, availability of TMs availing P2P connectivity, etc.

55. NSE being a Market Infrastructure Institution has to weigh multiple competing considerations and take a decision that would maximize the benefits to all stakeholders while minimizing inconveniences and disruptions to its systems. In our view, this is precisely what NSE did. In our opinion, one wrong cannot justify another wrong. If W2W and GKN availing Sampark connectivity was wrong then affording the same connectivity to Millennium and Mansukh was not a viable solution. It is, thus, incorrect and erroneous to suggest that NSE thus failed to ensure fair access to its TMs. In the given circumstances, the irregularity that was discovered was rectified in the shortest possible period. For the same

reason, since Microscan did not have the requisite license the same was rightly denied by NSE. No discrimination was adopted by NSE.

56. The WTM has found that NSE was actively associated with and facilitated the process of transition from Sampark to Reliance and consequently, came to the conclusion that NSE was involved in the deal between Sampark and Reliance so that W2W and GKN could continue to enjoy the connectivity without any loss to their latency advantage. In the first instance, we find that the WTM has misdirected itself and travelled beyond the show cause notice as we do not find any such allegation of a transition to Reliance so as to preserve any purported latency advantage to W2W and GKN. From the record, we find that NSE was not involved in the decision of Sampark to take the services of Reliance. In fact, Sampark itself volunteered to work with Reliance as it had prior business relationship, based on which NSE on August 12, 2015 allowed W2W to switch from Sampark to Reliance. Subsequently, Sampark transferred its infrastructure to Reliance in which NSE was not involved. NSE at that time was only interested in rectifying the discrepancy and the lacunae at the earliest which was done within 24 days. If NSE facilitated the transfer of Sampark's infrastructure to Reliance, it is hard to comprehend as to how the transitioning of an infrastructure from an illegible entity to a legible entity was violative

of norms of fair and equitable access or such facilitation became fraudulent. We find that NSE was not involved in the decision of Sampark to handover its assets to Reliance. The evidence on record establishes that NSE only gave a list of service providers to Sampark. In our view, the transitioning of the infrastructure from Sampark to Reliance follows all norms or fair and equitable access nor is the same fraudulent. We find that Sampark had itself volunteered to work with Reliance. Further Reliance had upgraded its infrastructure around the same time as Sampark was installing its MUX in the NSE MMR and, therefore, the same could have been a reason for Reliance to take over the infrastructure of Sampark. Thus, in our opinion, we do not find any shred of evidence to show that NSE was actively associated with and facilitated the process of transition from Sampark to Reliance so that W2W and GKN could continue to enjoy connectivity of Sampark under the banner of Reliance without any loss to their latency advantage.

57. The impugned order alleges that NSE did not have any documented policy for verification of prospective service providers. The impugned order finds that NSE permitted an unauthorized service provider to provide P2P connectivity. The impugned order finds that it was NSE's duty to verify Sampark's license before permitting access to brokers from their racks in NSE colo facility and

that NSE failed to carry out due diligence and allowed an ineligible entity, namely, Sampark to install its MUX in NSE MMR in violation of its own policies and, therefore, NSE is guilty of gross negligence and displayed malafide intention to defraud its own policy on engagement of empaneled vendors as set out in its own circular.

58. In this regard, NSE claimed that it does not control pre-installed infrastructure but retain discretion to deal with members with requests of P2P connectivity. According to NSE, there was no general requirement to formulate the policies governing P2P connectivity in as much as the architecture inherently takes place outside the colo facility and does not interfere with NSE colo infrastructure.

59. It was contended that P2P connectivity is a service that could be taken by TMs from a telecom service provider, whereby a leased line (i.e. private circuit for transmission, and includes fibre optic cables used for this purpose) connects two designated points, namely :

(a) one end is the TM’s rack at NSE colo; and

(b) the other end is a location designated by the members i.e. the B-end point (usually the member's office(s) outside NSE premises).

Therefore, P2P connectivity starts where the colo infrastructure of NSE ends.

60. The P2P connection does not lie in the core data dissemination and trading path of NSE, and is not directly connected to the NSE's trading systems. P2P connectivity to the outside world begin from NSE's MMR in which TMs were assigned their respective racks. The MMR, therefore, was the end point of NSE's co-location architecture. The cabling for the P2P connectivity began from these racks and proceeded onward to the B-end point, chosen by the TM. P2P connectivity is not part of the infrastructure provided by NSE to TMs.

61. It was urged that there is a distinction between Exchange provided infrastructure and TM's infrastructure and that NSE can only ensure similar latency i.e. the time taken for a packet of data to travel through its source to its destination. It was contended that NSE cannot control latency outside of its infrastructure since it would depend on the member's infrastructure. It was also urged that SEBI investigation report itself revealed that P2P connectivity was

part of members infrastructure and thus, it was urged that P2P connection does not lie in the trading path of NSE as it was not directly connected to NSE's trading system.

62. It was contended that if TMs wanted to avail P2P connectivity, NSE merely facilitated the same by allowing the members (and/or their service providers) to enter the co-location facility to lay cables, and physically access the co-location data centre to set up such P2P connectivity. The non-prescriptive stance of NSE is evident from the following.

(i) NSE did not and even today does not, regulate the type of infrastructure a TM wishes to install in the racks allocated to a TM. These are matters left to the commercial wisdom of the members.

(ii) Choices of service provider, equipment specification, connection bandwidth and connection quality, etc. are left entirely to the choice and discretion of the member. The contract of P2P connectivity is entered into between the telecom service provider and the member. NSE is not a party to the contract, or privy to the commercial arrangement between the telecom service provider and the member; and

(iii) TMs were free to avail of a P2P connection initially from a specified list of service providers in NSE colo as provided in the NSE circular of 2009 and subsequently vide the notification of 2013.

63. It was, thus, contended that a conscious decision was taken that since Sampark violated the terms and conditions of its license, DoT was the appropriate authority to take action and revoke the license, if necessary.

64. Having heard the learned senior counsels for the parties on this aspect, we are of the opinion that while starting the co-location facilities, NSE came out with its guidelines of 2009 circular which intimated the TMs to use leased line from the four service providers, namely, MTNL, Reliance, TATA, Bharti. Subsequently, NSE notified in 2013 that leased line facilities can be availed from the service providers of DoT. Thus, it is not open for NSE to suggest that it was not their duty to ensure that Sampark had a valid license or not. The contention that it is not the duty of NSE to regulate the licensor, namely, Sampark is not correct. In our opinion, if any infrastructure is laid inside the premises of NSE and even though it is the TMs infrastructure, it is the onerous duty of NSE to ensure that such infrastructure which is being laid inside NSE premises are in

accordance with the policies laid down by NSE through its circulars and notifications. NSE cannot escape this obligation.

65. We find that NSE had issued the 2009 circular and the notification of 2013 requiring TMs to take leased line from service provider licensees of DoT. Thus, if the TMs approached NSE for P2P connectivity to its colo rack placed inside NSE premises, it was the duty of NSE to inquire as to whether the vendor i.e. Sampark was a licensed service provider or not. In the instant case, we find that no such steps were taken by NSE to find out as to whether Sampark was the authorised license vendor of DoT to lay the P2P infrastructure and provide services to the TMs. By not doing this minimum inquiry, NSE has failed to carry out due diligence on this aspect.

66. The contention that NSE policy distinguished between provisions of NSE owned infrastructure and deployment of member's infrastructure and that no monitoring or verification was required for deployment of members own infrastructure is not correct. Once certain policies and circulars are issued by NSE and any infrastructure is being laid inside NSE premises then it became an onerous duty of NSE to ensure that infrastructure is being laid in accordance with its circulars and notifications. In our opinion, verification was required for deployment of TMs infrastructure inside NSE premises. NSE has failed to regulate the infrastructure installed

in member's infrastructure which was being done by an unauthorized vendor.

67. We are of the opinion that in this regard, NSE has failed to carry out due diligence in not verifying the license of Sampark. However, by not doing so, we do not find that there was a deliberate attempt on the part of NSE to play a fraud upon other TMs in order to give advantage to W2W and GKN. In fact, the investigation report finds that there was no undue benefit or advantages derived by W2W and GKN while availing Sampark's P2P connectivity. This fact was further confirmed by EY in its report. We are of the opinion that no fraud was played nor was there any violation of Regulations 3 and 4 of the PFUTP Regulations or violation of Regulation 41(2) of the SECC Regulations.

68. For the same reason, NSE could not allow Sampark to access the racks of the TMs in NSE's colo facility. Since Sampark did not have the requisite license, it could not allow an illegible vendor to install MUX in its MMS and allow a TM to connect through such MUX. There was negligence and lack of due diligence though we are of the opinion that there was no malafide intention to defraud other empanelled vendors or the TMs, nor was it detrimental to the securities market. We find that MUX is a junction box for connecting multiple users to a network line of a service provider.

MUX serves as a conduit for multiple connections to be provided to a common line of a service provider. Therefore, installation of MUX was in no way detrimental to the securities market.

69. It was alleged that NSE gave latency advantage to W2W. It was alleged that when permission was given to Sampark to lay the cabling, W2W was required to give an undertaking that P2P connection would be from its rack in NSE's office to its office at 213, P J Tower, BSE building. It was contended that NSE had issued a policy which did not allow its brokers to establish direct connectivity from its colo facility to BSE colo centre and that the appellant required that the connectivity from NSE colo was to be first terminated at the office of the brokers and then from the office of the broker the connectivity was taken to BSE colo rack. In the investigation, it was noted that P2P connectivity of W2W was directly terminated at the W2W rack in BSE colo instead of terminating at their office which was in violation of NSE's policy. On this basis, it was alleged that NSE by facilitating laying of cable for W2W through Sampark provided latency advantage to W2W over other stockbrokers. It was also alleged that when Sampark had installed its MUX at NSE MMR, it was installed in such a manner that the source cable was first connected to W2W MUX and from thereon it went to other brokers rack through Sampark's MUX into

NSE MMR. On the basis of a diagram in the given investigation report, it was alleged that W2W through Sampark had arranged the cabling in NSE colo rack in such a manner that W2W had lower latency compared to other stockbrokers connected through Sampark MUX placed in NSE MMR. It was, thus, alleged that NSE failed to conduct due diligence and failed to provide a level playing field to all its stockbrokers.

70. The WTM after considering the material evidence held that the diagrammatic representation clearly indicated that a latency advantage was given to W2W. Further, the direct connectivity between NSE colo and BSE colo by W2W gave advantage of a minimum latency as compared to other brokers. Further, the path of source cable which went from the W2W's rack in Sampark's MUX in MMR instead of going to the MUX first also gave connectivity benefit to W2W with lower latency. The WTM further found that Sampark had promised W2W that if they choose Sampark's P2P connectivity, it would give latency less than one milisecond, based on which, the WTM concluded that latency advantage was given to W2W.

71. Having heard the learned counsel for the parties on this issue, we are of the opinion that the installation of MUX by Sampark was totally unauthorized. We have dealt this issue in the earlier part of

this judgment and we have found that there was lack of due diligence on the part of NSE in allowing an unauthorized vendor to make such connection and, therefore, it is not necessary to dwell on this aspect any further.

72. However, we find that the finding given by the WTM to the effect that NSE facilitated W2W in getting P2P connectivity through Sampark in order to give a latency advantage is patently erroneous and is based on surmises and conjunctures. It was alleged that the source cable for W2W's P2P connectivity is connected to W2W rack at NSE and thereafter through Sampark MUX at the NSE MMR and that the end of the W2W's P2P connectivity did not terminate at W2W office at BSE but terminated directly at W2W rack at BSE thereby giving lower latency advantage to W2W. The finding that based on the diagrammatic representation, W2W had arranged its connectivity on both ends, i.e. NSE colo and BSE colo in such a manner that it enjoyed latency advantage is purely based on surmises and conjectures. In the first instance, there is no evidence that cabling diagram as depicted in the show cause notice and in the impugned order transmitted any information first to W2W at its rack before proceeding to MUX. On the contrary, the submission of the appellant before us appears to be plausible, namely, that at the relevant time W2W's rack contained merely a passive junction box

through which the fibre optic cable passed before reaching Sampark's MUX in the NSE MMR. There is no evidence to show that any data reached W2W before going to Sampark MUX in the NSE MMR. In this regard, we find that initially Sampark has installed its MUX at W2W's rack and when more TMs required P2P connectivity, it was found that there was cabling issues in the duct space and, consequently, MUX was shifted to NSE MMR. Therefore, at the relevant time, the source cable passed through Sampark MUX installed in NSE MMR and, thereafter through W2W rack. Such procedure which was adopted and thereafter modified does not, in any way, gives any clue of giving latency advantage to W2W. It may be noted here that when connectivity was given to W2W, at that moment of time, W2W was the only member connected to Sampark MUX.

73. There is no doubt that as per the NSE policy W2W was required to give an undertaking that the P2P connectivity would terminate at their office in BSE and not at the BSE colo. The correspondence on the record of W2W internal mail which SEBI had accessed clearly demonstrated that W2W was misleading NSE with respect to the end-point termination of its P2P link. The employees of W2W were aware that their connectivity directly to BSE colo was in violation of NSE policy. The WTM rightly found that W2W

deliberately misled NSE while terminating the link at W2W rack at BSE colo.

74. However, once the aforesaid finding is given that NSE was misled by W2W, the WTM fell in error in holding that NSE facilitated laying of cable for W2W by Sampark so as to provide latency advantage to W2W over other stockbrokers. This finding, in our opinion, is patently erroneous and based on surmises and conjunctures. Once a finding has been given that W2W was deliberately misled NSE, the question of NSE facilitating W2W or Sampark for the purpose of giving latency advantage to W2W does not arise.

75. The finding on latency advantage is based on the diagram given in the show cause notice as well as in the impugned order. In our opinion, the conclusion drawn that the cabling in the NSE colo rack was depicted in the diagram gave lower latency to W2W compared to other stockbrokers connected through Sampark's MUX in NSE MMR is based on no evidence. The investigation report of SEBI finds that W2W and GKN who availed Sampark's P2P connectivity between May 15, 2015 to September 2015 did not receive any undue benefit. The fact that through this connectivity directly from NSE colo rack to BSE colo rack resulted in increase of turnover of W2W cannot lead to a conclusion that W2W was given

latency advantage and that marginal increase in turnover was attributed through Sampark's P2P connectivity. The turnover can increase through a variety of factors such as market conditions, brokers trading strategy, etc. In fact, the investigation report concludes that it was not feasible to draw any causal relationship between Sampark's P2P connectivity and the profit earned by the brokers. Further, the forensic auditor has not been able to quantify any unfair benefit. We also find that the EY's report noted that latency impact or advantage, if any, on account of W2W's connectivity at NSE colo and BSE colo could not be ascertained. We find that there is no evidence of any unfair latency advantage. There are no logs, latency measurement maintained by the members regarding the P2P connectivity and, thus, relying upon a sales pitch made by Sampark to W2W that the P2P connectivity would give a latency of less than one milisecond and a bandwidth of one Gigabyte cannot be a deciding factor in coming to a finding of latency advantage being given to W2W.

76. We also find that SEBI itself issued a circular dated December 1, 2016 and allowed direct connectivity between server of a stockbroker placed in NSE colo and server of the same stockbroker placed in colo facility on another recognized stock exchange. This circular by itself gives a clear indication that there was no latency

advantage where P2P connectivity was directly connected between the two colo racks of two stock exchanges or whether it went through the office of TMs and thereafter to the colo rack of BSE.

77. In this regard, further finding that NSE did not conduct inspection of W2W connectivity at BSE office while granting P2P connectivity to some TMs and conducting site visits for other TMs and, therefore, NSE adopted a discriminatory approach, in our opinion, is stretching the alleged violation a little too far. In this regard, we find that NSE at the relevant time did not allow direct connectivity between NSE colo and BSE colo. It was noted that on December 1, 2016, vide SEBI's circular it had allowed direct connectivity between two colo racks in the two different stock exchanges. Therefore, prior to December 1, 2016, P2P connectivity requests were made by TMs, the membership department of NSE used to initiate site inspection. Undoubtedly, when W2W applied for P2P connectivity, no site visit was undertaken. The explanation given was that W2W already had a P2P connectivity from Reliance and, therefore, it was not necessary to conduct another onsite inspection. Similarly, the site visit for GKN was not undertaken at the time as NSE was informed that the connection would terminate at the BSE Edge router. The explanation has been disregarded by the WTM and a finding of discrimination has been given solely on the

ground that a site inspection was carried out for GRD Securities (hereinafter referred to as 'GRD') and SMC Global Securities (hereinafter referred to as 'SMC') before permitting the services of P2P connectivity. In this regard, we find that GRD and SMC were availing colo facilities for the first time and, therefore, a site inspection was carried out which, in our opinion, conformed to the NSE policy. Similarly, in the case of Millennium, the office address which was provided by them was identical to the address for GRD and, therefore, led to a doubt as to whether two TMs who had asked for two separate P2P connections had the same office. These were all the more reasons for NSE to carry a site inspection.

78. For the reasons stated aforesaid, the finding that in relation with W2W and GKN, NSE had waived its policy of site inspection and due diligence was not carried which led to providing unfair latency advantage to W2W and discriminating other stockbrokers is patently erroneous and is based on erroneous appreciation of the evidence. The finding that NSE failed to provide equal, unrestricted and transparent access to its stockbrokers because W2W deliberately misled NSE that their P2P connectivity would be terminating at their office at BSE and, consequently, NSE acted in a prejudicial manner is patently erroneous and cannot stand test of scrutiny.

79. A lot of noise has been raised by the respondent on the issue of latency advantage being given by NSE to the two TMs, namely, W2W and GKN. We fail to understand as to how the P2P connectivity from one colo rack to the office of the TM and / or to the colo rack of BSE would give a latency advantage. As far as we are aware the latency advantage is for the trades being executed by a TM from the colo facility given by the stock exchange. In this regard, to recapitulate P2P connectivity is a service that was taken by a TM from a telecom service provider whereby a leased line was connected to two designated points. On one end, it was the TM's rack at NSE colo facility and the other end was the location designated by the TM which was outside NSE premises.

80. It was contended by NSE that P2P connection does not lie in the core data dissemination and trading path of NSE and that P2P connection was not directly connected to the NSE trading system. This fact is borne out from the statement of Mr. Deviprasad Singh and Mr. Ravi Varanasi who were employees of NSE. SEBI's investigation report (Volume VII page No. 1640) also suggests that P2P connection was not in the trading path. There is no discussion on this issue nor any finding has been given by the WTM in the impugned order to the effect that P2P connection was in the core data dissemination and trading path of NSE. Admittedly, P2P

connectivity was not part of the infrastructure provided by NSE to the TMs.

81. We, however, tend to agree with the submission of NSE that the P2P connection was not in the trading path of NSE for the following reasons :-

a. P2P connectivity does not fall within the trading path of the co-location facility at NSE and does not come to NSE trading system. The trading on the colocation facility is between the stock exchange trading server and member's server on the co-location rack. The dissemination of live data ends at the colo rack of the TM. The P2P connectivity starts beyond this path and connects post-trade and pre-trade connectivity to the members' premises. There is nothing to indicate that P2P connectivity has two live points in the trading system.

b. P2P connectivity is not part of the infrastructure provided by NSE to its TMs which is admitted by the respondent. P2P connectivity is the infrastructure provided by third party service providers who are directly engaged by the TMs. The NSE has no

involvement in the P2P connectivity being offered by third party service providers to the TMs.

c. There is no finding that the P2P lines were used for transmission of market data from and to the NSE colo facility. In fact, the investigation report suggests otherwise. There is no material to support the contention raised by SEBI before us showing that P2P connectivity was used for transmission of live market data especially when SEBI concedes that the statement of the employees of NSE categorically stated that no trading occurred on P2P connectivity.

d. The data that was transmitted to the P2P lines was, thus, not live trade orders but were post-trade data or pre-trade data.

e. The purpose of installing a co-location rack at NSE premises was to reduce the latency. If the colo rack was placed at the TMs' office and if live trade took place through P2P connectivity, then the purpose of rendering the co-location facility at NSE premises would become redundant. Further, the advantage given to the TM to reduce the latency while placing the colo rack at NSE

premises would be lost if live trades are transmitted through P2P connectivity to the TM's premises.

f. Suggestion by the respondent that a TM would receive market data quicker than other brokers transmitted through P2P connectivity is patently erroneous, in as much as, we are of the opinion that if live data was transmitted from the NSE's trading server to the colo rack placed inside the NSE premises and thereafter through the P2P connectivity to the office of the TM which was located outside NSE premises, the TM would not get any latency advantage.

In view of the aforesaid, we are of the opinion that P2P connectivity did not give any latency advantage to the TMs.

82. The show cause notice alleged that NSE had violated Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations. The WTM came to the conclusion that NSE had violated Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations on account of granting preferential treatment to W2W and GKN and depriving the same to other stockbrokers for facilitating laying of cable for W2W through Sampark so as to provide latency advantage to W2W over other stockbrokers and by

allowing W2W and GKN to continue to avail Sampark's connectivity even after finding that Sampark did not have a requisite license and by conducting site inspection in the office of Millennium, GRD and SMC for the purpose of P2P connectivity while not following the same procedure for W2W and GKN and, therefore, such preferential treatment was collusive and fraudulent.

83. We have already held that NSE did not give any preferential treatment to the two stockbrokers nor any latency advantage was given to the two stockbrokers while using the P2P connectivity. We have also held that no preferential treatment was granted to the two stockbrokers permitting them to establish P2P connectivity through an unauthorized service provider nor any discriminatory approach was made by NSE towards other stockbrokers. We have also found that there was no intentional negligence on the part of the NSE by waiving physical inspection of the office site of W2W.

84. Therefore, finding of collusion and / or fraud on the part of NSE in the given circumstances cannot be sustained. In this regard, the provisions of Section 12A(c) of the SEBI Act, Regulations 3(d) and 4(1) of the PFUTP Regulations and definition of 'fraud' as defined under Regulation 2(c) of the PFUTP Regulations are extracted hereunder :-

"12A(c). Engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder."

"3(d). Engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made thereunder."

"4(1). Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities."

"2(c). "fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—

(1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;

(2) a suggestion as to a fact which is not true by one who does not believe it to be true;

(3) an active concealment of a fact by a person having knowledge or belief of the fact;

(4) a promise made without any intention of performing it;

(5) a representation made in a reckless and careless manner whether it be true or false;

(6) any such act or omission as any other law specifically declares to be fraudulent;

(7) deceptive behaviour by a person depriving another of informed consent or full participation;

(8) a false statement made without reasonable ground for believing it to be true;

(9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.

And "fraudulent" shall be construed accordingly;

Nothing contained in this clause shall apply to any general comments made in good faith in regard to—

(a) the economic policy of the government
(b) the economic situation of the country
(c) trends in the securities market;
(d) any other matter of a like nature

whether such comments are made in public or in private."

85. Section 12A of the SEBI Act provides that no person shall engage in any act which would operate as a fraud or deceit on any person in connection with the issue or dealing in the securities. Regulation 3(1)(d) of the PFUTP Regulations is on the same lines as provided under Section 12A of the SEBI Act. Regulation 4(1) of the PFUTP Regulations further provides that no person will include in a

fraudulent and unfair trade practices in securities. 'Fraud' is defined under Regulation 2(c) of the PFUTP Regulations and includes such act which induces another person or his agent to deal in securities with his connivance.

86. In ***Securities and Exchange Board of India Vs. Pan Asia Advisors Limited and Another, [(2015) 14 SCC 71],*** the Supreme Court has set out the scope of Section 12A of the SEBI Act. The Supreme Court held :-

> *"78. Section 12-A of the SEBI Act, 1992 creates a clear prohibition of manipulating and deceptive devices, insider trading and acquisition of securities. Sections 12-A(a), (b) and (c) are relevant, wherein, it is stipulated that no person should directly or indirectly indulge in such manipulative and deceptive devices either directly or indirectly in connection with the issue, purchase or sale of any securities, listed or proposed to be listed wherein manipulative or deceptive device or contravention of the Act, Rules or Regulations are made or employ any device or scheme or artifice to defraud in connection with any issue or dealing in securities or engage in any act, practice or course of business which would operate as fraud or deceit on any person in connection with any issue dealing with security which are prohibited. By virtue of such clear cut prohibition set out in Section 12-A of the Act, in exercise of powers under Section 11 referred to above, as well as Section 11-B of the SEBI Act, it must be stated that the Board is fully empowered to pass appropriate orders to protect the interest of investors in securities and securities market and such orders can be passed by means of interim measure or final order as against all those specified in the abovereferred to provisions, as well as against any person. The purport of the statutory provision is*

protection of interests of the investors in the securities and the securities market."

"79. Along with Section 12-A, when we read Regulation 2(1)(c) of the 2003 Regulations, the act of fraud has been elaborately defined to include any kind of activity which would work against the interest of the investors in securities. Further, such interest of the investors can be better ascertained by making reference to Section 2(h)(iii) of the SCR Act, 1956 which defines "security" to mean the right or interest in securities. A conspectus reference to Sections 12-A(a), (b) and (c) read along with Regulations 2(1)(b) and (c), as well as Section 2(h)(iii) of the SCR Act, 1956 sufficiently disclose that it would cover any act which will have relevance in protecting the interest of the investors in securities and security market with any person however remotely the same are connected with such securities, in the event of such an act working against the interest of investors in securities and securities market by way of fraud which has been elaborately defined under Regulation 2(i)(c) of the 2003 Regulations."

"90. Under Section 12-A, it is specifically provided to prohibit any manipulative and deceptive devices, insider trading and substantial acquisition of securities or control by ANY PERSON either directly or indirectly. If SEBI's allegation listed out earlier as well as all the other allegations fall under Sections 12-A(a), (b) and (c), there will be no escape for the respondents from satisfactorily explaining before the Tribunal as to how these allegations would not result in fully establishing the guilt as prescribed under sub-clauses (a), (b) and (c) of Section 12-A. Similar will be the situation for answering the definition under Regulations 2(1)(b), (c), 3, 4(1), (2)(a), (b), (c), (d), (e), (f), (k) and (r) of the 2003 Regulations, apart from taking required penal action against those who are involved in any fraud being played in the creation of securities."

87. In ***N. Narayanan Vs. Securities and Exchange Board of India, [(2013) 12 SCC 152]*** the Supreme Court held :-

> *"33. Prevention of market abuse and preservation of market integrity is the hallmark of securities law. Section 12-A read with Regulations 3 and 4 of the 2003 Regulations essentially intended to preserve "market integrity" and to prevent "market abuse". The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors' protection. Securities market is based on free and open access to information, the integrity of the market is predicated on the quality and the manner on which it is made available to market. "Market abuse" impairs economic growth and erodes investor's confidence. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. The statutory provisions mentioned earlier deal with the situations where a person, who deals in securities, takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality."*

88. Thus, Section 12A of the SEBI Act creates a clear prohibition of manipulative and deceptive devices. Section 12A(a), (b) & (c) stipulates that no person should directly or indirectly indulge in such manipulative and deceptive devices in connection with the issue, purchase and sale of any securities or use any device or engage in

any act which would operate as fraud or deceit on any person while dealing in securities. The manipulative and deceptive devices which would operate as a fraud or deceit is directly linked to "securities" and "dealing in securities".

89. The scope of PFUTP Regulations, 2003 has been set out by the Supreme Court in ***Kanaiyalal's case (supra).*** The Supreme Court held :-

> *"10. The 2003 FUTP has three chapters, namely, "Preliminary", "Prohibition of fraudulent and unfair trade practices relating to securities market" and "Investigation". Regulation 1 contains the short title and commencement. Regulation 2 consists of certain definitions. Clause (b) of Regulation 2 defines "dealing in securities" which includes an act of buying, selling or subscribing pursuant to any issue of any security or agreeing to buy, sell or subscribe to any issue of any security or otherwise transacting in any way in any security by any person as principal, agent or intermediary referred to in Section 12 of the SEBI Act. Clause (c) of Regulation 2 defines "fraud".*
>
> *"11. Regulation 3 prohibits certain dealings in securities, whereas Regulation 4 prohibits manipulative, fraudulent and unfair practices. Regulation 5 deals with the power of the board to order investigation. Regulation 6 elaborates on the power of the investigating authority."*
>
> *"14.2. Clauses (i), (j), (l), (m), (p), (o) and (q) of subregulation (2) of Regulation 4 expressly make themselves applicable only to the case of intermediaries and not to individual buyers or sellers."*

"23. The object and purpose of the 2003 FUTP is to curb "market manipulations". Market manipulation is normally regarded as an "unwarranted" interference in the operation of ordinary market forces of supply and demand and thus undermines the "integrity" and efficiency of the market."

"29. On a comparative analysis of the definition of "fraud" as existing in the 1995 Regulations and the subsequent amendments in the 2003 Regulations, it can be seen that the original definition of "fraud" under the FUTP Regulations, 1995 adopts the definition of "fraud" from the Contract Act, 1872 whereas the subsequent definition in the 2003 Regulations is a variation of the same and does not adopt the strict definition of "fraud" as present under the Contract Act. It includes many situations which may not be a "fraud" under the Contract Act or the 1995 Regulations, but nevertheless amounts to a "fraud" under the 2003 Regulations."

"30. The definition of "fraud" under clause (c) of Regulation 2 has two parts; first part may be termed as catch all provision while the second part includes specific instances which are also included as part and parcel of term "fraud". The ingredients of the first part of the definition are :

1. *includes an act, expression, omission or concealment whether in a deceitful manner or not;*
2. *by a person or by any other person with his connivance or his agent while dealing in securities;*
3. *so that the same induces another person or his agent to deal in securities;*
4. *whether or not there is any wrongful gain or avoidance of any loss.*

The second part of the definition includes specific instances:

(1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;

(2) a suggestion as to a fact which is not true by one who does not believe it to be true;

(3) an active concealment of a fact by a person having knowledge or belief of the fact;

(4) a promise made without any intention of performing it;

(5) a representation made in a reckless and careless manner whether it be true or false;

(6) any such act or omission as any other law specifically declares to be fraudulent;

(7) deceptive behaviour by a person depriving another of informed consent or full participation;

(8) a false statement made without reasonable ground for believing it to be true;

(9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on

the statement itself or anything derived from it other than the market price."

"33. Regulation 3 prohibits a person from committing fraud while dealing in securities. A reading of the aforesaid provision describes the width of the power vested with SEBI to regulate the security market. In our view, the words employed in the aforesaid provisions are of wide amplitude and would therefore take within its sweep the inducement to bring about inequitable result which has happened in this instant case."

"34. Regulation 4 prohibits manipulative, fraudulent and unfair trade practices. It is to be noted that Regulation 4(1) starts with the phrase "without prejudice to the provisions of Regulation 3". This phrase acquires significance as it portrays that the prohibitions covered under Regulation 3 do not bar the prosecution under Regulation 4(1). Therefore Regulation 4(1) has to be read to have its own ambit which adds to what is contained under Regulation 3."

"39. It should be noted that the provisions of Regulations 3(a), (b), (c), (d) and 4(1) are couched in general terms to cover diverse situations and possibilities. Once a conclusion, that fraud has been committed while dealing in securities, is arrived at, all these provisions get attracted in a situation like the one under consideration. We are not inclined to agree with the submission that SEBI should have identified as to which particular provision of the 2003 FUTP Regulations has been violated. A pigeon-hole approach may not be applicable in this case instant."

"47. Accordingly, non-intermediary front-running may be brought under the prohibition prescribed under Regulations 3 and 4(1), for being fraudulent or unfair trade practice, provided that the ingredients under those heads are satisfied as discussed above. From the above analysis, it is clear that in order to

establish charges against tippee, under Regulations 3(a), (b), (c) and (d) and 4(1) of the 2003 FUTP, one needs to prove that a person who had provided the tip was under a duty to keep the non-public information under confidence, further such breach of duty was known to the tippee and he still trades thereby defrauding the person, whose orders were front-runned, by inducing him to deal at the price he did."

"54. The definition of "fraud", which is an inclusive definition and, therefore, has to be understood to be broad and expansive, contemplates even an action or omission, as may be committed, even without any deceit if such act or omission has the effect of inducing another person to deal in securities. Certainly, the definition expands beyond what can be normally understood to be a "fraudulent act" or a conduct amounting to "fraud". The emphasis is on the act of inducement and the scrutiny must, therefore, be on the meaning that must be attributed to the word "induce".

"55. The dictionary meaning of the word "induced" may now be taken note of :

> *Black's Law Dictionary, 8th Edn., defines "inducement" as "The act or process of enticing or persuading another person to take a certain course of action".*
>
> * * *
>
> *Merriam-Webster Dictionary defines "inducement" as "a motive or consideration that leads one to action or to additional or more effective actions".*

"56. A person can be said to have induced another person to act in a particular way or not to act in a particular way if on the basis of facts and statements made by the first person the second person commits an

> *act or omits to perform any particular act. The test to determine whether the second person had been induced to act in the manner he did or not to act in the manner that he proposed, is whether but for the representation of the facts made by the first person, the latter would not have acted in the manner he did. This is also how the word "inducement" is understood in Criminal law. The difference between inducement in Criminal law and the wider meaning thereof as in the present case, is that to make inducement an offence the intention behind the representation or misrepresentation of facts must be dishonest whereas in the latter category of cases like the present the element of dishonesty need not be present or proved and established to be present. In the latter category of cases, a mere inference, rather than proof, that the person induced would not have acted in the manner that he did but for the inducement is sufficient. No element of dishonesty or bad faith in the making of the inducement would be required."*

90. In the light of the above and on the totality of the facts in the given case, we are of the opinion that while interpreting a statute, an effort must be made to give effect to each and every word used by the legislature. The Courts should presume that the legislature inserted every part for a purpose and the legislative intention is that every part of the statute should have effect. While interpreting a provision, the effort must always be made to find out the true intention behind the law.

91. From the aforesaid decisions and on a reading of the provisions of Section 12A of the SEBI Act and Regulation 3 & 4 of

PFUTP Regulations, it is apparently clear that the object of Section 12A & PFUTP Regulations is to curb “market manipulations”. The manipulative and deceptive devices must be in relation to “securities” and must be by a person “dealing in securities”. The Supreme Court has enlarged the scope of “fraud” under the PFUTP Regulations to cover an action or omission even without deceit if such act or omission had the effect of inducing another person to deal in securities. Thus, “inducement” became more significant where ‘fraud’ was required to be proved. The Supreme Court held that fraud can be inferred on a preponderance of probabilities. However, the inferential conclusion must be arrived at from proven and admitted facts.

92. Further, fraud cannot be proved only on alleged negligence, as amounting to collusion and connivance. The Supreme Court in ***Kanaiyalal’s case (supra)*** has categorically held that the element of “inducement” must exist and should be proved before holding that a person is guilty of fraud. In the instance case, there is no finding that NSE had induced someone and thereby played a fraud in the securities market. There is no cogent evidence to show that the NSE is guilty of “inducement”. In the absence, of any evidence, the charge of fraud is not proved, nor the provisions of Regulation 3 and 4 of PFUTP Regulations applicable.

93. We have gone through the impugned order and we find that the charge of fraud is not made out under any circumstances. In order to establish the charge of fraud, SEBI is required to establish that the fraud was induced which, in the instant case, is missing. Merely on surmises and conjunctures one cannot come to a conclusion that a fraud was committed by NSE and that was induced in connivance with the two stockbrokers.

94. In the instant case, we find that it was the two stockbrokers who came forward with an application to get P2P connectivity through Sampark and, thus, on this short point, the question of NSE inducing W2W or GKN to subscribe to the co-location facility with the promise of faster access does not arise.

95. As we have already held that there is no relevancy of the latency advantage from P2P connectivity as no trading or live data was transmitted on these lines and, therefore, the question of NSE facilitating laying of cable, etc. and, therefore, depicting fraudulent or unfair trade practices does not arise.

96. We have also found that due diligence was not carried out by NSE while allowing Sampark to provide P2P connectivity without finding as to whether Sampark had a valid license for that purpose. We have held that there was lack of due diligence and, thus,

negligence on the part of NSE. Lack of due diligence and / or negligence cannot amount to fraud as defined under Regulation 2(c) unless there is evidence to show that there was a deliberate intention on the part of NSE to commit a fraud by misrepresentation or by concealment of fact or by such act or omission under any other law specifically declares it to be fraudulent. In the absence of any such evidence, we are of the opinion that the charge of fraud under Regulations 3 and 4 of the PFUTP Regulations read with Section 12A of the SEBI Act is not proved.

97. This leads us on the last issue relating to disgorgement. The WTM has directed NSE to disgorge a sum of Rs. 62.58 crore alongwith interest at the rate of 12% p. a. from September 11, 2015 till the date of the actual payment. Other directions under Section 11 and 11B of the SEBI Act were also passed. Since we have already held that no violation was committed under Regulation 3 and 4 of the PFUTP Regulations and Section 12A of the SEBI Act, and we have also found that NSE has not violated Regulation 41(2) of the SECC Regulations, therefore, the question of disgorgement does not arise.

98. Even though Section 11 had no provision for disgorgement of an amount, the Supreme Court held that the powers given to SEBI under Section 11 included the powers to issue directions for disgorgement. However, Explanation to Section 11B was inserted by

Act No. 27 of 2014 which provided a direction for disgorgement of an amount equivalent to the wrongful gain or loss averted. For facility, the explanation to Section 11B is extracted hereunder :-

> ***"11-B. Power to issue directions and levy penalty.***
>
> ……..
>
> *Explanation . — For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.*"

99. From the above provision, it follows that any direction to disgorge must :

a. be made in relation to any transaction or activity;

b. such transaction or activity ought to be in contravention of the provisions of SEBI Act or the Regulations made thereunder;

c. the person directed to disgorge must have made profit or averted losses from such activity or transaction; and

d. an amount equivalent to the “wrongful gain” made or “loss” averted by such contravention may be disgorged.

100. The contention of NSE is, that the direction to disgorge was made without providing an opportunity to show that the quantification is inappropriate. It was urged that the show cause notice failed to indicate the nature of the measures or directions which the authority proposed to take under Section 11 and 11B of the Act. It was contended that the statutory authority was bound to set out the exact nature of the measures which it proposed to take in the show cause notice and by not providing the requisite measure in the show cause notice the order of disgorgement was wholly illegal and in violation of the principles of natural justice. In support of his submission, the learned counsel placed reliance in the case ***Gorkha Security Services v. Govt. of NCT of Delhi & Ors. [(2014) 9 SCC 105],*** wherein the Supreme court held :-

> *“22... However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz :*

i) The material/ grounds to be stated on which according to the Department necessitates an action;

ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit."

101. It was also urged that before a direction of disgorgement could be passed it was necessary for the respondent to give a finding of ill-gotten gains or unfair profit or unjust enrichment made by NSE by the ill-gotten or unethical acts. It was contended that only a wrong doer who had made gains from the wrong doing can be asked to disgorge. In support of his submission, NSE relied upon the decision of this Tribunal in ***Karvy Stock Broking Ltd. Vs. SEBI, [2008 SCC Online SAT 74],*** wherein this Tribunal held :-

"(5) Before we deal with the contentions of the parties, it is necessary to understand what disgorgement is. It is a common term in developed markets across the world though it is new to the securities market in India. Black's Law Dictionary defines disgorgement as — The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.‖ In commercial terms, disgorgement is the forced giving up of profits obtained by illegal or unethical acts. It is a repayment of ill-gotten gains that is imposed on wrongdoers by the courts. Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct.

> *Disgorgement of ill-gotten gains may be ordered against one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal act(s) could be asked to do so. Since the chief purpose of ordering disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, it would follow that the disgorgement amount should not exceed the total profits realized as the result of the unlawful activity. In a disgorgement action, the burden of showing that the amount sought to be disgorged reasonably approximates the amount of unjust enrichment is on the Board."*

102. In ***National Securities Depository Ltd. Vs. Securities and Exchange Board of India, [2007 SCC OnLine SAT 208]***, this Tribunal held :-

> *"We do not think that the Board could direct the appellants to disgorge the aforesaid amount without first determining their guilt and whether they had made any illegal gains. Again, it is not that every erring entity is held liable to disgorge the amount. Persons who have made illegal or unethical gains alone could be asked to disgorge their ill gotten profits."*

103. From the aforesaid decisions, it is clear that SEBI has wide powers to issue directions for disgorgement under Section 11 and 11B of the Act. However, explanation to Section 11B, as inserted by Act No. 27 of 2014 gave specific power to SEBI to issue a direction for disgorgement of an amount equivalent to the wrongful gain.

Further, the direction to disgorge must be in relation to any transaction or activity and that such transaction or activity is in contravention to the provisions of the SEBI Act or the Regulations made thereunder. Further, the person must have made profit or averted loss from such transaction or activity.

104. Disgorgement means that the act of giving up something, namely profit obtained by illegal or unethical acts. It is a repayment of ill-gotten gains by the wrong doer. Disgorgement is also an equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not necessary that in each and every case there should be a direction to disgorge profits merely because the provisions of the Act or Regulations have been violated. Disgorgement should be ordered only where persons have made gains or averted loss/losses as a result of their illegal / unethical acts.

105. Thus, it becomes essential first to pin point a person and hold him guilty of making illegal gains and only thereafter direct him to disgorge the ill-gotten gains. Further, there must be a finding of ill-gotten gains by illgotten or unethical acts.

106. Disgorgement is not a punishment but only an equitable remedy to prevent a wrongdoer from unjustly enriching himself as a

result of his wrongful acts. As stated earlier, disgorgement should be the amount equivalent to the wrongful gain made or loss averted by such contravention. Equitable direction under Sections 11 and 11B could be issued, but in our view there was no occasion to issue a direction for disgorgement. The direction for disgorgement is patently erroneous since we do not find any unethical act/acts on the part of NSE.

107. We are also of the opinion that the reasoning given by the WTM to disgorge a portion of the revenue earned by NSE through its colo facility is patently erroneous and against the provisions of the SEBI Act.

108. The disgorgement can be of an amount equivalent to the amount earned or gain made or loss averted by such contravention. Before an order of disgorgement could be issued, the WTM has to arrive at a specific finding that NSE had made a wrongful gain. In the absence of any finding that NSE had made a wrongful gain, the question of disgorgement does not arise. In the instant case, the WTM in paragraph nos. 70.1 without giving any finding that NSE had made a wrongful gain through P2P connectivity deemed it proper to direct NSE to deposit a reasonable portion of the revenue earned through its colo facility which has nothing to do with the alleged P2P

connectivity. The two are totally different. There is no finding that NSE has charged an additional fee or revenue for P2P connectivity.

109. Portion of the revenue earned by NSE through its colo facility cannot be made part of disgorgement. Revenue earned by NSE from colo facility is not an unlawful gain and, thus, the direction to disgorge an amount from the revenue earned is wholly erroneous and illegal.

110. We have found that NSE was negligent in not carrying out due diligence while allowing an unauthorized vendor to provide P2P connectivity to its TMs. For this negligent act, direction under Section 11 and 11B of the SEBI Act other than disgorgement could be issued.

111. The WTM issued the following directions :-

a) NSE is directed to deposit a sum of Rs. 62.58 crores as determined at para 70.3 above alongwith interest calculated at the rate of 12% p.a. from September 11, 2015 till the actual date of payment, to IPEF of SEBI within 45 days from the date of this order.

b) NSE, on completion of every six months (by June 30th and December 31st) for the next three years, shall get its network architecture and infrastructure in its Colo facility and its linkages to the trading infrastructure audited by an independent CISA / CISM qualified and CERT-IN empanelled auditor. The deficiencies / shortcomings observed therein and the corrective steps taken thereon, with the comments of the MD and CEO of the Noticee No. 1 shall be submitted to SEBI after obtaining approval of its Governing Board within 60 days from June 30th and December 31st of the year starting from June 30, 2019.

c) NSE is directed to prepare a comprehensive documented policy which shall, inter alia, include Guidelines, Standard Operating Procedures and Protocols with respect to its Colo facility including the eligibility criteria for Telecom Service Providers, the norms to be observed by the Stock Brokers and other registered intermediaries. The said documented policy is directed to be issued to the market intermediaries under intimation to SEBI, within three months from the date of this order.

d) NSE, is directed to submit to SEBI, a report duly certified by its MD and CEO and with the comments of its Governing Board certifying that the network architecture and connectivity at its Colo facility and its linkages to the trading infrastructure are in conformity with SEBI's regulatory norms to provide fair, equitable, transparent and non-discriminatory treatment to all the market intermediaries registered with the Noticee No. 1. Such report shall be submitted within 30 days after every six months (ending on June 30th and December 31st) for the next three years. First such report shall be filed for the six months ending on June 30, 2019, by July 31, 2019 based on the existing system and practices, pending compliances to directions issued at b) and c) above.

e) NSE is directed not to introduce any new derivative product for next six months from the date of this order.

112. In view of the aforesaid, the direction to disgorge an amount of Rs. 62.58 crore alongwith interest cannot be sustained and to that extent is quashed and other directions given under Section 11 and

11B read with Section 12A of the SEBI Act are sustained and are appropriate for the violations found by us.

Chitra Ramkrishna – Noticee Nos. 3

113. The show cause notice alleges :-

a. Denial of services to certain stockbrokers resulting in dissemination and non-adherence to principles of fairness and equal opportunity by allowing W2W and GKN to terminate the connection directly in the rack placed inside NSE colo which was contrary to the normal practice followed by NSE. Further, in the case of Millennium and other brokers, Sampark was asked by NSE to install the MUX in NSE MMR.

b. Non-verification of license of Sampark by NSE.

c. Preferential treatment given to W2W and GKN by :-

i. Facilitating laying of cable for W2W so as to give latency advantage to W2W over other stockbrokers.

ii. Allowing W2W and GKN to continue to avail Sampark's connectivity even after

finding that Sampark did not have the requisite license.

iii. Conducting site inspection of office of Millennium, GRD and Sampark for P2P connectivity while not following the same procedure for W2W and GKN.

d. Millennium was unable to avail P2P connectivity on account of fraud policy on the part of NSE which only allowed P2P connectivity of W2W and GKN by installing MUX in their rack and denying the same to the Millennium and, therefore, followed discriminatory policy.

e. Non-transparent mode of communication to stockbrokers. The existing circular of 2009 was modified in 2013 without referring to the earlier circular.

f. Due diligence was not followed while checking the license of Sampark.

114. The stand of the appellant Chitra Ramkrishna is the same as that of NSE. The appellant however contended that she was the Managing Director and Chief Executive Officer of NSE from April 1, 2013 till December 2, 2016 and was responsible for the day to day affairs of NSE. Nonetheless, the appellant was not involved in the day to day operations of NSE colo facility and the decision with respect to providing access to brokers to colo system was taken by the Business Team of NSE in consultation with the Technology Team and Colo Support Team. Further, the functional heads of each division were to oversee the day to day activities of their respective teams and consequently, the said appellant had no specific role in the matter of permitting members to select the ISP providers or permitting the service provider to set up any equipment in the NSE colo premises or from scrutinizing the eligibility of the service provider. It was stated that such action was required to be taken by the functional heads and these issues were never brought to her level. The appellant categorically contended that none of the functional heads responsible for the issues raised in the show cause notice had brought to the appellant's notice regarding the problem which they faced in the colo facility. The appellant also denied the charge of fraud.

115. The WTM held that since the appellant was functioning as a MD and CEO of NSE, she was in fact an executive head in-charge of day of day operations of the organization. Since the appellant was effectively functioning as a head of the frontline regulator in the securities market and the functional heads were reporting to her, the appellant cannot disassociate herself with the alleged violations to be on the strength that the functional heads are responsible for the alleged violation and, in any case, the violation, if any, was not brought to her notice. According to the WTM, these are crucial matters which must have been brought to her notice by the functional heads. The WTM held that the appellant noticee nos. 3 would be held responsible even for routine matters, since she was completely in command and control of the exchange during the relevant period of time and cannot escape or disown the responsibility of any fraudulent action or lack of action of any activities committed by the subordinate officers. The WTM further came to the conclusion that the liability and accountability of a MD is onerous in nature and, therefore, it is not open to the appellant noticee nos. 3 to escape from her responsibility as the MD & CEO of the company.

116. The WTM having found that NSE did not verify the license of the service provider and adopted a non-transparent mode of communication to the stockbrokers and further allowed W2W and

GKN to establish P2P connectivity through Sampark while denying permission to others and that NSE did not have the transparent policy for taking due diligence of service providers and followed certain discriminatory policies against other stockbrokers and gave preferential treatment to certain stockbrokers, held that the appellant Chitra Ramkrishna, noticee nos. 3 violated Regulation 3(d) and Regulation 4(1) of the PFUTP Regulations read with Section 12A of the SEBI Act and Regulation 26(2) of the SECC Regulations.

117. We have already held in the earlier paragraphs that most the charges levelled against NSE which are common to the appellant have not been proved. We have exonerated NSE of those charges and, therefore, such charges against the appellant noticee nos. 3 also cannot be sustained. The findings against her are consequently set aside.

118. We have already held that no preferential treatment was granted to W2W and GKN nor any discriminatory policy was adopted for other stockbrokers. Further, NSE did not adopt any non-transparent mode of communication to its stockbrokers through issuance of circular and notification nor any discriminatory policy was adopted over other stockbrokers. We have also found that no latency advantage was given to W2W and GKN. Thus, the charges on these grounds, etc. against the appellant cannot be sustained.

119. The only charge that was proved against NSE was lack of due diligence and negligence in not verifying the license of Sampark. We have held that it was the duty of NSE to verify the license, since it was part of their policy. The contention of the appellant noticee nos. 3 that such alleged violation was never brought to her notice by the functional heads and, therefore, she cannot be made vicariously liable for their actions since she had no knowledge appears to be attractive but cannot be believed. It may be true that while permission was granted by the functional heads and its subordinate officers to W2W and GKN to install the P2P connectivity through Sampark which decision may not have been intimated to MD being a routine matter, nonetheless, we are of the opinion that when at some stage it was found by the concerned department that Sampark did not hold a valid license, such violation being serious and the measures taken thereafter must have been brought to the notice of the MD / CEO, namely, the appellant, noticee nos. 3.

120. Even though, the appellant noticee nos. 3 may not have any specific role in the matter of permitting members to select the service provider or to set up equipment in the NSE colo services, the fact that the license of the service provider was not scrutinized by the functional heads and its subordinates cannot lead to the conclusion that the appellant being not aware would be allowed to go scot-free.

Noticee nos. 3 was responsible for the over-all functioning by NSE. She was in control of the affairs of NSE and, therefore, when its own policies are being violated by the functional heads and its subordinate officers, the appellant being the head of the institution is morally responsible for the alleged violation. It cannot be denied that all the departments / divisions of NSE were under her supervision and control and all the functional heads were reporting to her. Thus, by virtue of the office of the MD and CEO, we are of the opinion that being in-charge and responsible for the conduct of the business of NSE, the liability and accountability falls on her head with regard to an action or lack of action of any activities committed by the subordinate officers.

121. In ***Sayanti Sen vs. SEBI [2019 SCC Online SAT 132],*** this Tribunal held :-

> *"12. The usual pattern in economic legislations is that when an offence is committed by a company, the liability is not imposed on all the officers of the company en bloc. Those who are guilty are generally sorted out from those who are not guilty. The Companies Act, however, makes a slight departure from this conventional pattern. It gives an opportunity to the board of directors to distribute the work as between the members of the board or to appoint a managerial person like managing director or whole time director or manager. If nothing of this sort is done, only then the whole board is liable to be prosecuted."*

"13. As per Section 5 of the Companies Act it becomes clear that a managing director, whole time director, manager, secretary and any person who has been authorized by the board or by any director are now officers in default. Section 5(g) of the Companies Act makes it apparently clear that if there is a managing director appointed in a company, he would be an officer in default. Further, in the absence of any managing director, if the board has specified any particular director or manager or any other person as an officer in default in which case only that specified director or manager etc. as the case may be would be an officer in default."

"14. Section 5(g) of the Companies Act further provides that apart from the directors any officer can also be penalized if his role can be attributed to be an officer in default. If any officer has played some role in bringing about the default or he might have performed the duties assigned to him then he could be penalized as an officer in default. Section 5(g) of the Companies Act thus makes it clear that in the absence of any managing director or any specific order of a board, then by a deeming fiction, all the directors of the company would be officers in default."

"21. In this regard the Ministry of Corporate Affairs while initiating prosecution against the Directors under the Companies Act came across a lot of hurdles as to who was an officer in default and whether any Director could be prosecuted without there being evidence with regard to being responsible for the affairs of the Company. In this regard, the Ministry of Corporate Affairs issued a Master Circular dated 29th July, 2011 on prosecution of Directors and clarified that the prosecution should be filed primarily against the Managing Director and against such Directors who were in charge and responsible for the affairs of the Company. It was clarified that extra care should be taken in examining such cases and no such Director should be held liable for any act of omission or commission by the Company which would constitute a breach or violation of any

> *provisions of the Companies Act which had occurred without his knowledge or consent or where he had acted diligently in the Board process."*

122. Even though, NSE is a well organized corporate structure with several vertical with 450 employees, the day to day operations and implementations of NSE's policies are handled by responsible functional heads. When a violation is committed by the company, the liability cannot be imposed on all the officers of the company and the penalty is imposed upon a person who is found guilty. The Companies Act makes a departure from this conventional pattern. It gives an opportunity to the board of directors to distribute the work between the members of the board or to appoint managerial personnel like MD or whole time director, etc. It is, therefore not necessary under the Companies Act that every director is required to be penalized merely because he is a director but being a managing director, he is an officer in default as per the Companies Act and is over all responsible for the affairs of the company and in the larger context is morally responsible for any violation committed of its own policies.

123. Thus, given the lack of due diligence and negligence committed by NSE in not verifying the license, we are of the opinion that in the given circumstances, it is presumed that when the matter

came to the light that Sampark did not have a valid license, it must have brought this fact to the knowledge of the MD. In any case, the appellant noticee nos. 3 is morally responsible for this lapse which she cannot escape.

124. The WTM directed that Chitra Ramakrishna shall not hold any position in any stock exchange, clearing corporation, depository for a period of three years. Further she will not hold any position in a listed company for three years.

125. The powers conferred on SEBI under Section 11 and 11B is to protect the interests of investors in securities and to promote the development of and to regulate the securities market. Therefore, the measure to be adopted by SEBI is remedial and not punitive. In a given case a measure of debarring a person from entering the securities market will be justified, but in our view, by no stretch of imagination debarring noticee nos. 3 for the alleged lapse could be remedial in nature. A remedial action is to correct a wrong or a defect. Preventive measure can be issued in a given case of unfair trade practice or where fraud is proved. In the instant case, the above is lacking and debarring the noticee would be clearly punitive and violation of Article 19(1)(g) of the Constitution of India as it takes away the fundamental right to carry on its business.

126. Thus, the direction to debar the appellant noticee nos. 3 cannot be sustained and is quashed. At best penalty could be imposed upon appellant noticee nos. 3.

Mr. Ravi Varanasi (Noticee nos. 5), Mr. Nagendra Kumar SRVS (Noticee Nos. 6) and Mr. Deviprasad Singh (Noticee Nos. 7)

127. Common submissions have been made on behalf of these three employees of NSE and the same are being taken up together.

128. The impugned order *inter-alia* holds all the appellants guilty of violation of the PFUTP Regulations. Additionally, the appellant Mr. Ravi Varanasi has been held to have violated the Code of Ethics under the SECC Regulations and SEBI's Master Circular dated December 31, 2010. The main purported findings in the impugned order are :-

a) Sampark's license was not verified before permitting it to provide P2P services to 2 brokers (W2W and GKN) and even after it was discovered that its license did not permit direct service to end clients / brokers, W2W and GKN connections were not immediately terminated;

b) Other brokers were not allowed to take direct services from Sampark and, on the other hand, other service providers without requisite licenses were not allowed to give direct services to other brokers;

c) Site visits were conducted for some other brokers, but not for W2W and GKN;

d) Cabling for W2W in the colo facility was such that it got latency advantage for trading as compared to all other brokers;

e) The NSE, W2W, GKN and Sampark colluded to fraudulently given W2W and GKN trading benefits by providing lower latency P2P connections while depriving other brokers of similar lower latency P2P connections.

129. The findings against these appellants are the same as given in the case of NSE and, therefore, the findings and the contentions are not being repeated here.

130. Mr. Ravi Varanasi, noticee nos. 5 was the Head of Business Development Team at NSE. Mr. Nagendra Kumar, noticee nos. 6

was the Head of the Membership Department which was a part of the Business Development Team at NSE. Mr. Deviprasad Singh was the Head of the IT Operations at NSE. The findings against these appellants of providing preferential treatment to some brokers and discriminating other brokers and not conducting site visits and providing latency advantage to some brokers have also been set aside in so far as the case of NSE and, therefore, these findings against the appellants for the same reasons cannot be sustained. The finding that these appellants alongwith W2W and GKN fraudulently gave these brokers trading benefits by providing lower latency also cannot be sustained and are set aside.

131. The only point that remains to be considered is with regard to the non-verification of Sampark's license and, therefore, there was lack of due diligence and negligence on their part. In this regard, we find that Mr. Ravi Varanasi contended that he was the Head of the Business Development Team and was not concerned with the setting up of the colo facility or the day to day management of the colo facility. The request for P2P connectivity was lodged initially with his team i.e. Business Development Team and thereafter the team used to pass such request to the concerned department of NSE for further processing. Therefore, the permission to lay the P2P lines to Sampark was not within his domain. Further, it was specifically

stated that verifying license of Sampark was outside the scope of his role and responsibility.

132. Mr. Nagendra Kumar, noticee nos. 6 was the Head of the Membership Department and contended that as head of the department, he is not required to verify the license of the service provider and that he had no role to play regarding the verification of the license. The said appellant also contended that the request for all forms of connectivity to the exchange was first lodged with the Business Development Team of which he was a part of and thereafter such request was forwarded to the concerned department of NSE for further processing. Mr. Deviprasad Singh, noticee nos. 7 contended that P2P connectivity was part of the member's infrastructure and was not in violation of NSE policy. It was further contended that the violation committed by Sampark regarding its license was a matter between DoT and Sampark and that the fact that Sampark told NSE that they had license by DoT to provide connectivity and that Sampark had ensured that they had the requisite license was sufficient for processing the case of the two stockbrokers.

133. We find that the contention of the aforesaid appellants that the request from the TMs for all forms of connectivity to the exchange which was lodged first with the Business Development Team was forwarded to the concerned department of NSE for further

processing is a vague statement. None of these appellants have named the "concerned department" for processing of the P2P connectivity. The e-mails between the appellants and the two stockbrokers and internal e-mails of the two stockbrokers as well as the internal e-mails of these appellants clearly indicate that they were in-charge of processing the request of the TMs for the P2P connectivity. We find that the appellants had played an active role in the entire matter pertaining to P2P connectivity by Sampark. The contention of Mr. Nagendra Kumar that he had no role to play with regard to the verification of license, etc. is patently erroneous. The e-mails of Mr. Nagendra Kumar clearly indicate that he was involved in the process of granting permission to Sampark for laying P2P connectivity.

134. Noticee nos. 5 Mr. Ravi Varanasi was functioning as the head of the Business Development Team at NSE. The colo support team was reporting directly to him. We are, therefore, of the opinion that Mr. Ravi Varanasi was looking after the operational activities relating to colo requests during the relevant period. The contention of all the appellants that it was not within their role and responsibilities to verify the license of Sampark is patently erroneous. NSE's stand on this was very clear that it was the Business Development Team which was involved in the processing

of P2P connectivity of Sampark. The Membership Department which was under the head of Business Development and IT Operations which was part of the colo team all reported to Mr. Ravi Varanasi. We find all the three appellants were involved at one stage or the other with regard to granting of permission to Sampark to lay the P2P connectivity for the two brokers. We find that these three appellants cannot shrug their responsibilities or contend that it was outside the scope and responsibilities to verify the license of Sampark. The 2009 circular and 2013 notification of NSE clearly indicated that a TM could utilize the services of a license service provider of DoT and, therefore, whenever a TM came with a request seeking permission for getting the P2P connectivity through a service provider, it was the onerous task of the Business Development Team and the IT Operations to find as to whether the vendor had a valid license provided by DoT. In the instant case, we find that these appellants have no right to shrug of their responsibilities by saying that the P2P connectivity was being processed by the concerned department and not by their department. We further find that an evasive reply has been given by these appellants contending that it was not their role and responsibility to verify the license of the vendor. We find that Mr. Deviprasad Singh and Mr. Nagendra Kumar were fully involved in the process of granting permission to Sampark and should have verified the license of the vendor. Thus,

two appellants were reporting to Mr. Ravi Varanasi who was the head of the Business Development Team and, therefore, Mr. Ravi Varanasi also cannot feign ignorance in the matter relating to granting permission to Sampark. We, therefore, find that the appellants are guilty of lack of due diligence / negligence in not verifying the license of the service provider Sampark.

135. In view of the aforesaid, the direction that the appellants shall not hold any position either directly or indirectly or be associated directly or indirectly with any stock exchange, clearing corporation or depository or any intermediary registered with SEBI for a period of two years is harsh and excessive and cannot be sustained and is quashed. Such direction if implemented would lead to automatic termination of their services which can never be the intention of the Regulator. In addition to the aforesaid, the additional direction against Mr. Ravi Varanasi of being debarred from holding any position either directly or indirectly or have been associated directly or indirectly with any listed company in any of the stock exchanges recognized by SEBI for a period of three years also cannot be sustained and is quashed. However, for the violation found by us, a penalty, if any, can be imposed.

136. In view of the aforesaid, the contention that there has been a gross violation of principles of natural justice as permission to cross-

examine those persons whose reports, statements, mails, letters were considered by NSE becomes immaterial as it does not touch upon the issue in which the appellant has been found guilty.

Way2Wealth Brokers Pvt. Ltd., noticee nos. 8 and Mr. M. R. Shashibhushan, noticee nos. 9

137. The appellant W2W, noticee nos. 8 was found to have violated Regulations 3 and 4 of the PFUTP Regulations and Regulation 9 of the Securities and Exchange Board of India (Stockbrokers and Sub-brokers) Regulations, 1992 on account of being a direct beneficiary of preferential treatment as it was allowed to continue the Sampark's line even after NSE came to know that it does not have the requisite license to provide such connectivity. Further, Sampark's connectivity at NSE to other stockbrokers was from Sampark's MUX placed at NSE MMR whereas Sampark's MUX was connected to BSE co-location through W2W rack which was only rectified in April 2016 and, therefore, gave a latency advantage. In so far as noticee nos. 9 Mr. M. R. Shashibhushan is concerned, he was a Chief Executive Officer and was found to be involved in the P2P connectivity by the impugned order. W2W has been directed to disgorge a sum of Rs. 15.34 crore along with interest

at the rate of 12% p. a. and further have been directed not to accept, induct or enroll any new client for a period of one year from the date of the order and that noticee nos. 8 would not undertake any trades on any stock exchange recognized by SEBI in its proprietary accounts for a period of two years. In so far as noticee nos. 9 is concerned, the WTM directed that he shall not hold any position either directly or indirectly or be associated directly or indirectly with any stock exchange, clearing corporation, depository for a period of two years.

138. In view of the findings given by us in the earlier paragraphs that there was no collusion between the broker W2W with the employees of NSE nor any fraud was played either by NSE employees or by the brokers, we are of the opinion that the charge of collusion / fraud under Regulations 3 and 4 of the PFUTP Regulations read with Section 12A of the SEBI Act cannot be sustained.

139. We have also held that no latency advantage was given to the brokers in the P2P connectivity and, therefore, there was no preferential treatment given to the noticee nos. 8 nor any discriminatory policy was followed by NSE official to other stockbrokers.

140. We, however, find that W2W introduced Sampark to NSE for the purpose of laying P2P connectivity which turned out to be an unauthorized vendor. It was on W2W request that permission was granted to Sampark. In our opinion, the record indicates that W2W was an old TM of NSE since 2010 and was already using a leased line of a service provider. Switching over from one authorized service provider to another service provider was a major decision and, therefore, it was all the more necessary for the broker to conduct due diligence and care in finding about the antecedent of the service provider. Without verifying as to whether Sampark was an authorised service provider, the broker introduced Sampark to NSE and allowed NSE to get misled. We find that W2W was at fault in introducing Sampark to NSE. We however find that the appellant was guilty in introducing Sampark to NSE for laying the P2P connectivity. The appellant was a TM since 2010 and was using TATA leased lines. It leads to an irresistible inference that it was the lure of more data speed and more bandwidth that motivated noticee nos. 8 to accept the offer of Sampark to establish a new P2P connectivity.

141. In addition to the aforesaid, W2W had given an undertaking to NSE that the end line of P2P connectivity will terminate at their office which was located in the BSE premises.

Instead of terminating at their office the P2P connectivity was directly connected to its colo rack at BSE premises. This direct connection was in violation of the undertaking given by them to NSE. The contention that W2W was unaware is patently erroneous. The contention of noticee nos. 9 that he was not aware of such irregularities is patently erroneous. Their internal correspondence between noticee nos. 9 and its employee Rima Shrivastav clearly indicates that they were aware of the irregularities. We, thus, find that the broker W2W and its Chief Executive Officer noticee nos. 9 to be guilty of these irregularities.

142. However, for the reasons stated earlier on the issue of disgorgement with NSE and for the same reason, we find that the direction to disgorge a sum of Rs. 15.34 crore alongwith the interest cannot be sustained and is quashed. For the violations committed by the broker, the direction of the WTM not to accept, induct or enroll any new client for a period of one year and not to undertake any trades in its proprietary account for a period of two years was appropriate. The direction against noticee nos. 9 Mr. Shashibhushan not to hold any position with any stock exchange, clearing member, etc. for a period of two years is harsh and inappropriate and cannot be sustained and is quashed. However, for the violation found by us, appropriate penalty could be imposed, if any.

GKN Securities noticee nos. 12, Ms. Sonali Gupta noticee nos. 13, Mr. Om Prakash Gupta noticee nos. 14 and Mr. Rahul Gupta noticee nos. 15

143. The allegation against GKN is that they were direct beneficiary of preferential treatment by NSE since NSE allowed GKN to continue to use Sampark's connectivity even after knowing that Sampark did not have the requisite license to provide such connectivity. The WTM found that preferential treatment was given by NSE and such preferential treatment pointed towards collusion between GKN and NSE for giving benefit to GKN, since GKN continued to avail this service of Sampark in spite of Sampark not having the requisite license. The WTM accordingly directed GKN to disgorge an amount and issued other direction under Section 11 and 11B of the SEBI Act.

144. For the reasons given in the previous paragraphs, we also find that the directions given by the WTM restraining noticee Nos. 13, 14, and 15 from holding any position in any stock exchange, clearing corporation or depository for a period of two yeas is harsh and inappropriate and cannot be sustained and is quashed. However, penalty, if any, can be imposed for the violations found by us.

145. We have already held that preferential treatment was not given by NSE to GKN nor latency advantage was given in the P2P connectivity. Further, inspite of knowing that Sampark did not have the requisite license, it does not point out to collusion between GKN and NSE and, therefore, the finding of preferential treatment, discrimination to others and collusion between NSE and GKN cannot be sustained and, to that extent, the charges cannot be sustained.

146. In view of the aforesaid, the question of disgorgement of unlawful gains does not arise and for the reasons stated aforesaid, while considering the case of NSE, the direction to disgorge unlawful gain of Rs. 4.9 crore against GKN does not arise and cannot be sustained. However, the direction restraining the noticee from accepting new client for a period of one year and not to undertake any trades in its proprietary account for a period of two years is justified. Appropriate penalty, if any, can be imposed.

147. For the reasons stated aforesaid, Appeal Nos. 334 of 2019 National Stock Exchange of India vs. SEBI is partly allowed. The direction to disgorge an amount of Rs. 62.58 crore alongwith interest cannot be sustained and to that extent the order is quashed. Other directions passed by the WTM under Section 11 and 11B read with 12A of the SEBI Act are affirmed and are appropriate for the

violations found by us. By our order dated May 22, 2019, we passed the following order :-

> *"8. In the light of the aforesaid, we direct the appellant to transfer Rs. 62.58 crores from this escrow account to SEBI within two weeks from today. SEBI shall keep this amount in an interest bearing account which would be subject to the result of the appeal. We further direct the appellant to ensure that all revenues emanating from co-location facility including from any fiber connectivity from stock brokers co-location facility to their offices shall continue to be placed in the same escrow account as was placed during the pendency of the investigation before SEBI and such details of the escrow account would be submitted to SEBI from time to time."*

148. Since we have set aside the unlawful gains, we direct SEBI to refund a sum of Rs. 62.58 crore along with interest accrued on it to the appellant within four weeks from today. We further vacate the direction given to the appellant for depositing the revenues emanating from colocation facility, etc. in an escrow account and the details to be submitted to SEBI from time to time.

149. In Appeal No. 337 of 2019 of Chitra Ramkrishna noticee nos. 3, the direction given by the WTM debarring Chitra Ramkrishna from holding any position for a period of three years is quashed. The appeal is partly allowed. Penalty, if any, could be imposed.

150. The direction given by the WTM against Mr. Ravi Varanasi, Mr. Nagendra Kumar and Mr. Devi Prasad Singh in Appeal Nos. 324 of 2019, 325 of 2019 and 323 of 2019 respectively restraining them from holding any position in any exchange, clearing corporation or depository for a period of two years cannot be sustained and is quashed. The appeals are partly allowed. Penalty, if any, can be imposed.

151. The direction given against Way2wealth Brokers Pvt. Ltd. in Appeal No. 326 of 2019 disgorging a sum of Rs. 15.34 crore cannot be sustained and is quashed. The direction of the WTM restraining W2W from accepting, inducting or enrolling any new client for a period of one year and not to undertake any trade in its proprietary account for a period of two years is appropriate and is affirmed. The appeal is partly allowed. By our order dated May 6, 2019, we had directed the appellant to deposit a sum of Rs. 7.5 crore which was to be kept by the respondent in an interest bearing account. Since we have set aside the order of disgorgement, we direct SEBI to refund a sum of Rs. 7.5 crore alongwith the accrued interest within four weeks from today.

152. The direction against Mr. M. R. Shashibhushan in appeal No. 327 of 2019 restraining him from holding any position for a

period of two years cannot be sustained and is quashed. The appeal is partly allowed. Penalty, if any, can be imposed.

153. The direction given by the WTM against GKN Securities in Appeal No. 183 of 2019 to disgorge a sum of Rs. 4.9 crore alongwith interest cannot be sustained and is quashed. The direction restraining GKN Securities from accepting, inducting or enrolling from any new client for a period of one year is appropriate and is sustained and further direction that they will not undertake any trade on any stock exchange in their proprietary account for a period of two years is also appropriate and is affirmed. By our order dated May 6, 2019, we had directed the appellant to deposit a sum of Rs. 2.5 crore with SEBI which would be kept in an interest bearing account and which was subject to the result of the appeal. Since we have set aside the order of disgorgement, we direct SEBI to refund a sum of Rs. 2.5 crore alongwith accrued interest within four weeks from today.

154. The direction against Sonali Gupta, Omprakash Gupta and Rahul Gupta in Appeal Nos. 183 of 2019 from restraining them from holding in position in any stock exchange, clearing corporation and depository for a period of two years cannot be sustained and is quashed. Penalty, if any, can be imposed.

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

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

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

09.08.2023
PTM

PRAMILA TANAJI MISAL

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GLOSSARY

Sr. No.	***Abbreviation***		***Description***
1.	Algo	:	Algorythm
2.	BSE	:	BSE Ltd.
3.	COLO	:	Co-location
4.	CFT	:	Cross Functional Team
5.	Deloitte	:	Deloitte Touche Tohmatsu India LLP
6.	DMA	:	Direct Market Access
7.	DOT	:	Department of Telecommunications
8.	GKN	:	GKN Securities Pvt. Ltd.
9.	GRD	:	GRD Securities
10.	HFT	:	High Frequency Trading
11.	IP-1	:	Infrastructure Provider – 1 License
12.	IPEF	:	Investor Protection and Education Fund
13.	Mansukh	:	Mansukh Securities and Finance Ltd.
14.	MMR	:	Meet-me-room
15.	Microscan	:	Microscan Computers Pvt. Ltd.
16.	Millennium	:	Millennium Stock Broking Pvt. Ltd.
17.	MUX	:	Multiplexer
18.	MTBT	:	Multi-cast Tick-By-Tick
19.	NSE	:	National Stock Exchange of India Ltd.

20.	P2P	:	Point-to-Point connectivity
21.	PFUTP Regulations		Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003
22.	Reliance	:	Reliance Communications Ltd.
23.	Sampark	:	Sampark Infotainment Pvt. Ltd.
24.	SEBI	:	Securities and Exchange Board of India
25.	SEBI Act		Securities and Exchange Board of India Act, 1992
26.	SCRA	:	Securities Contracts (Regulation) Act, 1956
27.	SECC Regulations	:	SEBI (Stock Exchanges and Clearing Corporations) Regulations, 2012
28.	SMC	:	SMC Global Securities
29.	TAC	:	Technical Advisory Committee
30.	TBT	:	Tick-by-Tick Mechanism
31.	TMs/TM	:	Trading Members / Trading Member
32.	TSPs	:	Telecom Service Providers
33.	W2W	:	Way2wealth Brokers Pvt. Ltd.
34.	WTM	:	Whole Time Member

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

09.08.2023
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