**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.1181 of 2018**

63 Moons Technologies Ltd (formerly
Financial Technologies (India) Ltd.
Represented by its Authorized Signatory
having its office at FT Tower, CTS 256
and 257, Chakala, Andheri (West)
Mumbai 400003. .. Petitioner

Versus

The State of Maharashtra, through
Dy. Secretary of Government,
Home Department, 2nd floor,
Mantralaya, Mumbai 400032. .. Respondent

WITH

**NOTICE OF MOTION NO. 397 OF 2018**
**In**
**WRIT PETITION NO.1181 OF 2018**
**WITH**
**NOTICE OF MOTION NO.37 OF 2019**
**IN**
**WRIT PETITION NO. 1181 OF 2018**

63 Moons Technologies Ltd (formerly
Financial Technologies (India) Ltd. .. Petitioner

Versus

The State of Maharashtra, through
Dy. Secretary of Government .. Respondent

WITH

*Tilak*

WITH

**CHAMBER SUMMONS LODGING NO. 155 OF 2018**
**IN**
**WRIT PETITION NO.1181 OF 2018**

63 Moons Technologies Ltd (formerly
Financial Technologies (India) Ltd. .. Petitioner

Versus

The State of Maharashtra, through
Dy. Secretary of Government .. Respondent

WITH

**CHAMBER SUMMONS LODGING NO. 156 OF 2018**
**IN**
**WRIT PETITION NO.1181 OF 2018**

63 Moons Technologies Ltd (formerly
Financial Technologies (India) Ltd. .. Petitioner

Versus

The State of Maharashtra, through
Dy. Secretary of Government And
NSEL Investors Action Group (Intervenor) .. Respondent

WITH

**NOTICE OF MOTION NO. 281 OF 2018**
**In**
**WRIT PETITION NO.1181 OF 2018**

**WITH**

**NOTICE OF MOTION NO. 86 OF 2018**
**In**
**WRIT PETITION NO.1181 OF 2018**

*Tilak*

**WITH**
**NOTICE OF MOTION NO. 89 OF 2019**
**In**
**WRIT PETITION NO.1181 OF 2018**

63 Moons Technologies Ltd (formerly
Financial Technologies (India) Ltd. .. Petitioner

Versus

The State of Maharashtra, through
Dy. Secretary of Government .. Respondent

WITH

**WRIT PETITION NO.508 OF 2017**

63 Moons Technologies Ltd (formerly
Financial Technologies (India) Ltd. .. Petitioner

Versus

The State of Maharashtra, through
Dy. Secretary of Government .. Respondent

WITH
**NOTICE OF MOTION NO.38 OF 2019**
WITH
**NOTICE OF MOTION NO.591 OF 2018**
**WITH**
**CHAMBER SUMMONS (L) NO. 81 OF 2017**
**WITH**
**CHAMBER SUMMONS NO. 143 OF 2018**
**IN**
**WRIT PETITION NO. 508 OF 2017**

63 Moons Technologies Ltd (formerly
Financial Technologies (India) Ltd. .. Petitioner

Versus

The State of Maharashtra, through
Dy. Secretary of Government And
Pankaj R. Saraf (Applicant) .. Respondent

*Tilak*

...

Mr.Vikram Nankani, Senior advocate along with Mr.Abad Ponda, Dr.Sujay Kantawala, Arvind Lakhawat, Mr.Rahul Sarda, Raktim Gogoi, Ms.Manik Joshi, Mantul Bajpai, Ayush Agarwal i/b.Crawford Bayley and Co., Advocates for the petitioner in W.P.No.1181/2018.

Mr.Navroz Seervai, Senior Advocate a/w Arvind Lakhawat,, Rahul Sarda, Manik Joshi Mantul Bajpai, Ayush Agarwal i/b.Crawford Bayley and Co., Advocates for the petitioner in W.P.No.508/2017.

Mr.Vaibhav Singh, Radhika Indapurkar i/b M/s. Shardul Amarchand Mangaldas for the Applicants in NMWL Nos.100/2019 and 101/2019.

Mr.Rafiq Dada,Sr. Adv. a/w Mr.Avinash Avhad, Spl.PP and Mr.Mahesh Rawool, Ms.G. R. Shastri, AGP for the Respondent-State.

Nupur Desai, Aanchal Jaswani, Ginni Ahuja i/b. M/s.Markhand Gandhi, advocates for the applicants in Chamber Summons No.156 of 2018.

Mr.Sandeep Karnik, advocate for the applicants in CHSWST No.193 of 2018 and CHSWST.No.81/2017.

Mr.Ramchandra Lothikar, Sr. P.I, Mr.Pawar- API(EOW)

Mr.K.Suryakrishnamurthy- Competent Authority.

**CORAM: SHRI RANJIT MORE &**
**SMT. BHARATI H.DANGRE, JJ.**

**RESERVED ON : 3rd MAY 2019**

**PRONOUNCED ON: 22nd August 2019**

*Tilak*

**JUDGMENT :- (Per Bharati Dangre, J)**

1 A significant and axial issue involved in the two writ petitions before us revolve around the National Spot Exchange Limited (NSEL) and the parties are diversificated on the issue as to whether the said establishment is a Financial Establishment or not, and whether it has accepted the deposits.

Both the Writ Petitions are filed by the petitioner which is a listed Company registered under the Companies Act, engaged in the business of developing and selling technology products of facilitating trading on exchanges such as stock exchange and commodity exchange and it claims to have more than 63,000 shareholders and more than 800 employees. The petitioner claims to be a leader in Financial Technologies market and has developed a software by name “ODIN” and it is claimed that this software has provided a platform for online trading and it is claimed by the petitioner that it has become a market leader due to its effort and determination.

2 The petitioner has posed a challenge to the Constitutional validity of Sections 4 and 5 of the Maharashtra

Protection of Interests of Depositors in Financial Establishments Act, 1999 (for short 'MPID Act') being violative of Article 14, 19 and Article 300A of the Constitution and also to the levy of attachment on the petitioner's assets by six notifications issued by the respondent no.1 by invoking the powers conferred on the authority under the said enactment. Writ Petition No.1181 of 2018 assails several notifications issued by the State and it also sought several interim reliefs and the said reliefs came to be granted in favour of the petitioner by passing several interim order from time to time. Writ Petition No. 508 of 2017 assails the validity of the relevant provisions of the Maharashtra Protection of Interest of Depositors Act (for short 'MPID') to the extent which affects the petitioner as a promoter of the alleged Financial Establishment.

3 Since both the Writ Petitions revolve around the same facts, we would refer to the facts as stated in WP No.1181/2018. The petition proceeds to state that one of the many subsidiaries of the petitioner is the National Spot Exchange Limited (hereinafter referred to as 'NSEL') and the

petitioner holds 99.99% shares of NSEL. The NSEL had launched contracts for buying and selling of commodities on its trading platform with different settlement periods ranging from T+0 days to T+36 days. In the aforesaid contracts, the word 'T' denotes the Trade date i.e. the day on which the trade took place and '+0' or '+36' is referred to as number of business days after which the delivery of commodity and payment of price therefor, was to be effected by the Buying Trading Member and Selling Trading Member, as the case may be. Under these contracts, according to the petitioner, a quantity of particular commodity would be brought and sold on the exchange of T+2 basis and at the same time, the buying trading member and the selling trading member would resell the commodity on T+25 basis. This, in short, is the transaction which is referred to in the petition and it is stated that NSEL provided an electronic trading platform for spot contracts in various commodities on a compulsory delivery basis. It is stated that NSEL commenced its operation in October 2008 in accordance with the Notification dated 5th June 2007 issued by the Department of Consumer Affairs, Government of India

under the FCRA, 1952, by which "All forward contracts of one day duration for the sale and purchase of commodities traded on" NSEL were exempted from the purview of Forward Contract Regulations Act, 1952 (for short 'FCRA'). It is the case of the petitioner that the NSEL operated an Exchange in accordance with the Rules, Regulations and bye-laws and in its terms, the brokers became the members of the exchange and traded in commodities on the exchange platform on their own account and on behalf of their clients and the brokers were also bound by the bye-laws and Rules of Exchange. The petition further proceeds to state that these T+2 and T+25 contracts which were traded together, were also referred to as 'paired contracts' where the buyer/investors would enter into a contract to buy a commodity with T+2 delivery cycle and simultaneously buyer/investor would also enter into a contract to sell the commodity with T+25 delivery cycle with the same parties as the first contract. However, NSEL was charged with violation of terms and conditions of the Exemption Notification dated 5th June 2007 since complaints were received from a number of depositors against NSEL and it was alleged that as a

Financial Establishment, it had collected money by promising attractive returns to depositors, but there was a failure to return the deposits when the time for repayment came. On a complaint filed by one Pankaj Ramnaresh Saraf on 30th September 2014, an FIR came to be registered under Section 120-B read with Sections 409, 465, 467, 471, 474 and 477(A) of the IPC. It was alleged that by unilaterally closing down the Exchange, the NSEL defaulted in repayment of approximately Rs.5600 crore which was due to be paid to approximately 13,000 investors. It was also alleged that the money collected by NSEL from the investors fell within the definition of the term "deposit" as per section 2(c) of the MPID Act and hence the provisions of MPID Act were invoked and applied on 24th October 2013. The petitioner was roped in as its subsidiary company, since NSEL did not have sufficient money or property to return the deposits or make payment of interest or render services against which the deposits were received in terms of Section 4 of the MPID Act, 1999, the properties of its promoters i.e. petitioners were also held liable for attachment. Writ Petition No.1181 of 2018 question the applicability of the

provisions of the Maharashtra Protection of Interests of Depositors in Financial Establishments Act, 1999. In the facts of the present case, the said challenge is found in the petition broadly on the following parameters :

(a) There was no receipt of 'Deposits' by NSEL so as to confer jurisdiction on the respondent to invoke and apply the provisions of MPID Act qua NSEL and consequently, qua the petitioner.

(b) NSEL is not a 'Financial Establishment' but an electronic platform to conduct trade in commodities in forward contracts where amounts paid-in and paid-out including margins represent the price of the goods bought and sold.

(c) The withdrawal of exemption under the FCRA cannot make NSEL and consequently its promoter liable under MPID as there are separate penal consequences prescribed in FCRA itself for violation of its provisions and in fact, the EOW Mumbai has already registered a separate FIR under the FCRA against NSEL and the brokers for acting in breach of the provisions of the Act.

(d) The definition of 'Financial Establishment' must by necessary implications exclude an Exchange/future

market to avoid conflict with the legislative powers of the Parliament under Entry 48 of List I of VIIth Schedule of the Constitution of India.

(e) Admittedly, the petitioner has not received any part of the sum of Rs.5600 crores alleged to have been received by NSEL as the alleged 'deposits' and the properties of the petitioner are not acquired out of the alleged deposit purportedly collected by NSEL.

(f) The assets/property is already attached by the respondent are sufficient to cover the amount currently outstanding which is about 4822 crore.

4 The petition, has in detail, highlighted the trading process on NSEL's exchange platform and the petitioner has also tendered a compilation of sample documents generated in the course of transactions on NSEL's trading platform. To support the submission that NSEL was only an online platform where willing buyers and willing sellers purchased and sold various commodities and earned its profits due to difference of the prices of commodities in short and longer duration contracts, the thrust of the petition is on the fact that the business model of NSEL was operative only as a platform or

pipeline and NSEL never accepted any Deposits and, therefore, it is asserted that it was not a Financial Establishment as defined under Section 2(d) of the MPID Act, thereby attracting the provisions of the said enactment.

5 The petition further proceeds to state that the Economic Offences Wing of Mumbai Police (EOW) who was subsequently investigating C.R.No.89 of 2013 has filed three charge-sheets but in those charge-sheets, not a single rupee has been traced by money trail to the petitioner as a promoter nor the petitioner was named as an accused. The petitioner company was, however, served with notices alleging that the company has received an amount of Rs.84 crore from NSEL and the petitioner was restrained from disposing, alienating or creating any third party rights in relation to its assets. The petitioner challenged the said notice and the said writ petition is pending for adjudication before this Court. The notice came to be stayed by directing the petitioner to deposit an amount of Rs. 84 crore in the Court and this direction, according to the petitioner, was complied. The cause of action for filing the

present petitions as stated in the petition is the issuance of notification by the Collector and the District Magistrate, Mumbai City and the first notification which is challenged is dated 4th April 2018 by which the petitioner's two bank accounts with HDFC bank came to be attached and consequent to this order of attachment, the properties have been declared to vest in the competent authority as per Section 4(2) of the MPID Act. The petition assails similar other notifications which have been issued on 7th April 2018, 11th April 2018, 19th April 2018 and 15th May 2018. The challenge to the subsequent notifications is introduced by way of an amendment since the respondent had issued a corrigendum dated 17th April 2018 and the notifications which were earlier issued by the Deputy Secretary, came to be replaced by the notification issued in the name of the Secretary of the Department. Apart from questioning the said notifications on the ground of wrongful and excessive attachment of accrued income and the permissibility to attach its software “Odin” and the attachment of receivables from Odin, the petitioner has raised a challenge that in terms of Section 4 of the MPID Act, the Government

ought to have first attached and liquidated the assets acquired out of the deposits and it is only after liquidating such assets, if there was a short fall in repaying the alleged investors, then the assets of any other person, including the petitioner, would have been attached. The impugned notifications are basically assailed on the ground of misreading of the existing provision of Section 4 of the MPID Act and it is prayed that it is either necessary to read them down or strike down the same as *ultra vires*. The said relief is sought to be justified on the ground of the vagueness and possible area of misinterpretation leading to the gross abuse and misuse of the latter portion of clause (ii) of sub-section (1) of Section 4 i.e. "*such other property of the Financial Establishment or the promoter, Director, Partner or Manager or members of the said Financial Establishment as the Government may think fit*", being susceptible of a misuse. Because of the words "*such other property*" instead of any other property offering in the last part of the section which has a vital impact when read with "As the Government may think fit" and unless the decision of the Government is directed to be guided by these yardsticks, the provisions can be subjected to misuse

and abuse. The provisions of sub-section (2) of Section 4 is also challenged as ex-proprietary in nature and as violative of Article 300-A of the Constitution. It is further averred that even if assuming for a moment, that the trading platform of NSEL was abused for doing financial transactions in the garb of commodity trading, that itself do not make the NSEL actual recipient accepting deposits and it cannot be termed as 'Financial Establishment' under Section 2(d) of the MPID Act. The petitions therefore seeks a relief of quashing of the impugned notifications (i) (ii), (iii), (iv), (v) and (vi) apart from seeking a declaration to the effect that section 4 and 5 of the MPID Act are violative of Article 14, 19(1)(g) and Article 300-A of the Constitution.

6 In support of the petitioner, we have heard the learned senior counsel Shri Vikram Nankani. He would submit that as far as issue of validity of the provisions of MPID Act is concerned, the same would be dealt by Advocate Shri Seervai and Shri Nankani would focus on the action against the petitioner in form of the notifications issued under Section 4 by

the respondent. Shri Nankani has submitted that the petitioner company is a 99.99% shareholder of NSEL. He would reiterate that NSEL was an electronic platform for trading of forward contracts of one day duration in commodity between willing buyers and sellers acting through their respective brokers.

He would submit that the NSEL started trading in paired contracts and it is alleged in the complaint on the basis of which the FIR was registered against the NSEL that there was a default in the payment of about Rs.5600 crore to approximately 13,000 investors who had lost their money due to them and what are popularly referred to as 'paired contracts' covering trading in commodity in forward contracts mainly under T+2 and T+25 contracts. Mr.Nankani would submit that these 13000 investors were the traders in commodity who brought Commodity under T+2 contract and sold the same under T+25 contracts and these traders (investors) transacted through the registered members of NSEL who acted as brokers on their behalf. Mr.Nankani would invite our attention to the mechanism in place with NSEL which included the different elements i.e. the brokers (registered members) and the client or

traders (so-called investors/buyers). According to him, the brokers and the clients or traders had an independent agreement between them and the clients originally entered into T+2 contracts and thereafter, in T+25 contracts reversed the trade so as to receive monies from the seller in T+2 contracts which expired on 25th day under the T+25 contract, meaning thereby that the seller under the original contract of T+2 was buyer under the T+25 contract. He would submit that the price/amount under T+25 contract was higher than the price/amount under the T+2 contract and the difference being the business profit for the trader/seller under the T+25 contracts. He would further demonstrate by stating that it is the original seller (who was the buyer under T+25 contract) who failed to return the money received under T+2 contract on expiry of 25th day, and therefore, he is the defaulter and there are according to Mr.Nankani, in all 24 such original sellers who received or collect monies under T+ 25 contract but defaulted in payment on an aggregate sum of Rs.5600 crore under the T+ 25 contracts. He would submit that all the transactions are screen based and takes place on real time basis where the

brokers on both sides place their orders for trade and accept orders for trade on their respective computer terminal and a situation emerged on 31st July 2013 when the 24 sellers and their brokers who had entered into reverse trades on T+2 date and received monies thereunder failed to honor their commitment of squaring off their position by buying back the commodities on T+25 date. As a result, 148 buyers and brokers could not receive monies on their open positions due to default committed by 24 sellers and their brokers.

Mr.Nankani would submit that in this transaction, there was no question of any deposit being accepted by NSEL and therefore, it cannot be termed as 'Financial Establishment' which would attract the provisions of MPID Act. He would submit that all trades entered into NSEL exchange were governed by its bye-laws which were available in public domain and these bye-laws clearly spelt out the rights and obligations of the parties and all the brokers who sought to trade on behalf of the clients were required to register with NSEL and become trading members and they agreed to abide by the Rules, regulations and bye-laws of the NSEL. He has placed on record

a sample client registration form and a sample client member agreement. He would further submit that the NSEL has also maintained the Settlement Guarantee Fund (SGF) where the contributions are made by the members and this is exclusively used to pay off in case of default by one of the members, in the event, the shortfall is also made up by further contributions from members themselves. Based on this nature of transactions, Shri Nankani would submit that the trade cycle made it clear that the NSEL did not receive any deposit which was the condition precedent for invocation of Section 4(1) of MPID Act and in the present case, according to him, NSEL has received money from buyers at T+2 date. Such money was immediately paid to the sellers at T+2 date. However, on T+25 date, the parties who were sellers on T+2 date and who were under an obligation to make payment on T+25 failed to do so and it is not the NSEL, but such sellers who receive monies from buyers on T+2 date with an obligation to make payment on T+25 date who had defaulted and, therefore, they would become the financial establishment well nigh and he would submit that the notification issued on 31st March 2017

issued by the respondent has characterized most of the sellers as Financial Establishment. The learned senior counsel would also further submit that despite the Forensic Audit by EOW, Mumbai establishing the complete trail of further diversion of funds by the 24 defaulters to their associated persons and entities, respondent has not attached the properties of each of the beneficiaries equivalent to the monies that has been traced and without first exhausting the properties of those persons to whom the alleged deposits have been traced, the respondent has illegally attached the properties of the petitioner – Promoter of NSEL. He would further submit that the issue whether NSEL has received deposits, is a jurisdictional issue.

7 Mr.Nankani has elaborated his argument that NSEL is not a financial establishment and he would refer to the investigation of the EOW in this regard and submit that the NSEL has acted only as a pass-through or a platform and could not be termed as 'financial establishment'. He would place reliance on the investigation conducted by EOW which has revealed that the entire trail of monies lost by the

investors/trader have been traced to the 24 defaulters and their group companies and associates and conversely no part of the alleged deposits have been traced to the Board Members of NSEL or to the petitioner as a promoter of NSEL. He makes an extensive reference to the judgment of the Hon'ble Apex Court in case of ***63 Moons Technologies Vs. Union of India*** delivered on 30th April 2019 and he would rely upon certain portions of the said judgment and its concluding paragraphs. In a nutshell, Shri Nankani has submitted that the six impugned notifications issued by the respondent attaching immovable and movable properties of the petitioner deserve to be quashed, after declaring that NSEL is not a financial establishment under the MPID Act and rather declaring that each of the 24 defaulters are the financial establishments.

8 Mr.Nankani has invited our attention to the methodology adopted by the NSEL and he submits that there is no deposit accepted by the NSEL nor it had promised any secured return but NSEL only facilitated the parties to enter into transactions and settlement of their accounts and

remuneration payable to the NSEL by the buyers and sellers was a fixed fee based on turnover of transactions. He would submit that the trade cycle on the NSEL's Exchange is identical to a trade cycle on Indian Stock Exchange such as Bombay Stock Exchange, National Stock Exchange, etc.

The learned Senior counsel has also pressed in service the judgment of the Apex Court in case of ***Carona Limited Vs. M/s.Parvathy Swaminathan and Sons***[1], to submit that the Court in exercise of writ jurisdiction is empowered to examine whether the jurisdictional fact of receipt of money as a deposit with promise of return, exists in the transaction since it is a *sine qua non* for exercise of power by the respondent under Section 4(1) of MPID Act. Shri Nankani submits that even if FIR filed by one Mr.Pankaj Saraf which has led to the investigation and invocation against the MPID is perused, there is no reference to deposit received by the NSEL and perusal of the allegations in the FIR in relation to non-availability of commodity would probably attract some offences under the IPC but do not attract the provisions of the MPID. He would also

1 2007(8) SCC 559

place heavy reliance on the report of the auditor appointed by the Economic Offences Wing to trace out the trail of money which has been deposited by the 24 sellers and their brokers and he submits that the auditor in his report dated 24th February 2018 has clearly reported the names and amounts due from the 24 defaulters to whom the complete fraud amount of Rs.5600 crore can be traced. He would submit that the report of the auditor supports the submission of the petitioner that NSEL is a pass-through and did not receive any money in its account. In this background and surrounding circumstances, Mr.Nankani would urge to grant the relief as prayed in the petition.

9 As against the said submission advanced by the petitioner, we have before us the affidavit in reply filed by the State Government and also the submission advanced by learned senior counsel Shri Dada in support of the State Government. He has placed reliance on the affidavit filed by Shri Prabhakar Loke, ACP and Chief Investigating Officer NSEL, Economic Offences Wing dated 29th June 2018. The said affidavit,

according to him, deals exhaustively with the challenge of the constitutional validity of the said Enactment in question and also set out in detail the modus operandi of the NSEL, justifying invocation of provisions of the Enactment against NSEL and the petitioner who is its promoter. Based on the affidavit, the learned senior counsel submits that the petitioner is the promoter of NSEL and holds 99.99% total share capital. He would submit that the NSEL had indulged in large scale financial transactions whereby investors were promised heavy returns and Shri Dada would rely upon following circumstances to establish that NSEL is a Financial Establishment accepting deposits and he would highlight the said circumstances as follows :

> (i) All the parties trading on the NSEL platform were forced to execute paired contracts of T+2 and T+25 simultaneously.
>
> (ii) None of the parties were given a choice to make any singular trades and the trades had to be in paired contracts.
>
> (iii) The price for the paired contracts, at the stage of buy and sell i.e. for T+2 and T+25 was fixed before hand and simultaneous contracts were executed at the same time.

(iv) This allowed NSEL to represent to the investors that it was giving fixed returns and the price difference between T+2 and T+25 was ranging between 14% to 16% per annum.

Shri Dada would submit that a person who wanted to buy a product was compelled to buy it at a particular rate by a contract 'T+2' and compelled to sell at the same time by an agreement at a particular rate on the basis of the contract styled as 'T+25'. He would also submit that the amount which the buyer paid was received by NSEL and thereafter disbursed to a purported seller who was really a borrower and who got an unsecured loan from the exchange and this buyer was promised a rate of return of 14% to 16% and the purported seller who was really a borrower from exchange availed this unsecured loan. Shri Dada has placed reliance on the Brochure published by NSEL which promised 14% to 16% yield in form of return and he would further submit that in the investigation, it is revealed that the prices for buying and selling were fixed so that assured returns were given and it did not matter whether any money has been paid to NSEL since the sellers were the bogus sellers and they were in fact liable to pay heavy interest

to the NSEL as they got unsecured loan. He would further submit that the contention that money when received was given to the purported sellers, and when repaid was given to the original buyer, is totally misleading assertion and on the other hand, his submission is that money was received by NSEL from investors and it was passed on to borrowers by NSEL and the entire transaction was a financial transaction. Shri Dada would thus emphatically submit that NSEL squarely fall within the term 'Financial Establishment' as contemplated under the MPID Act and by relying on the charge-sheet, he would advance a submission that the actual transaction between NSEL and borrowers are not supported with actual delivery of goods and in many cases, the accounts of the NSEL and borrowers did not match with each other due to unilateral bogus entries made by either of the parties to suit and accommodate each other. He would further submit that the investigation has also concluded that the physical delivery of the commodities has not been checked and there was no control over the stock lying in warehouses and in fact, the entire financial mishap has occurred due to the collusion between NSEL, its owners,

Directors, management, sellers, borrowers and others and it is a clear-cut case of criminal conspiracy and criminal breach of trust where innocent people were duped of their investment on account of the financial jugglery and fraudulent entries in the books of accounts. Thus, according to Mr.Dada, the NSEL is a financial establishment and he would rely on the observations made of the Division Bench in Writ Petition No.1403 of 2015 wherein it was held that NSEL had accepted the deposits as defined under the MPID Act and hence, it is covered within the definition of 'Financial Establishment' and therefore, according to him, the issues stand foreclosed.

He would painstakingly invite our attention to the purpose of enacting the MPID Act and would submit that it is a fit case where the petitioner who is a promoter of NSEL has rightly been pinned down by taking assistance to the provisions of the enactment since the NSEL did not own any property and about 13000 investors have been duped to the tune of Rs.5600 crore. Mr.Dada has also justified the impugned enactment and submit that the vires of the MPID Act being upheld once, it is

not susceptible to challenge and he has placed on record the judgment of the Apex Court in case of ***K.K. Baskaran Vs. State***,[2] which has upheld the judgment of the Tamil Nadu High Court where the validity of Tamil Nadu Protection of Interest of Depositors Act, 1997 came to be upheld. According to Shri Dada, the interpretation placed by the petitioner on Section 4 of the MPID Act is a misconceived one and he would submit that the attachment contemplated under Section 4(2) for the promoter is only on the contingency mentioned in the Section i.e. financial establishment has failed to return the deposit after maturity or a demand by the depositor or to pay interest or assured benefits and if the Government has reason to believe that such financial establishment is acting in a calculated manner detrimental to the interest of depositors with intention to defraud them and if the Government is satisfied that such financial establishment is not likely to return the deposit or make the payment of interest or other benefits assured. He would submit that in the event the Government is satisfied about these two situations, in order to protect the interest of

2 2011 (3) SCC 793

the depositors after recording the reasons in writing, it is competent to exercise the power by attaching the property believed to have been acquired by such financial establishment either in its own name or in the name of any other person from out of the deposits collected by the financial establishment. He would submit that if it transpired that such money or other property is not available for attachment or not sufficient for repayment of deposits, such other property of the said financial establishment or the promoter, director, partner or manager or member of the financial establishment can be attached by the State Government. The learned Senior counsel would thus submit that the basis of attachment of the property of the Director, Promoter, Partner or Manager of the financial establishment is to fasten the liability on the promoter who has been defined under the Companies Act to include a person who has control over the affairs of the Company, directly or indirectly or a person in accordance to whose advise, directions or instructions, the Board of Directors of the Company is accustomed to act. According to him, this provision enables to fasten the liability on the persons who are in control and

management and it is they who must bear the responsibility of returning the money taken by way of deposits.

We would deal with the submissions advanced by learned Senior counsel Shri Seervai a little later.

10 With the assistance of the learned counsel appearing on both sides, we have perused the Writ Petition along with its annexures and also the affidavits tendered on behalf of the respondent. On hearing the learned counsel for the parties and on perusal of the writ petition, in order to effectively adjudicate the issues raised before us, we would deal with the issues under the following particular heads :

I The nature of transaction entered into by the NSEL.

II The FIR filed and the subsequent invocation and application of provisions of MPID Act against NSEL.

III An action taken against the present petitioner which is the promoter of NSEL by issuing notifications under Section 4.

IV The constitutional validity of the Maharashtra Protection of Interest of Depositors Act, 1999

Shri Nankani has raised the jurisdictional issue and he has submitted that the entire initiation of action against the petitioner as the promoter of NSEL is erroneous, since the authorities have proceeded on a wrong presumption that NSEL is a financial establishment and it has accepted deposits from the investors. In light of the said averment, it would be necessary to refer to the affairs of the NSEL which is a subsidiary of FTIL, which is now known as '63 Moons Technologies".

11 Before we proceed to deal with the petitions, it would be appropriate for us to inter-relate the petitioner to the NSEL who is termed to be the Financial Establishment. The petitioner, 63 Moons Technologies Limited, earlier known as Financial Technologies (India) Limited (FTIL) is an Indian Financial Service Company formed in the year 1988. The said Company claims to offer technology in intellectual property to create and trade in financial market. The said Company started its operation in the year 1988 by developing technology

products for connecting the financial markets. It introduced its first commodities derivatives trading platform, Multi-Commodity Exchange (MCX) in the year 2007 and thereafter it established similar such exchanges. The National Spot Exchange Limited is one of the subsidiary of the petitioner.

I The nature of transaction entered into by the NSEL.

12 We also briefly delve into the events which led to the foundation and formation of NSEL. The Tenth Five Year Plan (2002-2007) conceptualized the idea of an Indian common market and it was an outcome of a policy decision to create a common nation wide market for commodities. NSEL came into being to fulfill a vision of Government to create common Indian market for trading of commodities. It came into existence as one of the several subsidiaries of FTIL which holds 99.99% of its shares. Apart from the NSEL, the NCDEX Limited and National APMC were also established for fulfilling the dream project of an Indian Common Market.

13 The National Spot Exchange Limited is the India's first electronic commodity spot exchange that was established with a vision to create a 'single market' across the country for both the manufactured and agricultural produce. It is a National Level Institutionalised and demutualized Electronic Spot Exchange aimed at creating an unified common Indian market for various commodities. The object of NSEL is to enhance farmers price realization and reduce consumer paid price by reducing cost of intermediation and improving market efficiency. It thus aimed to provide a delivery based platform to achieve price efficiency. It operated in 24 commodities with its most active contracts being Castor seeds, Cotton seed, cotton, barley and maize. The Cotton Corporation of India became member of NSEL to sell cotton bales on NSEL platform. Similarly, the Food Corporation of India also became a member of NSEL in March 2010 and commenced sale of wheat through National Spot Exchange. The key features of the National Spot Exchange included a Centralized Trading Platform on which numerous buyers and sellers interfaced with one another to carry out transactions. Another key feature, being Counter

Party Guarantee, where all the trades were made subject to margin/security payable in advance and the NSEL being monitoring the positions based on automated risk management system, the NSEL provided counter party guarantee. The remote market access was also a key feature of the mechanism along with the assurance of quality specification. The Government of India, therefore, granted permission to NSEL along with two other spot exchanges to start its operation and it issued a government notification on 5th June 2007, thereby granting general exemption under Section 27 of the Forward Contracts Regulations Act (FCRA). The notification issued by the Ministry of Consumer Affairs, Food and Public Distribution on 5th June 2007, exempted all forward contracts of one day duration for the sale and purchase of commodities traded on National Spot Exchange Ltd, in exercise of powers conferred by Section 27 of the FCRA Act, 1952. The said notification stipulated the following conditions :-

(i) No short sale by members of the Exchange shall be allowed.

(ii) All outstanding positions of the trade at the end of the day shall result in delivery.

(iii) The National Spot Exchange Ltd. Shall organize spot trading subject to regulation by the authorities regulating spot trade in the areas where such trading takes place.

(iv) All information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agency.

(v) The Central Government reserves the right to impose additional conditions from time to time as it may deem necessary; and

(vi) In case of exigencies, the exemption will be withdrawn without assigning any reason in public interest"

The NSEL commenced its operations by providing an electronic trading platform in October 2008 and simultaneously six State Governments issued licences under the model Agriculture Produce Market Committee (APMC Act) to the NSEL. The Forward Market Commission was appointed as a designated agency to regulate the Spot Exchanges. The Spot Exchange was mainly regulated by the three main regulators i.e. (i)the State Agriculture Marketing Board, (SAMB) regulating the transaction involving the farmers sale of agricultural commodities on electronic platform, (ii) Forward

Market Commission (FMC) which regulated all the trade where netting of intra-day transaction in the commodities contract is followed by Exchange and (iii) Warehouse Development Regulatory Authority (WDRA) which covers the aspect of negotiability of warehouse receipts.

In the year 2012, the designated agency for implementation of the notification came to be replaced by Forward Markets Commission, Mumbai".

14 NSEL was granted conditional exemption from applicability of the Forward Contract Regulations Act, 1952 and this exemption was in respect of contracts of one day duration for sale and purchase of commodities traded on the Spot Exchange established by NSEL. The conditions placed an absolute bar on short sales and stipulated that all outstanding positions at the end of the day must result in delivery of commodities. The NSEL started its activity in the year 2008 and it started trading in T+2 and T+25 based contracts which were traded together and were called as 'paired contracts' where the buyer/investor would enter into a contract to buy the

commodity with T+2 delivery cycle and simultaneously, the buyer/investor would also enter into a contract to sell the commodity with a T+25 delivery cycle with the same parties as the first contract.

15 The NSEL continued to enjoy the exemption until it was served with a show cause notice on 27th April 2012 by the Central Government, alleging contravention of the specific condition imposed while granting exemption from the provisions of the FCRA and the Central Government by its letter dated 12th July 2013, directed the National Spot Exchange not to launch any fresh contracts till further instructions from the authority and it settled all the existing contracts on due dates. In furtherance of the said directives, the NSEL on 31st July 2013, suspended trading in all contracts except 'E' series contracts until further notice and it decided to merge the delivery and settlement of all pending contracts with effect from 31st July 2013 and to defer it for a period of 15 days. On 6th August 2013, the Government of India issued a notification in partial modification of its earlier notification dated 5th July

2007 and imposed additional condition on the NSEL to protect the interest of the commodity market participants which read thus :

I No trading in existing 'E' series contracts and no further or fresh one day forward contracts in any commodity shall be undertaken on NSEL without prior approval to Central Government.

II Settlement of all outstanding one day forward contract under the supervision of Forward Market Commission.

16 Ultimately, on 19th September 2014, the Central Government withdrew the exemption conferred in favour of the NSEL since it was of the opinion that on the basis of the experience gained, the entities which were granted exemption under Section 27 of the Act, facilitated unregulated forward trading on the platform have failed to serve the purpose for which they were created and the Government after expressing its opinion to that effect, in view of the various risk associated with trading in such unregulated entities, concluded that forward trading is not in public interest. The Ministry of Finance, therefore, rescinded notification dated 5th June 2007 with immediate effect.

II The FIR filed and the subsequent invocation and application of provisions of MPID Act against NSEL.

17 On 30th September 2013, one Mr.Pankaj R. Saraf lodged an FIR (C.R.No.216 of 2013) with the MRA Marg Police Station. In his statement, he stated that he was an investor in Traders contract offered by the NSEL through its broker and he was regularly trading in T+2 and T+25 contracts and on 20th July 2013, he was informed by his broker that NSEL had issued press release on 25th July 2013 based on a circular issued by the Department of Consumer Affairs requiring NSEL to submit an undertaking that new contracts will not be launched until further instructions and that the existing contract should be settled on due date. He also stated that he was informed by his broker that NSEL had issued a Press Release proposing a settlement cycle in consultation with the planters on payment in a staggered manner and he placed on record the said press release. However, since he was to receive payments under various trades of commodities, under various contracts entered by him, he apprehended that the settlement terms worked out

by NSEL would not be implemented and since he did not receive the amounts of the payments due to him, he lodged the FIR. He alleged that he was cheated by NSEL, the defaulters and there was practically very little hope for recovery of the amount due and outstanding on the contract, which he had invested in NSEL. He also alleged that NSEL has cheated him by creating a false impression of being a proper spot exchange with correct risk management systems in order to induce him into the trade on the spot exchange and deliberately misled him that the trades were backed up by genuine warehouse receipts and in fact, the loss could not be recovered since the funds from the settlement guarantee fund of the exchange was misappropriated, leaving no security to ensure payment of his outstanding amount. In the FIR, he categorically stated that he was operating through his two brokers i.e. Capital First Commodities Limited and Way 2 Wealth Programme Pvt.Ltd and he was to receive Rs.137 lakhs from the first broker and Rs.65 lakhs from the second broker. The FIR gave a detailed narration of the working of the NSEL and its relationship with the FTIL i..e the petitioner. A statement is made in the said

complaint that after discussion with various investors and from the reports published in the newspaper, he had gathered that the accused persons named in the FIR had defrauded 13000 investors to the tune of Rs.5600 crores or may be more. The statement of the complainant came to be recorded by the Sr. Inspector of Police, EOW, Unit V, Mumbai on 30th September 2013. Along with the statement, the complainant also placed before the EOW the various circulars issued by NSEL, as well as the NSEL brochure – NSEL presentation and various press articles along with the copy of contract notes and warehouse delivery allocation reports.

18 The core issue involved and which has been brought before us is whether the NSEL is a financial establishment within the meaning of Section 2(d) of MPID Act. The said question can be answered provided it is established that NSEL was accepting deposit as covered by Section 2(c)of the MPID Act under any arrangement or in any other manner.

Before we proceed to answer the said question, it would be expedient to make a reference to the enactment of

1999 which is an act to protect the interest of depositors of the financial establishment and known as Maharashtra Protection of Interests of Depositors in Financial Establishments Act, 1999. The MPID Act 1999 was brought into force from 21st January 2000 and the said enactment was necessitated in the backdrop of the fact that there was a mushroom growth of financial establishments in the State and these establishments were in the process of grabbing money received as deposits from public and thereby attracted the middle class and poor on the promise of unprecedented high attractive interest rate or rewards and without any obligation to refund the deposit to the investors on maturity failed to do so. Many of such financial Establishment defaulted to return the deposits to the investors and at times, the deposits ran into crore of rupees causing great public resentment and uproar and creating law and order problem in the State and in particular, city like Mumbai. The State, therefore, deemed it expedient to make a suitable legislation to curb the unscrupulous activities of such financial establishments in the State and enacted the Act of 1999. The said enactment define 'financial establishment' in Section 2(d) as follows :

> "**Financial Establishment**" means any person accepting deposit under any scheme or arrangement or in any other manner but does not include a corporation or a co-operative society owned or controlled by any State Government or the Central Government or a banking company as defined under clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949)".

The term 'deposit was defined as follows '2(c)"

> "**Deposit**" includes and shall deemed always to have been included any receipts of money or acceptance of any valuable commodity by any Financial Establishment to be returned after a specified period or otherwise, either in cash or kind or in the form of a specified service with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include".

Section 3 of the said enactment is a charging section and any financial establishment which fraudulently defaults any repayment of deposit on maturity along with any benefit in form of interest, bonus, profit or in any other form as promised or fraudulently fails to render the service as assured against the deposit, then, every person including the promoter, partner, director, manager or any other person or an employee responsible for the management of or conducting the business or affairs of such financial establishment is liable for punishment and fine. The explanation appended to the said

section clarifies that if such a default is committed due to the inability arising out of impracticable or commercially not viable promises made while accepting such deposit or arising out of deployment of money or assets acquired out of deposits in such a manner as it involves inherent risk in recovering the same when needed, shall be deemed to have committed a default or failed to render these services fraudulently. The enactment then set out the entire scheme which covers attachment of properties under Section 4, such attachments being made absolute by the designated Court under Section 6 of the enactment, administration of the property so attached and the procedure to be followed by the Designated Court for taking an action under Section 3. We would be dealing with Section 4 at a slightly later stage. However, at the outset, it would be necessary to ascertain as to whether NSEL is a financial establishment and whether it had accepted any deposit 'as contemplated under the Act of 1999. The definition of the term 'deposit' under Section 2(c) is n inclusive definition and it is deemed to have always included any receipt of money or acceptance of any valuable commodity to be returned after a

specified period or otherwise, either in cash or in kind or in form of a specified service with or without any benefit in form of interest, bonus, profit or in any other form.

19 In order to ascertain whether NSEL had received any deposit to bring it within the purview of a financial establishment, we have carefully considered the rival submissions advanced by the learned senior counsels appearing for the petitioner and the State. Mr.Nankani has placed before us the entire gamut of operations carried out by NSEL and he has explained the various stages involved while trading on the online platform provided by NSEL. Our attention was invited to the bye laws as well as the regulations governing the trading process on the platform of NSEL and we would make a brief mention to the said bye laws as well as the regulations.

20 The NSEL was governed by the Bye-laws known as the 'bye-laws of National Spot Exchange Limited, Mumbai' which came into force with effect from June 2008. The bye-laws governed its functioning in addition to the provisions of business rules and regulations framed by NSEL. The bye-laws

contained and introduced certain terminology with reference to the transactions taking place on the platform of NSEL and we would make a reference to certain relevant terms. It defined Automated Trading System or the Trading System of Exchange to the following effect :

> 2.7 **Automated Trading System or Trading system of the Exchange** means National Electronic Spot Trading System, which shall be the computerized system provided by the Exchange for conducting spot trading in commodities permitted by the Exchange, access to which is made available to an exchange member, for use either by himself or by his authorized persons, participants, authorized users and clients, and which makes available, quotations in the commodities traded on the Exchange, facilitates trading in such commodities and disseminates information regarding trades effected, volumes transacted, other notifications, etc., as may be decided to be placed thereon by the Relevant Authority. The Automated Trading System shall hereafter be referred to as "NEST".

It also contain the following terms :

> 2.14 **Buy Order** means an order to buy a commodity permitted for trading on the exchange.
>
> 2.15 **Buyer** means and includes, unless the context indicates otherwise, the buying client, the buying exchange member acting either as an agent on behalf of the buying client or buying on his own account.
>
> 2.12 **Circular Trading** means and relates to trading by a client or an exchange member or a group of related exchange members and/or their clients, normally through more than one exchange and executing trades, with one or more entities of this group entering buy orders and on the

other side one or more entities of the same group and/or with other unconnected entities in the market entering sell orders or vice versa with a design to manipulate the price of a commodity and/or to create artificial volumes in a commodity.

2.25 **Clearing House** means the division of the Exchange, or an entity designated as such by the Exchange, providing the services of settlement of transactions to the exchange members, and guaranteeing settlement by delivery or otherwise of the obligations to the clearing members, on behalf of the Exchange.

2.26 **Clearing member** means a trading – cum – clearing member or an institutional clearing member of the Exchange who has the right to clear transactions in commodities that are executed in the trading system of the Exchange.

2.27 **Client** means a person who has executed an agreement with a member of the Exchange for dealing through such member in commodities permitted on the Exchange.

2.33 **Days of tender** mean the days on which relevant delivery documents and certified warehouse receipts are permitted to be presented to the Clearing House of the Exchange.

2.35 **Delivery** order means an order issued by a seller in the prescribed form in favour of the Clearing House offering delivery of goods at one or more permitted delivery centres in fulfillment of his obligation.

2.55 "**Member of the Exchange**" or "Exchange Member" means a person, a sole proprietary firm, joint Hindu family, a partnership firm, a company (as defined under the Companies Act), a co-operative society, a body corporate or public sector organization or statutory corporation or a government department or non-government entity or any other entity admitted as such by the Exchange for trading, clearing or settlement in a

commodity permitted by the Exchange and shall not mean a shareholder of the Company unless expressly stated. Membership of the Exchange in this context shall not mean or require or entitle shareholding in the Company.

2.72 **Seller** means and includes, unless the context indicates otherwise, the selling client, and the selling exchange member acting as an agent on behalf of such selling client and denotes the selling exchange member when he is dealing on his own account.

2.86 **Trader Work Station** (hereafter referred to as "TWS") means a computer terminal of an exchange member which is approved by the Exchange and which is installed and connected to "NEST" or any other trading system of the Exchange, for the purpose of trading on the Exchange.

Apart from these definitions, it also defined the terms 'Pay-in' – Pay-in date', 'Pay-out – Pay-out date' assailing a broad meaning and the definitions were contained in clause 2.60 to 2.63 :

2.60 **Pay-in**, in respect of transactions done on the Exchange, means making available funds to the Clearing House by the exchange members in accordance with the applicable settlement schedule notified by the Clearing House from time to time.

2.61 Pay-in Date means the date and time prescribed by the Exchange or its clearing house for each settlement by which date and time, exchange members are required to perform their obligations by way of payment of funds or commodities as applicable, to the clearing house.

2.62 **Pay – out** in respect of transactions done on the Exchange means release of funds by the clearing house to the exchange members who become entitled to receive them to the extent of and upon their fulfilling their pay - in obligations into the clearing house, in accordance with

> the applicable settlement schedule notified by the Exchange or clearing house from time to time.
>
> 2.63 **Pay-out Date** means the date and time prescribed by the Exchange or clearing house for each settlement on which date and time, the clearing house shall be required to release funds to the respective accounts of the exchange members and/or clients.

The Bye-laws in great detail set out the procedure of the nature of transactions taking place on the platform of NSEL and set out the rules for clearing and settlement of transactions, creation of a settlement guarantee fund, client protection fund and other funds. It also contains a clause for conciliation and arbitration in clause 3.1.2. The bye-laws were made applicable to all the members and participants of the exchange, authorized persons, approved users, clients and all entities involved in trading, clearing and settlement of transactions to the extent specified therein. The limitation of liability of the NSEL was made very clear in clause 3.7 of the said bye-laws.

> **3.7 LIMITATION OF LIABILITY**
>
> The Exchange shall not be liable for any activities of its members or of any other person, authorized or unauthorized, acting in the name of any member, and any act of commission or omission by any one of them, either singly or jointly, at any time shall not be in any way construed to be an act of commission or omission by any

> one of them, as an agent of the Exchange. Save as otherwise specifically provided in these Bye-Laws and in the Business Rules and Regulations of the Exchange, the Exchange shall not incur or shall not be deemed to have incurred any liability and accordingly, no claim or recourse shall lie against the Exchange, any member of the Board of Directors/or committee duly appointed by it or any other authorized person acting for and on behalf of the Exchange, in respect of or in relation to any transaction entered into through the exchange made by its members and any other matters connected therewith or related thereto, which are undertaken for promoting, facilitating, assisting, regulating, or otherwise managing the affairs of the Exchange to achieve its objects as defined in the Memorandum and Articles of Association of the Exchange.

A clause of secrecy in the Bye-laws made it imperative for the exchange to take necessary steps to preserve and protect the details, particulars, date or information available in nest and its computer systems. Indemnity clause in form of 3.10 reads thus :-

> 3.10 **INDEMNITY**
>
> Every member of the Exchange shall indemnify and keep indemnified the Exchange from and against all harm, loss, damages, injury and penalty suffered or incurred and all costs, charges and expenses incurred in instituting and/or carrying on and/or defending any suits, action, litigation, arbitration, disciplinary action, prosecution or any other legal proceedings suffered or incurred by the Exchange on account of or as a result of any act of commission or omission or default in complying with any of the provisions or the authorities regulating spot trading in the area where such trading takes place, and the Rules framed thereunder or these Bye-Laws or the Rules, Business

> Rules or Regulations of the Exchange or due to any agreement, contract or transaction executed or made in pursuance thereof or on account of negligence or fraud on the part of any member of the Exchange or the Clearing House and their employees, servants and agents.

A disclaimer clause in clause 3.11 of the bye-laws read thus :

> 3.11 DISCLAIMER Where any loss or damage is caused to or incurred by any party or person on account of or as a result of any act of commission or omission or default in complying with any of the provisions of any statute or the condition imposed by the authorities regulating spot trading in the area where such trading takes place or these Bye-Laws or Business Rules or Regulations of the Exchange or any agreement, transaction or contract executed or made in pursuance thereof on account of negligence or fraud on the part of any member of the Exchange or the Clearing House that is not a part of the Exchange but is an independent entity or their employees, servants or agents, in the event of the Exchange making good or being required to make good such loss or damages (or any part thereof) to such party or person, the Exchange shall be entitled to recover the amount.

Dealing in commodities specify the nature of transaction taking place on the platform of NSEL and it set out that the exchange shall provide its trading platform for spot trading in multiple commodities, multiple verities, which shall be consisting of different types of graded unprocessed, semi-processed, processed agricultural commodities, including those notified commodities by different State Agricultural Marketing

Board/Authorities as well as metals of different specifications including precious metals like gold and silver etc. The following stipulations in the bye-laws need to be noted :

> 4.6 While entering an order in the system, the member shall specify whether such order is on his own account or on account of his client. If the order is for and on behalf of a client, he should specify the respective client identification number.
>
> 4.7 Before executing a trade for a client, the member shall sign a written agreement with the client, as per the procedure and in the format, as may be specified by the Exchange.
>
> 4.8 All transactions in commodities permitted on the Exchange shall be cleared, registered and settled by the Clearing House and shall be subject to these Bye-Laws, Rules, Business Rules and Regulations framed thereunder by the Exchange. The Clearing House shall clear, register and settle the trades entered into on the exchange.
>
> 4.9 Members of the Exchange shall issue contract note for each of the transaction done by them for their respective clients on the trading system of the Exchange. Such Contract notes shall be issued strictly as the format prescribed by the Exchange. Members shall not issue contract note for any transaction, which has not been executed through the trading system of the Exchange.
>
> 4.10 In respect of all trades executed by the members of the Exchange, it shall be the responsibility of the respective members to pay all applicable statutory fee, APMC cess, VAT, stamp duty, service tax, taxes and levies in respect of all deliveries directly to the concerned Government Departments, unless otherwise specified by the Exchange.
>
> 4.11 All transactions in commodities permitted on the exchange shall be settled through the Clearing House;

Clearing Members shall alone be eligible and qualified to obtain directly the clearing, settlement and guaranteeing services of the Clearing House.

4.13 Only transactions in commodities permitted for trading on the Exchange, will be recognized as valid, provided the Clearing Member has paid to the Clearing House adequate security and margin deposits as prescribed. Clearing Members who clear trades shall pay the prescribed security, margin deposits and variation margins for their respective outstanding transactions to remain valid. Members of the Exchange and registered non-members whose trades are cleared by Clearing Members shall pay the prescribed margin deposits and variation margins for their respective outstanding transactions to remain valid.

4.19 The Exchange shall have the right to specify and charge transaction fee, clearing fee or any other fee from the member of the exchange. The Exchange may specify the maximum and minimum fees a clearing member may charge from other members of the Exchange and an exchange member from their clients.

4.20 (a) All outstanding transactions in commodities shall in general be for compulsory delivery at any one or more delivery points and/or warehouses approved, certified and designated by the Exchange

(b) All outstanding positions not settled by giving or receiving deliveries shall be auctioned by way of buying in or selling-out as per the Business Rules of the Exchange, together with a penalty as prescribed by the Managing Director or such committee for those failing to give or receive delivery.

4.24 Any member of the Exchange transacting in any contract and basis varieties that are not specified by the Board shall be liable to be dealt with under Bye-Laws relating to disciplinary action.

4.25 Members shall maintain a record of all their transactions in all commodities permitted by the Exchange.

> Members shall have separate records of their own account transactions and those of registered non-members, including orders from registered non-members for execution of transactions in commodities. Members shall preserve the records of registered non-members" orders for transactions for each registered non-member separately with the time and date of receipt of order, details of executed transactions for each registered non-member and books of accounts relating to the same, for a period of three years for production whenever required by the Board of Directors or any committee of the Exchange.

21 The mechanism of trading on the exchange was set out by bye-law no.5 and it contemplate the members of the exchange or their authorized representatives or approved users trade through the Traders Work Station (TWS) connected to the Nest or any other trading system of the exchange and 5.6 set out that the members of the exchange shall be solely responsible for all the transactions done by or through their respective TWS on the exchange. The trading facility enabled the use of nest only subject to compliance with the terms and conditions as set out in the bye-laws which may include payment of such deposits and/or charges provided by the business rules and regulations from time to time. The bye-law No.5.13.3 also set out that no exchange member shall have any right, title or interest in Nest or other trading system to

exchange, its facilitation and software information. The automated trading system provided by the exchange also known as Nest was available for facilitating trading in commodities permitted by the exchange for trading from time to time. The exchange provided the necessary architecture and infrastructure related to facilitate members of the exchange to establish connectivity with Nest and it was authorized to prescribe the specifications/descriptions of hardware, software and equipment and to carry out the required testing in such manner and time as may be prescribed by the exchange. The clearing house of the exchange by virtue of bye-law no.7 managed by the Clearing House Committee and all the transactions in the exchange are to be cleared and settled by clearing house of the exchange. Bye-law no.7 set out the procedure to be followed and clause no. 7.9 reads thus :-

> 7.9.1 In respect of commodities, or price indices, as may be determined by the Exchange from time to time, and traded and cleared by the Exchange in the manner specified in these Bye-Laws, the Exchange shall be deemed to guarantee the net outstanding financial obligations to clearing members.
>
> 7.9.2 Commodities, or price indices not guaranteed by the Exchange shall also be cleared, settled or closed out in accordance with the Bye-Laws

> and Rules, Business Rules and Regulations of the Exchange in force from time to time. The Exchange however shall not be responsible for the performance of such contracts. If any party to such contract defaults in respect of his financial obligations or fails to deliver goods on maturity of the contract, the defaulting member shall be liable for appropriate disciplinary action by the Relevant Authority and his contract will be closed out by the Relevant Authority in accordance with the Bye-Laws, Rules, Business Rules and Regulations or notices, or orders issued thereunder. The Exchange shall then be entitled to recover dues of any defaulting member from his security deposit and other funds, if any lying with the Exchange, as also from his debtor members and appropriate the amount so recovered for distribution amongst his creditor members on pro rata basis.
>
> 7.9.3 The Exchange shall not be deemed to guarantee the financial obligations of a defaulting clearing member to other members, who are doing clearing and settlement through him.
>
> 7.9.4 The Exchange shall not be deemed to guarantee the financial obligations of any member of the Exchange to his/its clients; and
>
> 7.9.5 The Exchange shall not be deemed to guarantee the delivery, the title, genuineness, quality or validity of any goods or any documents passing through the Clearing House of the Exchange.

22 The margins are then set out in bye-law no.8 and in respect of the transactions taking place in the exchange, it is imperative for the buyers and sellers to deposit an amount as initial margin and margin accounts are marked to market daily by clearing members and it is open for the exchange member to

close out upon position of a client, when the call for further margin or any other payment due is not complied by the client. The clearing and settlement is set out by bye-law no.9 and an order to buy or sell would become a match transaction only when it is matched in the trading system and the procedure set out in the bye-laws is to the following effect :

> 9.1 The Clearing House of the Exchange shall function in respect of trading in commodities permitted on the exchange so
> as to provide clearing and settlement services for the transactions.
>
> 9.2 In order to facilitate smooth clearing and settlement, all members of the Exchange participating in trading shall be required to open such number of bank accounts with designated Clearing Banks as may be advised by the Exchange. All such members shall be required to strictly follow instructions of the Exchange in respect of operation of such bank accounts, minimum balance, segregation of clients" fund and own fund, etc. as may be required by the Exchange. They shall also submit an irrevocable mandate in writing enabling the Exchange to debit and credit their account electronically. They shall be required to keep the accounts adequately funded, so as to enable the Exchange to recover its dues by debiting their respective bank accounts.
>
> 9.3 Each clearing member shall submit or cause to be submitted all trades executed by constituent members or clients with whom he has an agreement to provide clearing and settlement services for their transactions and assist the Clearing House in the form and manner that is specified and prescribed by the Clearing House Committee to enable the Clearing House to provide clearing facility to the clearing members.

9.4 The Clearing House shall process all transactions submitted to the Clearing House and shall accept for substitution of the Exchange only the net liability of the Clearing member to the Clearing House.

9.5 An order to buy or sell will become a matched transaction only when it is matched in the Trading system and the Clearing House does not find the order to be invalid on any other consideration and further after verifying that the following are in agreement and/or in order :

(i) Commodity,
(ii) price indices,
(iii) Quantity,
(iv) Transaction quote,

9.6 Once a trade is matched and marked to market by the Clearing House, the Exchange shall be substituted as counter party for all net financial liabilities of the clearing members in specified commodities in which the Exchange has decided to accept the responsibility of guaranteeing the financial obligations.

9.7 All outstanding transactions shall be binding upon the original contracting parties, that is, the members of the Exchange until issue of delivery notice or delivery order or payment for delivery, as the case may be.

9.8.1 Each trading day shall be a settlement day, unless it is declared otherwise by the Relevant Authority at its discretion;

9.8.2 All transactions in commodities permitted on the Exchange shall be subject to marking to market and settlement through the Clearing House, at intervals specified by the Relevant Authority under the Business Rules and Regulations of the Exchange, except on holidays when there is no trading and clearing. The Relevant Authority shall have the right to effect marking to market and settlements through the Clearing House more than

once during the course of a working day, if deemed fit on account of the market risk and other parameters; and

9.8.3 Settlement of differences due on outstanding transactions shall be made by clearing members through the Clearing House.

9.9.1 Settlement price shall be determined by the Relevant Authority based on price quotations of transactions executed in accordance with the Bye-Laws, Rules, Business Rules and Regulations of the Exchange and other information available on the daily official list or in such other manner, as may be determined by the Relevant Authority.

9.9.2 All transactions, after a mark-to-market and settlement, cleared by the Clearing House shall be included in the succeeding delivery marking procedure for creation of compulsory delivery obligation.

9.10 In case of commodities coming under settlement through delivery and payment, the difference shall be calculated between the contract rate and the closing price of that day. This difference shall be receivable/payable on the next working day of the date of transaction. Subsequently, delivery and payment settlements shall be made on the basis of closing price
of the date of trade.

Similarly, the bye-law also contain a detailed procedure for delivery. It also stipulate a settlement guarantee fund by bye-law no.12 to be maintained by the exchange in respect of different commodity segments and the minimum corpus of the Settlement Guarantee Fund to be ensured before the commencement of the trading was fixed at Rs.One crore. Every

member was required to contribute and provide a minimum security deposit in the SGF and the money in the SGF would be utilized in terms of the bye-laws. Clause 12.6 provide for administration and utilization of the SGF which include differing the expenses of creation and maintenance of SGF, to meet the shortfalls and deficiencies arising out of clearing and settlement obligations of clearing members, meeting any loss or liability of the exchange arising out of the transactions, etc. The Code of Conduct was also set out apart from the provision of arbitration in bye-law no.15.

23 Apart from the bye-laws, the National Spot Exchange Ltd has also framed the rules of National Spot Exchange Limited, Mumbai which set out the manner in which the exchange would be managed and the functions of various committees constituted under the bye-laws of the exchange, including the Membership Committee, Trading Committee, Clearing House Committee, Vigilance Committee etc. The qualifications and disqualifications of the member of the exchange along with the procedure to obtain the membership

are also set out in the said rules. It also provides for the duties cast on the members and the power of the Board to cancel, suspend, expel a member from the exchange.

The relating bye-laws set out the rights and obligations of the brokers vis-à-vis the trades of NSEL exchanges and all the brokers who wish to trade on behalf of their clients must necessarily obtain registration with NSEL and become its trading member and are bound by the Rules, regulations and bye-laws of the NSEL.

We have perused the bye-laws of NSEL and from the said bye-laws, it could be seen that the methodology which was adopted by NSEL could be summarized in a stepwise manner as follows :

(i) It was the broker or member of the NSEL who had access to the online trading system set up by NSEL on his computer terminal and this access could be gained by the broker upon registration as a member.

(ii) The broker / member placed an order either to buy or sell any commodity which is being traded on the exchange and he can also put an order for buying or selling of the same

commodity or any other commodity on the same date or any other date.

(iii) When the order for buying or selling is placed and it corresponds or matches in terms of the prescription of the commodity, quantity (in part or whole) price and delivery date, the transaction is matched by the automated software of the exchange and the contract is concluded between buyer and seller acting through their respective brokers/members. When two orders are placed by two different brokers/members for two separate clients match each other, a contract for buying and selling of a commodity comes into existence. The online transaction can be watched by any person on the electronic platform provided by the NSEL.

(iv) On the due date, the buyer through its broker pays in the amount of the price for purchase of the commodity against the transfer of document of title and on the same date, the amount is 'paid out' to the seller through its broker.

(v) The pay-in and pay-out mechanism takes place through the clearing house of NSEL where the net received from each broker is adjusted against the net amount to be paid

to each broker/member.

(vi) In this transaction, the NSEL receives transaction fee. It also maintains a Settlement Guarantee Fund (SGF) where contributions are made by the members and this fund is exclusively used to pay off in case of defaults by one of the members in which event, the short fall is also made up by further contributions from the members themselves. NSEL received the margin money which is again used towards pay-in and pay-out obligation of the members.

24 The trading mechanism involved the following salient features based on the Bye laws and Rules of NSEL.

(i) All contracts with single day duration

(ii) Positions outstanding at the end of the day result into compulsory delivery

(iii) Fully automated screen Based trading system with national reach.

(iv) An order driven trading system

(v) Transparent and fair system for automated order matching. Identity of the participants undisclosed. and flexibility for placing order.

25 The Exchange specified the procedures and operations for every clearing member and every member was required to open their clearing and settlement account with the exchange, and 9 clearing banks were appointed by the exchange for transfer of funds between clearing members and the exchange. Every member was to have a designated bank account with electronic fund transfer facility and the members were permitted to operate the settlement account for the purpose of settlement of deals entered through the exchange for payment of margin money or any other purpose as specified in the exchange. It contemplated the delivery procedure at NSEL warehouse where the seller desirous to sell/buy through NSEL had to compulsorily deliver the commodity in the NSEL designated warehouse of a particular location. The quality and the weight of the commodity was monitored and certified by the warehouse supervisor. The commodity inward document is to be issued by the depositor for depositing the commodity in the exchange warehouse. The quality certificate and the commodity inward document are issued on deposit of the

commodity and the warehouse receipt to be issued to the depositor the next day.

The Commodity came to be traded on the platform of NSEL in the following manner :-

> "1. A Trading Member of the NSEL, who possessed and wished to trade in a particular commodity, was required to place that quantity of the particular commodity in an NSEL accredited warehouse. On that basis, warehouse department of NSEL would generate a Warehouse Receipt ("**Warehouse Receipt**").
>
> 2. Thereafter the registered Trading Member, acting on his own behalf (or on behalf of a non-member client) who had placed the requisite commodity stock in the Warehouse, could, on the basis of the Standard / Proforma Contracts issued by the NSEL for that Commodity, punch a 'Sell Order' for sale of the said commodity online on the Exchange's online trading platform, stipulating the price and quantity offered apart from other details.
>
> 3. Buying Trading Members acting either for themselves, or their nonmember trading clients, would input Buy Orders for a particular commodity on the NSEL online Trading Platform.
>
> 4. On the Sale & the Buy orders for a commodity matching, there would be on Onscreen Trade Confirmation stipulating the commodity, the price and the quantity agreed upon.
>
> 5. At the end of the day, all trades (buy/sell) effected would be communicated by the Exchange to the Trading Member.
>
> 6. On the next day, an end of day Obligation Report, recording the Pay-in obligations (netted off) & the

Delivery Obligations (netted off only re same commodity trades), would be forwarded by NSEL / made accessible to the Trading Members (through the FTP : File Transfer Protocol).

7. On the Settlement date, NSEL would debit the Trading Member's designated Settlement Account for the amount of the Buying Member's Pay in Obligations and the same would be credited to NSEL's Exchange Settlement Account. NSEL's Operations Department would inform NSEL's Delivery Department of the particular Selling Member's delivery obligations. Based on that intimation, NSEL's Delivery Department would confirm to the Operations Department that the requisite quantity of the particular commodity sold was available as per the Warehouse Receipts generated by the Warehouse Department. On the basis of the said confirmation, the Operations Department would (i) release the purchase price amount to the selling broker's designated bank account; and (ii) would issue a Delivery Allocation Report to the Buying Broker / member informing him that the bought quantity of the commodity was allocated to him, from the particular warehouse receipt.

8. NSEL would then send the Buyer's details to the selling Trading Member & the selling Trading Member would arrange for the non-member client/seller to generate a VAT paid sale invoice in the Buyer's name for the particular quantity of the particular commodity sold. On application of the Buyer, and on the basis of the said Delivery Allocation Report & the VAT Paid Invoice, NSEL would issue a Delivery Note authorizing the Buyer to take delivery of the purchased commodity from the stipulated warehouse. In the event the buyer trading member opted not to remove the commodity from the Exchange designated warehouse, such trading member would be put in constructive possession of the commodity and could further trade therein and he was entitled to take physical possession thereof at any

time in the manner provided by the Rules and Bye-Laws of the NSEL Exchange."

26 Perusal of the mechanism clearly divulge that NSEL was an electronic trading platform for purchase and sale of commodities by registered trading members (and their client non-trading members) and the settlement of such contracts by payment from the buyer and seller through the exchange and the sell/delivery of the commodity by the seller to the buyer. It aimed at facilitating the transaction between buyer and seller through its electronic platform in accordance with the rules, regulations and bye-laws of the exchange. The bye-laws and rules of the exchange were in existence since its inception and were within the public domain. The nature of transaction to be carried out on the NSEL platform was also therefore, in public domain since the trading on this electronic platform commenced. The business/transaction which operated through NSEL, do not disclose any pay-in amount received by NSEL in its own right but it was only received in the process of settlement of the commodity trade and only for the purpose of passing it on to the selling trading member on the same day.

This amount cannot be said to be received as a deposit within the meaning of Section 2(c) of the MPID Act which contemplates a 'deposit' to be a receipt of money or acceptance of a valuable commodity on the promise that such money or valuable commodity would be returned / repaid by the financial establishment after a specified period or otherwise. The commodities contracts entered on the platform of the exchange were against the payment of the purchase price/pay-in amount who received a VAT paid sales contract from the seller for the commodity sold and purchased. The buyer was accordingly aware of the seller to whom the price amount had been paid through the exchange settlement mechanism and in fact, the NSEL performed the same role qua commodity trading as the Bombay Stock Exchange and NSE performed qua stock/equity trading by facilitating trading in equities and by effecting settlement of trades through payment and delivery. The Stock exchange did not accept the money or valuable commodity with the promise of its return with some surplus. The trading on the platform of NSEL did not involve it in the capacity of recipient of the traders money with an obligation to

return on maturity. The features of the transaction which involved the VAT being collected by the selling members from the buying members and no deduction of TDS by NSEL against the monies of the buyer which the exchange passed on to the ultimate seller is clearly indicative that NSEL was a mere pass-through platform between seller and buyer and no amount was received by NSEL as a deposit. The nature of transaction which was clearly available to those who were trading on the platform were conscious of their act of trading on the platform and no material has been placed on record by the State to disclose that the money came to be deposited with the NSEL.

Shri Nankani has placed on record the trading process on the NSEL exchange platform and he has explained the said process through the contract notes which have been placed on record in form of convenience compilation and also the illustrative copy of the summary of trades entered into by one of the trader i.e. Dani Commodities Pvt Ltd. He has also explained the NSEL trading mechanism through screen shots. We have carefully perused the same and attempted to comprehend the same in the backdrop of the bye-

laws/regulation framed by NSEL. From the said documents, we would decipher that NSEL was operating through its registered trading member who was a medium/conduit for the sale/purchase of the commodities. A registered trading member who had placed the requisite commodity stock in the warehouse on the basis of the standard/proforma contract issued by NSEL for that commodity would place the sell order for sell of the commodity online through the exchange platform highlighting the price and quantity offered. The buying trading members acting either for themselves or their non-member trading clients would place 'buy orders' for a particular commodity and contract note placed on record which is signed by the broker reflect the commodity to be offered for sale and at the same time, it recorded the purchase of the commodity after including VAT, warehouse charges, CNF charges, service tax, trade charges, stamp charges on the next trading date i.e. T+30, T+33 etc. The contract notes disclose the trading and unique client code being allotted to the trading member and it also include the brokerage/service tax/transaction charge and clarified that the contract entered into is subject to the terms

and conditions contained in the rules, bye-laws, business tour notices and directions of NSEL Ltd. Several such trade notices belonging to different clients have been placed on record and it includes the contract notes for the complainant Mr.Pankaj Saraf who has entered into T+@ and T+25 trades. It do not disclose that NSEL has accepted any amount or commodity with an assured return but what was the yield for a seller is the difference in the amount of the transaction effected by the two contracts i.e. T+2 and T+30 and that is how the yield (annualized) came to be calculated at a particular percentage. This yield is calculated and annualized on the basis of the total fund pay-in/pay-out date scheduled for the two transactions i.e. T+2, T+30 and the profit and loss on the above trading was a figure arrived at by totaling the two amounts by taking into consideration the number of days when the commodity was sold and the pay-out was scheduled, the yield was calculated. It varies from product to product depending on the period for which the second contract is scheduled whether 3 days, 30 days, 35 days etc. There was no promised or assured return since it was at variance with the prices of the commodity. Shri

Nankani has also placed on record the transaction recorded by the broker in favour of a particular trader on a particular date and by a letter signed by the broker, he is intimating the trader directly that he has carried out the buying and selling as per his instructions in form of transactions and we would like to reproduce one such specimen :-

Directors
Authorized Signatory
SANDHYA

WAY2WEALTH COMMODITIES PVT. LIMITED

Dealing Office:
3rd FLOOR, HINCON HOUSE, TOWER B, 247, PARK, LBS MARG, VIKROLI (WEST), MUMBAI-400083.

Regd. Office: #14, FRONTLINE GRANDEUR, WALTON ROAD, BANGLORE – 5600 001.

Web Site: www.way2wealth.com Email grievance@way2wealth.com

Corp. Office: 3RD FLOOR, HINCON HOUSE, TOWER -B, 247, PARK, L.B.S. MARG, VIKHROLI (W). MUMBAI, MAHARASHTRA 400083 INDIA Tel.
MEMBER : National Spot Exchange Limited, NSEL Member Code : 14600

To,
VOSTOK FAREAST SECURITIES PRIVATE LIMITED PGWM0297
ORION HOUSE 4TH FLOOR,
12 RAMPART ROAD FORT
MUMBAI Pincode:400023 INDIA
Pan # AAACV3561C

Contract No.MS/D/3143/366
Date : 19/07/2013

Dear Sir/Madam

I/We have this day done by your order and on your account the following transactions:

To be Stamped as Per the provisions applicable under the relevant Stamp Act.

| | | | BOUGHT FOR YOU | | | | | | SOLD FOR YOU | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Order No. | Trade No. | Trade Time | Quantity | Price | Value Rs. | Brokerage Total | Amount Rs. | Contract Specifications | Quantity | Price | Value Rs | Brokerage Total | Amount Rs. |
| 00001195<br>00001196<br>00001197<br>00001198 | 002349<br>002350<br>002351<br>002352 | 16.27.25<br>16.27.29<br>16.27.35<br>16.27.39 | | 239150.0000<br>239150.0000 | 783000.00<br>783000.00 | 313.20<br>313.20 | 783313.20<br>783313.20<br>3552.83<br>156.33<br>31.62<br>1570367.18 | STLTMTKUR2//<br>STLTMTKUR2//<br>STLTMTKR25//<br>STLTMTKR25//<br>(TRANSACTION | | 239900.0000<br>239900.0000 | 798000.00<br>798000.00 | 319.20<br>319.20 | 797680.80<br>797680.80<br>1595361.60<br>2499.43 |

*Tilak*

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|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | CHARG)<br>SERVICE<br>TAX<br>Stamp<br>charges<br>NET<br>AMOUNT | | | | | |

OTHER CHARGES, IF ANY:

Brokerage has been charged as stated and has been at rates not exceeding the official scale of Brokerage and indicated separately. This contract constitutes and shall be deemed to constitute as provided overleaf an agreement between you and me/us, and in the event of any claim (whether admitted or not), difference or dispute in respect of any dealings and contracts of a date prior or subsequent to the date of this contract (including any question whether such dealings, transactions or comtracts have been entered into or not) shall be referred to arbitration as provided in the Rules, Bye-laws and Business Rules of National Spot Exchange Ltde. (NSEL) Mumbai.

Yours faithfully,
For WAY2WEALTH COMMODITIES
PVT. LTD.

Director/Authorized Signatory
Member:National Spot Exchange Ltd.
PAN: AAACW6445N

S.Tax Regn# AAACW6445NST001

The said letter is accompanied with the terms and conditions relating to the transactions in relation to the purchase transactions and the sell transactions and it would be necessary to reproduce the same.

Terms and Conditions relating to the transactions executed on the Trading System of National Spot Exchange Limited and forming part of the Contract Note.

1. For Purchase Transactions: The client will be liable to pay the sales tax/VAT/Excise, levies including APMC Cess and other charges as applicable under the VAT/State Tax laws' APMC or other applicable Central and State enactments and the Rules, Terms & Conditions specified by National Spot Exchange Ltd. (NSEL). The Client shall issue valid sales tax/VAT/Excise/certificates/declaration forms as may be applicable or appoint the member as his agent for compliance of Sales Tax/VAT/Excise laws, APMC acts and Rules thereunder upon sale of commodities covered under this contract. In such cases, the client shall be liable to reimburse the statutory charges/taxes paid by the member.

2. For Sale Transactions: The client will be responsible for recovery of sales tax/VAT/Excise and other levies and other charges as applicable under the VAT/Sales Tax laws/other Central and State enactments applicable and the Rules. Terms & Conditions specified by National Spot Exchange Ltd. (NSEL). The client shall be responsible to comply or appoint the member as his agent to comply with the requirements of Sales Tax/VAT/APMC Cess. The client shall issue the commercial as well as applicable tax as well as excise invoice and valid sales tax certificates/declaration forms / and APMC Cess payment invoice copy as may be applicable, the buyer for compliance of relevant laws and regulations, upon purchase of commodities covered in this contract note.

3. Other levies if any; other statutory levies, as applicable on the buy/sell transactions, shall be collected accordingly.

This contract constitutes and shall be deemed to constitute an agreement between the client/client and me/us that all claims (whether admitted or not) differences and disputes in respect of this

contract or any dealings, transactions and deals/contracts of a date prior or subsequent to the date of this contract (including any question whether such dealings, transactions, deals or contracts have been entered into or not, shall be submitted to and decided by the process of arbitration as provided in the Rules, Bye-Laws, Business Rules of the Exchange. A part of the relevant extract of the Bye-laws and Business Rules as given hereunder forms part of this contract.

In matters where the Exchange is a party to the dispute, the Civil Courts at Mumbai shall have exclusive jurisdiction. In all other matters where Exchange is not a party, courts having jurisdiction to try and dispose off such dispute shall have jurisdiction.

27 Bare reading of the said document would divulge that what was contemplated through the platform of NSEL was purchase and sell transaction which was also accompanied with other statutory levies in respect of buy/sell transactions and this contract was deemed to constitute an agreement between the client and a member and was governed by the regulations and the bye-laws. Shri Nankani has also demonstrated before us the summary of trades entered by a particular trader and he has demonstrated the details of the transactions which generated a delivery obligation report and a fund settlement date pursuant to which the entries are taken in the ledger of a particular trade showing debit of obligation. The ledger of the respective traders reflect the delivery obligation and records the credit/debit pursuant to the said obligation on the respective dates. Not only this, the entries are further reflected in the NSEL settlement bank account showing amount received from a

particular trader with the entries of the respective pay-in and pay-out and this matches with the individual ledger accounts of the respective traders. Shri Nankani has also demonstrated the said transaction through the watch screens of the NSEL where the order for buy and sell is placed after the quantity and price of the commodity is displayed. From the screen shots produced before us, we can note that several commodities find place in the typical market watch screen which is accessible to the brokers and various commodities with its quoted price and the type of settlement are displayed. Anyone who wants to trade in the commodities will have to place an order through his broker and a buy order entry when clicked by a broker, the quantity and price would be decided by the buyer. Once such buy order is entered, the market watch window displays the quantity and price for the commodity. On seeing the price of the commodity, if any trader wishes to sell a particular commodity, he enters the sell order through his broker. The price and quantity is decided by the trader and the details are entered through his broker. Post the sell order, a trade is executed between a buyer and a seller for contract of a particular commodity at the price

displayed. The screen would then reflect the balance quantity. A confirmation is also recorded on the screen. It can thus be seen that the willing buyer and seller come on a platform, they trade through their broker, decide on the quantity and price which they want to trade in and the commensurating price and the quantity are matched through the platform provided by NSEL. On such a transaction being confirmed between the two, at the end of the day, all the trades effected would be communicated by the exchange to the trading member and on the next day, the pay-in obligations and the delivery obligations are forwarded by NSEL to the trading members. On the settlement date, the NSEL debit the trading members, settlement account for the amount of buying members, pay-in obligations and is credited to the NSEL's settlement account. The selling member would be informed of his delivery obligation and the NSEL through its delivery department would confirm the sell of the commodity as per the warehouse receipt generated by the warehouse department. Thereafter, the purchase price would be released in favour of the sellers, selling brokers, designated bank account and the delivery allocation

report would be issued to the buying broker along with the warehouse receipt. A VAT paid Sale Invoice would be issued in the buyers name for a particular quantity of a particular commodity being sold and on the basis of the delivery allocation report, NSEL would issue a delivery note authorizing the buyer to take delivery of purchase commodity and if the buyer/ trading member opted not to remove the commodity, he would be put in constructive possession.

28 It would be also relevant for us to refer to the FIR lodged by Pankaj Saraf on which basis the provisions of MPID has been invoked against the promoter of NSEL. We have perused the statement of the complainant and on perusal of the same, we have noted that even he has not stated that he had deposited money with the NSEL, on the other hand, he has stated that the trading which he was carrying on the platform of NSEL was successful till the time when the embargo was imposed upon the NSEL not to trade further. We have carefully perused the contract notes for T+2 and T+25 contracts of the complainant Shri Pankaj Saraf placed on record by Shri

Nankani. Perusal of the said notes disclose that a contract note executed on the platform of NSEL recorded the trading date, trade number, quantity bought/quantity sold and the brokerage. It also corresponded with the entry of buying and selling with the addition of the warehouse charges, CNF charges, service tax, trading charges, etc. for a further T+30 contract. We have taken note of various such contract notes placed on record for various commodities and have also perused the market watch screen placed on record in the compilation submitted by Shri Nankani which depicts the transaction entered into in respect of a particular commodity. We have also taken note of the confirmation receipts generated on the electronic platform and our attention was also invited to the amount deposited in the respective accounts known as 'settlement account'.

29 This leaves no doubt in our mind that the transaction was between two persons i.e. buyer and seller through medium of NSEL. No doubt something has gone wrong somewhere in these transactions and at the end, when a

show cause notice came to be issued to the NSEL by the Central Government, it was on the basis that the squaring off did not take place on the same day and all outstanding positions of the trade at the end of the day did not result into delivery. After 31st July 2013, 24 sellers and their brokers who had entered into reverse trades on T+2 date and received monies thereunder failed to honor their commitment of squaring off their position by buying back the commodities on T+25 date. As a result, 148 buyers and brokers could not receive monies on their open positions due to defaults committed by 24 sellers and their brokers. This was noted as a violation of the exemption conferred on the NSEL and the exemption from forward contracts of one day duration for sell and purchase of commodities traded on the NSEL came to be withdrawn. Resultantly, the NSEL was not in a position to settle the accounts and was required to dwindle on its activity.

30 The FCRA, 1952 is an enactment to provide for regulation to certain matters relating to forward contracts, the prohibition of options in goods and for the matters connected

therewith. Forward contract is defined under the said Act to mean a contract for delivery of goods and which is not ready delivery contract. Section 2(i) defines 'ready delivery contract' to be a contract which provides for delivery of goods and payment of price therefor, either immediately or within such period not exceeding 11 days after the date of the contract and subject to such conditions as specified by notification in the official gazette. The said enactment also contains the power to exempt any contract or class of contracts from operation of all or any of the provisions of the Act.

The said Act contains a provision for imposing penalty for certain acts mentioned in Section 20 and make such acts punishable. Thus, any violation of the provision of FCRA is punishable by taking recourse to the said enactment. It is not in dispute that the NSEL was granted exemption from the operation of FCRA Act. It is also to be noted that the EOW, Mumbai has already registered a separate FIR under the FCRA against the NSEL brokers and others. However, the withdrawal of exemption on violation of certain conditions subject to which

the exemption was granted would entail the consequences under the FCRA Act, 1952 and there are separate consequences which could then fall upon the NSEL. However, the present offence which has been registered against the NSEL is under the provisions of IPC and the provisions of MPID have been invoked and applied.

We have also perused the FIR filed by Mr.Pankaj Saraf on 30th September 2013 and on careful perusal of the FIR, it disclose that the complainant through his broker has traded on the platform of NSEL and he did not ever 'deposit any amount' with NSEL. The NSEL is alleged even on the complaint to be a medium through which the complainant entered into transaction through his broker. In the statement of Shri Saraf, the complainant before the EOW disclose that he had certain surplus funds and he was interested in investigating in the commodities market. Prior to his investment, he had visited the website of NSEL and he had carefully reviewed the presentations displayed on his website where NSEL had claimed that it monitors the positions on automated risk management system and offers counter party guarantee in respect of all

trades. He also further make a reference to the undertaking in the presentation that the quality of the underlying commodities is guaranteed by NSEL and goods have to be compulsorily weighed at the designated weigh bridge and it will be monitored and certified by the warehouse supervisor. He was also aware and conscious of the notification dated 5th June 2007 where the Forward Market Commission was appointed as designated agency. It is relevant to note that his statement contains the following averment.

> "Other presentations which are available on the website of NSEL also reiterate representations that the NSEL seeks to provide a market for buying and selling of commodities without any counter-party and quality risk. The marketing material available on the website of NSEL also categorically specifies that the end it is for this purpose that the exchange maintains the SGF. Further, it states that notwithstanding default of any member, payout is honoured as per the exchange schedule. A copy of the brochure titled "The New Face of Commodity Market", which is available on the website of NSEL is enclosed as Annexure-7.
>
> After reading the information available on the official website of NSEL,, I was convinced that investing in the products offered by NSEL was completely risk free. Further, since there was sufficient collateral for the contracts and that the exchange itself was standing behind these contracts. I had no reason to believe that there could be any defaults and even if there were defaults I was assured that the exchange as the guarantor would ensure settlement of the contract".

He also makes the following averment:-

> From the presentations and other information available on the website of NSEL. I understood that warehouses were an integral feature of NSEL as the commodities were required to be deposited int e exchange designated and certified warehouses as part of the pay-in obligations. Also, the circulars issued by NSEL in relation to the specific products, contained details on the quantity, quality, warehouse, assayer details etc. this read along with the risk management practices stated by NSEL in its Bye-Laws, confirmed the statements of NSEL on the warehouse, quantity and quality being under its complete administration.
>
> Once I heard about payment defaults, I started reading the bye laws and rules of NSEL to understand the exact nature of the obligations and duties of the exchange. It was then that I came to know that as per the NSEL Bye-laws, a certified warehouse means a warehouse approved and designated by the exchange for making deliveries to and taking deliveries from for fulfilling contractual obligations resulting from transaction in commodities.
>
> Further, as per the NSEL Bye laws, a certified warehouse receipt means "a receipt issued under the authority of the exchange or any agency approved by the exchange as a certified warehouse, evidencing proof of ownership of a stated quantity of commodities of a stated grade and quality by the beneficial owner or the holder of the certified warehouse receipt. Such certified warehouse receipt may either be in physical form or in materialized /electronic from as may be permitted."
>
> As per Regulation 4.20 (a) of the NSEL Bye-laws, all outstanding transactions in commodities is generally

> required to be for compulsory delivery at any one or more delivery points, and/ or warehouses approved, certified and designated by NSEL.
>
> Further under Regulation 7.11 of the NSEL Bye laws the clearing house of the exchange has the responsibility of receiving and maintaining margin payments, monitoring open positions and margins, and transmission of documents, payments, payments and certified warehouse receipts amongst the trading cum-clearing members and institutional clearing members of the exchange.
>
> Based on the above, it was clear that it was the exchange which was responsible for approving and designing the warehouse for making and receiving deliveries. Further, a review of the Bye laws also confirmed that the certified warehouse receipt which is issued by the exchange is an actual proof of ownership of the underlying commodities.

He thus alleged that the NSEL had misled him by making him believe that the exchange which is the counter party to the trades manages and supervises the quality and quantity of underlying commodity and the SGF is maintained for the purpose of ensuring settlement of trades even when the counter party defaulted. He therefore, alleges that there was a criminal breach of trust and he was defrauded by the false claims made by the exchange since the NSEL allowed trading on commodity by sellers without ensuring goods of appropriate quality and

quantity being stores in the exchange, controlled warehouses which resulted in thousands of investors trading in non-existent goods. Reading the entire statement as it is, the complainant alleges NSEL of not highlighting certain deficiencies in the underlying stocks and he attributes it as a large conspiracy and allege serious offences under the Indian Penal Code. Taking the FIR at its face value and accompanied by the brochure as well as the NSEL presentation which included the actual pay-out settlement, the members who have paid-in and would disclose that the electronic platform of NSEL was used by the traders. In no way, the complainant in the FIR allege a promised return in form of any interest, bonus, profit, but by the very nature of transaction, the yield – the difference in the price of a commodity between the two trading dates i.e.T+2 and T+30/33/25 was calculated as a yield but this, in our view, would not fall within the purview of deposit since neither the NSEL received the commodities to be retained by itself nor did it receive any amount to be deposited in its account. On the other hand, the nature of transaction which we have referred to above, involved bringing in the commodity and selling of the

commodity by depositing the amount of pay-in and pay-out in the respective accounts of the traders. Nonetheless, the NSEL had its chunk of charges in form of transaction charges and the charges of warehousing. The purchase and sell of the commodity is apparent since the VAT was paid on such transaction.

31 We have also perused the charge-sheet which is filed in pursuant to an investigation in the FIR lodged by Pankaj Saraf. The charge-sheet is filed by the EOW on 4th August 2014 and is placed on record of the Writ Petition. In the charge-sheet, NSEL is referred to as a 'Spot Exchange' designed to help the activity of buying and selling of a commodity, paying cash for and receiving goods on the spot. In the charge-sheet, it is stated that the important feature of any such exchange is that it has to stand guarantee subject to its bye-laws to either party that it will ensure that the contract is settled and if the buyer cannot bring the money for any reason, the Exchange would then sell the goods to someone else and recover the money and similar exercise if the seller defaults.

32 The charge-sheet further proceeds to state that when the seller and buyer are far away how does the exchange guarantee the delivery and it makes a reference to the warehouse receipt that is used for electronic trading. After making a reference to the operations of the NSEL, the allegation against NSEL in the charge-sheet is to the following extent :

> "Not only did NSEL permit investors to participate in these contracts but in fact NSEL actively encouraged and induced investors to enter into such dual transactions. This active inducement was not just by highlighting the possible benefits available due to the price differential but also by providing economic rationale to investors by waiving storage charges for those members and their constituents who sell the product on the larger duration contract out of delivery receivable against the purchase position of the shorter contract. Accordingly, many Members also actively marketed these contract. Moreover, NSEL retained the warehouse receipts issued by it which were to be used to discharge margin obligations on the trades"
>
> The members were required to register the client prior to executing trades on their behalf. For this purpose, the members required their clients to submit the duly filled in prescribed 'Know Your Customer' form and execute the member – client agreement with the members. Thereafter, the members would upload the relevant details in the Exchange software in order to generate the Unique Client Code (UCC). Once the UCC was generated, the client was permitted to execute trades through the members. There are around 13,000 clients of the above Members of the NSEL"

After referring to the transaction, the charge-sheet further records thus :

> "The trading on the platform of NSEL continued smoothly till mid July 2013.
>
> Suddenly, NSEL informed the public, for the first time, by way of the Press Note issued on July 15, 2013 that NSEL had received a directive from the Department of Consumer Affairs on July 2012, 2013 ("DCA Directive") to submit certain undertakings to the effect that (a) new contracts would not be launched until further instructions from the concerned authority; and (b) existing contracts should be settled on the due date. However, in the said Press Note, NSEL clarified that the existing business in the running contract traded on the spot exchanges will continue without any disruption and further stated that since spot exchanges do not have concepts like 'due date' (unlike futures contracts), NSEL was seeking further clarifications on the same. Effectively, the complainants were led to believe that the trades on NSEL would continue without disruption and would continue to remain safe and risk free.

It then makes a reference to the various circulars issued by the NSEL and proceeds to narrate the contents of the letter dated 16th August 2013 sent by the FMC to the NSEL published on the website of FMC. The entire letter is reproduced in the charge-sheet. After making a reference to the said letter, charge-sheet contains the following statement :-

> "It is alleged in the FIR that during the period from Oct, 2008 to July, 2013, NSEL allowed 25 Members, named as accused, to trade on the exchange as sellers. It is alleged that in authenticating these companies due diligence was not followed. It is further alleged that during the relevant

> period these 25 Members (Sellers) in connivance with NSEL traded fictitious stocks on the exchange for which they raised fake documents. During the initial contracts between these Member Companies as sellers & buyers, the companies squared off the contracts on the date of maturity, but later on when the investments in these companies grew substantially, they did not honour their commitment and thereby caused wrongful loss to the tune of Rs.2.2 crores to the complainant and approximately around 5600 crores to the other investors numbering more than 13000".

Further, the details of accused person/defaulters identified and amount secured by attachment also finds place along with the charge-sheet and this includes the 18 defaulters.

Perusal of the charge-sheet disclose that on investigation into the affairs of NSEL, even the EOW has no doubt in its mind that NSEL was operating as an exchange and from the reading of the charge-sheet at the most what is alleged to the Exchange, is failure on its part to abide by the rules and bye-laws and it ought to have closed down their position and declare them defaulter and initiate default proceedings against them. A reference to the letter dated 16th August 2013 from the FMC to the NSEL makes reference to several bye-laws of the Exchange and direct NSEL to submit details of all members who had failed to discharge their pay-in obligations and rather the

NSEL was called upon to explain as to who did not meet their pay-in obligations in time and why their position is not closed down in auction and why default proceedings are not initiated against them. NSEL, in fact, had responded to the said notice and a reference of the same finds place in the charge-sheet. Charge as contained in the charge-sheet is to the effect that on 1st August 2013, the exchange had SGF of 738.55 crores. However, during the interaction with the Board of NSEL, it was informed that the SGF had only 62 crores. Thus, the NSEL is charged with providing misleading information and serious doubt is raised about its authenticity. The direction was also issued to appoint a recruited forensic auditors firm to establish the credibility of books of accounts, record maintained by the exchange. It is in this backdrop, we would be required to determine the question whether NSEL had accepted deposits. As far as the role of the accused persons in the said charge-sheet is concerned, the charge-sheet deals with the defaulters i.e. 25 defaulting companies of NSEL and assessed amount of default on part of by each of them. For instance, as far as MSPD Agricultural Process P.Ltd is concerned, the charge-sheet

mentions that the outstanding amount against this Company is 633.49 crore and this company was trading on the platform of NSEL in Paddy rice and from the account of the said company, an amount came to be transferred to its sister concern and this is how the default company siphoned out the amount. The charge is that trading was taking place on the platform of NSEL but the defaulters who were not able to discharge their pay-out obligation and resultantly, the buyers who brought the goods on the platform of exchange were left without the actual commodities in hand and the squaring of the contracts entered between the buyer and seller did not fructify. We also have before us an affidavit filed by the respondent in Writ Petition No.508 of 2017 which contain following statements:

> "f The promoter of NSEL is Financial Technologies (India) Ltd (FTIL) which holds 99.99% of the total share capital of NSEL. The Founder Chairman and Group CEO of FTIL is Jignesh Shah. Jignesh Shah along with Joseph Massey and Anjani Sinha are in charge of the overall management and affairs of NSEL. The key officials of NSEL listed above are very central to the operations of the NSEL.
>
> g. There are 25 defaulters i.e. Mohan India Pvt.Ltd, N.K. Proteins Pvt.Ltd, ARK Imports, LOIL Health Foods Ltd, LOIL Overseas Foods Ltd, LOIL Continental Ltd, PD Agro Processors Pvt. Ltd, Lotus Refineries, Juggernaut

> Projects Ltd, Top Worth Steel & Power Pvt.Ltd, Metkore Alloys & Industries Ltd, White Water Foods Pvt. Ltd, NCS Sugars Ltd, Namdhari Food International Pvt Ltd, Shri Radhey Trading Corporation Pvt. Ltd, Spin Cot Textiles Pvt.Ltd, MSR Food Processing, Sankhya Investment, Yathuri Associates, Aastha Minmet India Pvt.Ltd, Brinda Commodity Pvt.Ltd.
>
> h. During the course of investigation it is revealed that the transactions between the NSEL and borrowers are not fully supported with actual delivery of goods. In many cases the accounts of the NSEL and borrowers are not matching with each other due to unilateral bogus entries made by either of the parties to suit and accommodate each other. The physical delivery of the commodities has not been checked by any of the parties and there was no control over stock lying in the warehouses. Prima facie it is revealed that there are many accommodation entries which caused this financial mishap due to collusion between the NSEL, its owners, directors, management, sellers, borrowers and other. Hence it is clear cut case of criminal conspiracy and criminal breach of trust where money of innocent people to the tune of Rs.5600 Crores have been washed out by financial jugglery and fraudulent entries in the books of accounts."

The said statements in the affidavit also leave no doubt in our mind that the respondents are also conscious of the role played by the NSEL and merely on the basis of a brochure, which we have perused, refers to an yield in terms of the commodities/produce, it is attempted to canvass that there was an assurance to the clients with fixed return @ 14 to 16% per annum. The affidavit also proceeds to state that the transaction

of the petitioners and the traders/suppliers of the goods are not supported by actual delivery of goods and in many cases, the accounts of the petitioner and the suppliers of the goods are not tallying with each other due to bogus entries and the physical delivery of the commodities have not been verified and there was no control over the stock lying in the warehouse. According to us, this may amount to an offence under section 465, 467 of IPC and we are not, in any case, absolving the NSEL or the petitioner if it has any role to play as a promoter from any of these liabilities and it would be imperative on them to be subjected to the regime of the penal laws. However, what is assailed before us is the invocation of the provisions of the MPID on the very basis that NSEL is a Financial Establishment and that it had accepted 'deposit'.

33 In the backdrop of the aforesaid facts placed before us, we are satisfied that the NSEL has not accepted any deposit and if it has not accepted any deposit, then it would not fall within the definition of ‘financial establishment’. The NSEL has received money from the buyers at T+2 date and it was

immediately paid to the sellers at T+2 date. However, on T+25 date, the parties who were sellers on T+2 date, and who were under obligation to make payment on T+25 date, failed to do so and it is not the NSEL but the sellers who receive the money from the buyers on T+2 date with an underlying obligation to make the payment of T+25 date but failed to do so and therefore, at the most, they could be referred to as 'financial establishment'. The Forensic Audit of EOW has revealed the complete trail of diversion of funds by the 24 defaulters to their associated persons and entities and it is an allegation of the learned Senior counsel Shri Nankani that the respondents have not attached the properties of each of the beneficiaries equivalent to the monies that have been traced to them and without exhausting the said properties of the persons to whom the alleged deposits have been traced, the respondents have straight way approached the petitioner in the capacity as promoter. Mr.Dada has strenuously urged before us that the NSEL had received the commodities and issued a warehouse receipt which was an evidence of a deposit of valuable commodity. However, in the course of investigation, it

has transpired that many of the warehouse receipts were fictitious and it was merely a ploy to disguise the real nature of transaction. If we accept this argument in totality, in any case, this receipt do not provide an answer to the nature of transaction that took place on the platform of NSEL and though it is no doubt that the commodity came to be accepted as a deposit, but it should be accepted with an assured return and in the present case, the commodity which was accepted was because it was to be sold to a purchaser and it is not the case of the State that it was a pure transaction where commodities are accepted as deposit. Mr.Dada has pegged his argument and submitted that NSEL on one hand, was accepting deposits by promising fixed returns of 14 to 16% and was further advancing unsecured loans to the defaulting companies and this is corroborated by the fact that it did not bother to verify the stock in its designated warehouses and in some cases, the prosecution had established that there was no stock at all, yet huge amounts were loaned out to the traders by NSEL. In the wake of this argument, the provisions of MPID would not be in any case, attracted on consideration of the submission of Shri

Dada. It is the case of the State Government that the amount from the investors was initially deposited in the accounts of NSEL and thereafter, they were transferred at the end of the trading season i.e. end of the day to the respective trades after deducting the charges of the NSEL. The submission of the State is that NSEL had accepted the money and then paid to the settlement accounts of the defaulters. In any case, such a deposit do not take the colour of the term 'deposit' as is contemplated under section 2(c)of the MPID Act as it would amount to deposit if it is to be returned after a specific period either in cash or in kind or in form of a specified service with or without any benefit. The petitioner has admitted that the amount used to come to NSEL to be paid to the respective traders on the T+25 settlement date and the NSEL was entitled to charge its transaction charges. This would clearly dispel the case of the respondent State that the NSEL was accepting deposit and therefore, it was a financial establishment. Shri Dada has also relied upon the judgment of the Apex Court in case of amalgamation of 63 Moons by the Central Government with the NSEL and he would place on record the judgment of

the Supreme Court delivered on 30th April 2019 setting aside the said amalgamation. He has placed heavy reliance on the said judgment. We have perused the said judgment which deals with the issue of applicability and construction of Section 396 of the Companies Act, 1956 and the amalgamation of companies by the Central Government in public interest. In fact, the said judgment recognizes that NSEL was incorporated in 2005 by Multi commodities exchange and its nominee and it provided an electronic platform for trading of commodities between buyers and sellers through brokers representing them. It also makes a reference to the exemption notification and refers to the freezing order passed by the Government. Exhaustive reference has been placed on the Grand Thorton report where the FMC had suggested the merger of FTIL and NSEL. The Apex Court also makes reference to the charge-sheet filed by the EOW Mumbai on 6th January 2014 against the Managing Director and CEO of NSEL as well as other defaulters and considered the charge that the employees of NSEL in exchange of monetary kick backs had colluded with the defaulters to enable them to trade on NSEL's platform without

depositing adequate goods in the warehouse in breach of rules and bye-laws by NSEL. The Apex Court deal with the amalgamation order dated 12th February 2016 and examine the judgment of the Bombay High Court delivered on 4th December 2017 by which the Writ Petition came to be dismissed. On due consideration of the power conferred under Section 396 and after recording that the impugned order is ultra vires Section 396 of the Companies Act, the Apex Court allowed the Appeals and set aside the judgment of the Bombay High Court, directing amalgamation of the said companies. In any case, we are of the specific opinion that the said decision do not have any serious effect on the present proceeding i.e. the challenge by the petitioner to the action initiated against it by taking recourse to section 4 of the MPID Act.

III An action taken against the present petitioner which is the promoter of NSEL by issuing notifications under Section 4.

34 Now we come to the notifications which are impugned in the present writ petition which are issued by the

respondent State under Section 4 of the MPID Act. The petitioner has assailed in the writ petition several notifications issued under sub-clause(1) of Section 4 and Section 5 of the MPID Act, thereby attaching the properties of the petitioner in the capacity of promoter of NSEL. The impugned notifications after making reference to the complaint filed by one Mr.Pankaj Saraf on the basis of which the offence was registered and the investigation was carried out by the EOW mention that the provisions of MPID Act were applied on 24th October 2013. The notification proceeds on a premise that complaints were received from a number of depositors against NSEL (referred to as 'financial establishment') that it had collected money by promising attractive returns to depositors but failed to return the deposits when the time for repayment came. The notification makes reference o the NSEL as a registered company providing an electronic platform for spot trading and commodities and operating in 16 States across the State. It also mentioned that it is promoted by FTIL (now known as 63 Moon Technologies). After making a reference to the nature of transactions taking place on the platform of NSEL, it also makes

a reference to the notification dated 12th July 2013 issued by the Department of Consumer Affairs directing the NSEL to submit certain undertakings in light of the alleged violation of the exemption notification. It then alleges that by unilaterally closing down the financial establishment, it defaulted into repayment of approximately 5600 crores which was due to be paid to 13000 investors and since the financial establishment had collected deposit, the provisions of the MPID Act are invoked. The notification then proceeds to state that as to why the properties of the petitioner are required to be attached and it states as under :

> By unilaterally closing down the exchange the said Financial Establishment defaulted in repayment of approximately Rs.5600 crores which was due to be paid to approximately 13000 investors. Since the money collected by the said Financial Establishment from the investors falls under the definition of 'deposit' as per Section 2(c) of the MPID Act, the provisions of MPID Act are applicable to the present case. Since, the Financial Establishment has accepted the money from the investors, it falls under the definition of "Financial Establishment" as per section 2(d) of the MPID Act. The provisions of the MPID Act were invoked in C.R.No. 89/2013.
>
> As the said Financial Establishment does not have sufficient properties which can be attached for the purpose of repayment of the deposits, the following provision of section 4 (I) (ii) of MPID Act "**or if it transpires that such money or other property is not available for attachment or not**

**sufficient for repayment of the deposits, such other property of the said Financial Establishment or the promoter, director, partner or manger or member of the said Financial Establishment as the Government may think fit"** was invoked and the properties and mones of the Promoters, and monies of the Promoters, Directors, mangers and Members of the said Financial Establishment have been attached under section 4 (I) of the MPID Act by the Government of Maharashtra *vide* notifications dated 28th August, 2014, 12th March, 2015, 22nd June 2015, 13th January, 2016, 17th March 2016, 21st September, 2016, 31st March, 2017, 4th April, 2018, 7th April,2018, 11th April2018, 19th April,2018, 15th May, 2018 and 24th May,2018.

Since, as per section 4*(1) (i)* of the MPID Act, the Government has received complaints form the depositors and is satisfied that the said Financial Establishment has failed and is not likely to return the deposits and that the attached properties of the said Financial Establishment are not sufficient for repayment of the deposits, the properties of the promoter of the said Financial Establishment *i.e.* M/s 63 Moons Technologies Ltd, are liable to be attached and utilized under the provisions of section 7 of the MPID Act. The said Financial Establishment is a wholly-owned subsidiary of M/s 63 Moons Technologies Ltd. [(previously known as Financial Technologies (India) Limited (FTIL)]. 63 Moons' shareholding in the said Financial establishment is 99.99/ and it is alos the promoter of the said Financial Establishment. As the Government of Maharashtra is satisfied that the attached properties of the Financial Establishment. As the Government of Maharashtra is satisfied that the attached properties of the Financial Establishment are not sufficient for repayment and that the said Financial Establishment does not have sufficient properties which can be attached for the purpose of repayment of the deposits, as per section 4 *(1)* of the MPID Act the properties of the promoter of the said Financial Establishment *i.e.* M/s 63 Moons Technologies Ltd. Are liable to be attached and utilized under the provisions of section 7 of the MPID Act.

Reference is then made to seven notifications issued earlier in respect of whom the allegation has been made that they are not signed by a person atleast of a rank of a Secretary to the Government of Maharashtra and therefore, as a measure of abundant caution, the Government ratified the said notifications and issued the impugned notification, thereby attaching the properties, including properties in addition to those already stand attached along with receivables like interest, dividends, and linked bank account into which receivables are deposited from the properties of M/s.63 Moon Technologies as per the schedule. It is this notification which is challenged by the petitioner apart from the ground that NSEL is not a financial establishment since it has not accepted the deposit also on one another ground i.e. that the power exercised by the State is malafide since the audit conducted by EOW do not trace any money trail to the petitioner. Another ground for assailing the said notification is that the EOW had already attached the properties worth Rs.8,548 crore and those properties have been sufficiently secured to deal with the alleged defaulted amount and the further attachments of the

property is in excess since the alleged payment crisis is of Rs.5600 crore.

We have dealt with the said argument in our interim order dated 24th October 2018 on a Notice of Motion being moved by the petitioner and we have granted stay to the impugned notifications only on the limited ground that the amount sought to be attached by said notification is in excess of the requirement of the amount alleged to be defaulted. However, dealing with the ground that no money trail is traced to the petitioner, they are supported by the audit report which has been placed on record.

We have perused the Forensic Report of the 17 defaulters and the said report in great detail has computed the outstanding trade obligation based on pending buying delivery obligation report and has worked out their respective liability. It has calculated the same on the basis of the withdrawals and deposits in the NSEL Settlement Account. Perusal of the said report in detail in respect of the defaulter companies would reveal as to how these Companies have utilized the funds and

transferred it to some other sister companies and failed to discharge their pay-out obligations and which has caused the loss to the investors. The Forensic Reports deal with the members of the National Spot Exchange Limited and we are really surprised to note that the EOW has not focused itself on the said forensic reports of the Companies which have traded on the platform of NSEL and have huge outstanding amounts pertaining to its trade obligation as on the date on which the transactions on NSEL were stopped and the audit reports have fixed the liability on these companies based on the pending buying contracts. These calculations are based on the basis of withdrawal and deposits in NSEL settlement accounts and the report is indicative of the diversion of funds by the said companies by transferring it and being utilized by some other companies or the individual family members. The audit report placed on record at Exhibit-EE contains a statement in respect of 17 defaulters including the big defaulters like N.K. Proteins Limited, Astha Group, Ark Importers Pvt.Ltd, Loil Group, Lotus Refinery Pvt. Ltd, Metkore Alloys and Industries Limited. It also gives the figures of the amount not attached as per EOW money

trail and the amount attached and disclose that 1,720.63 crore is not yet attached.

Our attention was also invited to the affidavit filed by the Deputy Secretary, Home Department, Government of Maharashtra in the High Court of Gujarat at Ahmedabad in the Special Civil Application No.18637 of 2015 in case of Ashita Nilesh Patel, where the application was filed by one Ashita, daughter of Chairman of NSEL and married to one Nilesh Patel, Chairman of N.K. Group who is a defaulter member of NSEL. The said affidavit proceeds to state as under :-

> D N. K. Proteins Ltd, a group company after becoming member of National Spot Exchange Ltd. Fabricated and forged the commodity receipts and traded in the national platform of National Spot Exchange Ltd. All the defaulters have caused the total loss of 5600 crores rupees to 13000 depositors out of which the group company 'N. K. Proteins Ltd.' has rupees approximately. 'N. K. Proteins Ltd. Is the biggest defaulter among all the defaulters.
>
> H That the aforesaid act of the 'N. K. group has caused ruination, miseries and bankruptcy and insolvency and hardships to large number of persons. Total 13000 persons have suffered and they have lost their monies to the tune of Rs. 5600 Crores.
>
> J This is a case wherein, the family members have acted as a group and partners in getting monetary benefits and in the process have defrauded thousands

> of depositors to the tune of more than 900 crores of rupees. It seems that these persons have prospered at the cost of thousands of innocent depositors.
>
> V It is submitted that in that view of the matter, this is a case where one family established different legal entities under the Companies Act, 1956. These legal entities are used by family members to subserve their won personal interest at the cost of large number of depositors. That 13000 investors have suffered to the extent of Rs. 5600 crores, out of which, petitioners' group of Companies have been liable to the extent of more than Rs. 900 crores.

A perusal of the said affidavit by the State Government before the Gujarat High Court put forth a completely different case and it is alleged that the N.K. Proteins Limited who had obtained licence membership for trading on NSEL's platform had fraudulently created the stock receipts and in the said affidavit, the transaction is explained in the following manner.

> "14 That it is submitted that the activities of National Spot Exchange were on electronic system. National Spot Exchange had its godowns. Any person who was the owner of or in possession of the commodities as listed by National Spot Exchange Ltd., would approach the National Stock Exchange through agent or himself. If that person wants to sell his commodity, he will physically place his commodity into the registered approved warehouses of National Spot Exchange Ltd. National Spot Exchange Ltd. Would thereafter issue acknowledgment receipt evidencing the quantity of the commodity and its quality. The receipt issued by National Spot Exchange is a tradable document. The receipt issued by National Stock Exchange would be placed online by the person who has placed his commodities in the approved warehouses of National Spot Exchange Ltd.

> It is the case of the Investigation agency that the 'N. K. Proteins Ltd, and its office bearers, in collusion with the official of National Spot Exchange Ltd., created fabricated and forged documents. For example take a case that on a given day N. K. Proteins Ltd, and its office bearers, in collusion with the officials of National Spot Exchange Ltd., crated fabricated and forged documents. For example take a case that on a given day N. K. Proteins Ltd, has placed goods of 100 MT commodities. A receipt is given of 100 MT, evidencing the goods having placed. Say for example, the value of the goods which is Rs.1 crore. But as a matter of fact, commodity is not placed at all in the godown. Based on this receipt generated and obtained, N. K. Proteins will display this receipt online for sale of goods by entering in to sale transaction on the platform of National Spot Exchange, it gets Rs. 1,10,00,000/-. In fact there are no goods at all. Then, the N. K. Group have created other commodities in second transactions by paying out the margin money. The company would, not suffer any loss and would have the money on hand of Rs. 1 crore without nay security for these many number of days. The instances of the fraudulent activities are manifold and multifold and the same would be further presented in details at the time of hearing of the present Writ petition. For these reasons, the present Writ Petition may not be entertained and the same may be dismissed.

35 The Gujarat High Court by its order dated 29th March 2017 refused to intervene on the ground of jurisdiction and redirected the petitioner to the appropriate Court in Maharashtra without touching the merits of the matter by keeping all the contentions open. However, what is to be worth noted is the stand of the respondents where it had referred to the trading member as defaulter before the Gujarat High Court.

If we discern the said affidavit, it becomes apparent and clear that the State has construed the trading members as the defaulters and has also highlighted the act on part of the defaulters which attract the provisions under Section 409, 465, 467, 468, 471, 474 of the IPC. The orders passed on the remand application by the Economic Offences Wing also disclose the role of the 25 members named as accused who trade on the exchange as sellers. The allegation against NSEL is that in authenticating these companies, due diligence was not followed and they traded fictitious stocks on the exchange for which they raised fake documents. The remand application state that the member companies as sellers and buyers initially squared off the contracts on the date of maturity, but later when the investment in these Companies grew substantially, they dishonored their commitment and caused wrongful loss to the investors numbering more than 13000. The role attributed to the trading companies was set out in the remand application and it is alleged that the Company siphoned off the amount and certain discrepancies are also attributed to NSEL in not properly supervising the receipt of stock in its warehouse. The

indication in the said application is that the trading members have received the funds from NSEL and the investigation was focused on whether the amounts have been divested. In such a scenario when the respondent State has itself alleged certain misdeeds to the NSEL only to a limited extent that the transaction between NSEL and borrowers were not fully supported with actual delivery of goods which emerged into a financial mishap due to collusion between the NSEL, borrowers and their clients and this is a clear cut case of criminal conspiracy and criminal breach of trust where the innocent's money to the tune of Rs.5600 crore have been washed out. If this is the case of the prosecution, then we are fully justified in taking a view that the transaction entered on the platform of NSEL was not the one of deposit of the amount or commodity and if it is not so within the meaning of Section 2(c) of the MPID Act, then NSEL cannot be charged of being a financial establishment and proceeded against under the provisions of the MPID Act.

36 We will now proceed to deal with the contention advanced by the petitioner through the learned Senior counsel Shri Seervai in Writ Petition No.508 of 2017 where the petitioner has sought a declaration that Sections 4 and 5 of MPID Act are violative of Articles 14 and 19 of the Constitution and also violate Article 300A of the Constitution on the other hand and the same are liable to be struck down. We have carefully considered the submission advanced by Shri Seervai. He has submitted that Section 4 of the MPID Act which is a power to attach properties on default of the return of the deposit has to be carefully construed. According to him, the said section is in two parts and the power under the said section is to be exercised by the Government where any financial establishment is acting in a calculated manner detrimental to the interest of defaulters and Shri Seervai has submitted that the section has to be read into two parts, the first part is where the Government is satisfied that the financial establishment is not likely to return the deposits or pay the interest, then it may attach the money or other property "believed to have been acquired by such financial

establishment, either on its own merits or in the name of any other person from or out of the deposits collected by the financial establishments". The second part, according to Shri Seervai, empowers the Government to attach "such other property" of the said "financial establishment or the promoter, director, partner or manager or member of the said financial establishment" in case the money or property is not available or insufficient for return of the deposit. According to Shri Seervai, the vagueness and possible area of misinterpretation in second part of sub-section (1) of Section is susceptible to gross abuse and misuse since it is unguided. Shri Seervai has submitted that the legislature has deliberately omitted the words "promoter, director, partner or manager or member" in earlier part of clause (ii) of Sub-section (1) of Section 4 where the words "any other person" only have been mentioned. According to him, the vital difference in the latter part and former part is that "any other person" would obviously refer to any person/entity other than the "promoter, director, partner, manager or member. Therefore, according to the learned senior counsel, any property of any promoter, director, partner,

manager, or member of the financial establishment can be attached like that of “any other person” if it has a direct bearing and relation to be borne “from or out of the deposit” and since these wordings are absent, according to Shri Seervai, the decision of Government may be abused or misused when the intention of the legislature is clear from the reading of the entire sub-section i.e. only that property of the promoter, director, partner or manager of a financial establishment will be attached which has a direct bearing and relation to be borne from or out of the deposits. He has expressed that the State Government as it may think fit, would be entitled to attach even untainted and unconnected properties of the promoter, director, manager, etc and such unguided delegation would result only in the subject satisfaction of the Government being based on whims and fancies and would also lead to absurdity. Shri Seervai has also argued that sub-section (2) of Section 4 of the MPID Act is ex-proprietary in nature and violative of Article 14 and 300 of the Constitution. He submits that unless the provisions are read down, the said provision would violate Articles 14 and 300A since if an order of attachment is made in

relation to the assets of the petitioner in its capacity as a promoter of the financial establishment, then on publication of the order in the gazette, the property vests in the Government and he will be divested of the ownership and title of the untainted property despite there being no knowledge, any culpability, and no involvement in any wrongful act by any financial establishment or any adjudication thereof establishing that the said property has been acquired from or out of the deposits of any such financial establishment. In such a contingency, the untainted property of the promoter would result in the promoter divesting of the property in favour of the State in terms of Section 4(2) of the MPID Act without any provision of compensation or public purpose in attaching the said properties. According to the learned Senior counsel, this would amount to confiscation of the property without the owner being guilty of any offence and it would violate Article 300A of the Constitution and such an expropriation of the property is extremely prejudicial and penal. The learned senior counsel has also urged that the attachment of the property as contemplated under sub-section (2) of Section 4 is without

affording an opportunity to the promoter to defend himself and it would amount to conviction without trial and is in utter violation of the principles of *Audi alteram partem*. He submits that the finding qua the Promoter has to be separate from the finding qua the principle i.e. 'financial establishment' before the State Government exercise the power and the said power can be exercised only when there is a clear and definite finding that trace the money to the properties sought to be attached. Non-provision of a pre-attachment hearing to the promoter and the clear distinction between the tainted and untainted property is emphasized by the learned senior counsel to advance his submission that sub-section (2) of Section 4 is clearly violative of the principles of natural justice. He further submit that in any contingency, the provisions of sub-section (2) of Section 4 cannot be construed to fasten the liability on the promoter i.e. the petitioner though the money trail has not been established to the promoter and since the language of section 4 do not contain any express inhibition, he has assailed the constitutional validity of the said provision and has prayed that if the provision is read down to exclude any action against the

delinquent promoter/directors and further to enable him to establish that they have not received any benefit from the financial establishment out of which they have acquired the property, then the provision can be saved, but in such circumstances, the impugned notification would be *ultra vires* the provision and would be required to set aside.

37 The Maharashtra Protection of Interest Depositors Act came to be challenged on the ground of lack of legislative competency and the Full Bench of this Court in ***Vijay C. Puljal Vs. State of Maharashtra***[3] declare the said enactment to be unconstitutional being beyond the legislative competence of the said legislature. The provisions of the Tamil Nadu Protection of Interest of Depositors (in Financial Establishment) 1997 which is also a legislation to curb the mushroom growth of financial establishments which were grabbing money received as deposits from the public on false promises for exorbitant and unprecedented high rate of interest without any obligation to refund these deposits to the investors on maturity was a subject

3 (2005) 4 CTC 705

matter of challenge before the Full Bench of the Madras High Court. The said enactment came to be challenged on the ground of violation of Article 14, 19(1)(g) and Article 21 of the Constitution. It also came to be assailed on the ground of legislative competency of the State legislature. The Full Bench of the Madras High Court examined the said enactment through a Full bench and upheld the said enactment, which contains paramateria provisions of the MPID Act and the challenge in regards to the validity with reference to the principles of natural justice have been answered by the Full Bench in para nos.21 and 22 to the following effect :

> 21. The power conferred under Section 3 on the authority to pass ad interim order of attachment of money or any other property alleged to have been procured either in the name of the financial establishments or in the name of any other person, from and out of the deposits collected by the financial establishments or if it transpires that if such money or other property is not available for attachment or not sufficient for repayment of deposits, such other property of the said financial establishments or the promoter, partner, director, member of the said financial establishments or a person who has borrowed money from the financial establishments to the extent of his default or, such other properties of that person in whose name properties were purchased from and out of the deposits collected by the financial establishments, in our considered opinion, is nothing but a power conferred on the competent authority required to be exercised in an emergent situation, where the financial establishment

> or any person mentioned in section 3 of the Act attempts clandestinely to siphon of or divert the funds of the depositors by mala fide transfers. Therefore, the question of giving an opportunity before passing such order of ad interim attachment does not arise.
>
> 22. What is the reasonable opportunity alleged to have been violated in the process, as complained by the financial establishments alas the complaint of lack of reasonable opportunity to the financial establishments in courtesy to the principles of natural justice, before attaching the property, in our considered opinion, could, by itself, not be termed as fatal to the principles of natural justice, as what is sought under such attachment is not to deprive any rights of the financial establishments or the directors, but to prevent any further unjust diversification of the funds of the depositors. Therefore, there cannot be any hesitation or reluctance in exercise of such power of attachment without affording an opportunity to the financial establishments as the Act provides a post-decision opportunity and also permits the innocent third parties to approach the Special Court for variation and modification, and we find sufficient justification in this regard.

It also made the following observations in paragraph no.26.

> 26. Wide option was also provided under the Act for settling the amount without payment of interest, thus giving a fair play in the joints. That apart, during the course of making the ad interim order of attachment absolute, by contemplating notice to the interested parties and permitting them to file their objections and also hearing the third parties, who have not even been served with notice, but filed their objections, requiring the Special Court to pass appropriate orders within 6 months from the date of filing the application under Section 4(3) of the Act, and then requiring the

> Special Court to pass appropriate orders on merits under section 7(4) of the Act, by which it may make the ad interim order of attachment absolute, vary it or cancel it and also by providing the Special Court to release the excess amount of property attached, which is more than the amount required for repayment to the depositors and then empower the Competent authority to bring the property to auction sale and then distribute the sale proceeds equitably, satisfies the principles of natural justice.

As regards the arguments that the properties of the innocent third parties were attached without giving them an opportunity, the Full Bench observed that the innocent parties are entitled to approach the Special Court after satisfying their bonafide and it observed the following effect :-

> For their any hardship in the interregnal period, the answer is that when a general evil is sought to be suppressed some martyrs may have to suffer, for the legislature cannot easily make meticulous exceptions and it has to proceed on broad categorizations and not singular individualization.

38 The said Tamil Nadu enactment also came to be tested touchstone on the principles contained in Article 14, 19(1)(g) and 21 and answered it in the negative. As far as question of legislative competency is concerned, after referring to the decision in ***Vijay C. Punjal Vs. State of Maharashtra***,

the Full Bench of the Madras High Court did not agree with the Full Bench of the Bombay High Court. The judgment of the Full Bench of the Madras High Court was taken to the Apex Court in case of ***K.K. Baskaran*** Vs. State,[4] and the Hon'ble Apex Court dismissed the challenge to the Full bench judgment of the Madras High Court. The Hon'ble Apex Court also did not agree with the view of the Full Bench of Bombay High Court in Vijay's case and it noted that though there are some differences in the Tamil Nadu Act and Maharashtra Act, but they are minor and the view taken would also be equally applicable to the Maharashtra Act. By applying the doctrine of pith and substance, the Apex Court held that the object of Tamil Nadu Act was to find a solution to the problem of the depositors who were deceived on large scale by the fraudulent activities of certain financial establishments and this resulted into disastrous consequences, both in economic and social life of such depositors who were exploited by false promise of high return of interest. The Court held that the object of the Act is to give a speedy remedy to the innocent depositors who are vulnerable

4 2011 (3) SCC 793

to the temptation of earning high rate of interest and who are victimized by financial establishment. The Apex Court in K.K. Baskaran observed thus :

> 28 In the case of the Tamil Nadu Act, the attachment of properties is intended to provide an effective and speedy remedy to the aggrieved depositors for the realization of their dues. The offences dealt with in the impugned Act are unique and have been enacted to deal with the economic and social disorder in society, caused by the fraudulent activities of such financial establishments.
>
> 29 Under Section 3 & 4 of the Tamil Nadu Act, certain properties can be attached, and there is also provision for interim orders for attachment after which a post decisional hearing is provided for. In our opinion this is valid in view of the prevailing realities.
>
> 30 .....
>
> 31 We fail to see how there is any violation of Article 145, 19(1)(g) or 21 of the Constitution. The Act is a salutary measure to remedy a great social evil. A systematic conspiracy was effected by certain fraudulent financial establishments which not only committed fraud on the depositor, but also siphoned off or diverted the depositor's funds mala fide. We are of the opinion that the act of the financers in exploiting the depositors is a notorious abuse of faith of the depositors who innocently deposited their money with the former for higher rate of interest. These depositors were often given a small pass book as a token of acknowledgment of their deposit, which they considered as a passport of their children for higher education or wedding of their daughters or as a policy of medical insurance in the case of most of the aged depositors, but in reality in all cases it was an

> unsecured promise executed on a waste paper. The senior citizens above 80 years, senior citizens between 60 and 80 years, widows, handicapped, driven out by wards, retired government servants and pensioners, and persons living below the poverty line constituted the bulk of the depositors. Without the aid of the impugned Act, it would have been impossible to recover their deposits and interest thereon.
>
> 33 The State being the custodian of the welfare of the citizens as parens patriae cannot be a silent spectator without finding a solution for this malady. The financial swindlers, who are nothing but cheats and charlatans having no social responsibility, but only a lust for easy money by making false promise of attractive returns for the gullible investors, had to be dealt with strongly. The small amounts collected from a substantial number of individual depositors culminated into huge amounts of money. These collections were diverted in the name of third parties and finally one day the fraudulent financers closed their financial establishments leaving the innocent depositors in the lurch.

Shri Dada has vehemently submitted before us that the issue has now been put to rest by K.K. Baskaran (supra) and even the MPID Act was tested on the parameters of Articles 14, 19(1)(g) and 21 of the Constitution and it has been held that the Madras Act do not violate any of the provisions and according to Shri Dada, the provisions of the Madras Act are similar to the one contained in the MPID Act.

39 An attempt is made on behalf of the learned counsel for the petitioners to canvass before us that there is a distinction between the provisions of Section 4 of the MPID Act and the relevant section which permits such an attachment as contemplated under the Tamil Nadu Act. Our attention was invited to Section 4 of the Madras Act and Shri Seervai has submitted before us that the Tamil Nadu Act is distinct in its wording under Section 3(ii). According to Shri Seervai, a similar wording is contained in Section 3(2) of the Odisha Protection of Interest of Depositors Act, 2011. The submission of Shri Seervai is that in this particular context, since the properties of the petitioner in the capacity of a promoter are being sought to be attached, the attachment of the petitioner's property without a money trail being traced and unless and until some default has been established on the part of the petitioner as promoter, the properties could not be attached. As against this, the argument of the State through Shri Dada is to the effect that the present enactment is distinct in its character and the promoter like the petitioner who wear the cloak of manifest arbitrariness when monies of depositors are

lost and cannot be repaid except by attaching the properties of promoters, the principle of restitution would come into picture to protect the need of depositors and the need to obviate the evil effect of financial establishment who operate to deprive investors of their investment have sufficient reasons to justify the enactment of the MPID Act.

In ***Baskaran*** (supra), the Hon'ble Apex Court has noted that there is a little variance in the provisions of the Tamil Nadu Enactment and the MPID Act but on a larger platform, the Apex Court had observed that a systematic conspiracy was effected by certain fraudulent financial establishment which have not only committed fraud on the depositors but also siphoned off or diverted the depositor's funds malafide would amount to abuse of faith of the depositors who have innocently deposited their money with the former for higher rate of interest. The Apex court refused to take note of the submission that the provisions of the enactment enacted by the State legislature for protection of interest of the depositors is violative of Article 14, 19(1)(g) or

21 of the Constitution since the said enactment was looked at as salutary measures to remedy the great social evil.

Further, while dealing with the Pondicherry Enactment in case of ***New Horizons Sugar Mills Limited Vs. Government of Pondicherry***[5] while testing the said enactment on the challenge of legislative competence, the Apex Court made reference to the Tamil Nadu Protection of Interest of Depositor's Act and proceeded on the footing that the provisions are in *para materia*. The Apex Court had made itself clear that the decision in case of K.K. Baskaran, ***Sonal Hemant Joshi Vs. State of Maharashtra***,[6] and Vijay Kuljal, insofar as they relate to the Protection of Interest of Depositors would be equally applicable to the facts of the case. Their Lordships held that the validity of the Tamil Nadu Act and Maharashtra Act has been upheld by the Supreme Court in the said decisions and the object of all these enactments being same, and /or similar in nature, and since the validity of the Tamil Nadu Act and the Maharashtra Act have been upheld, the impugned decision of the Madras High Court in upholding the validity of Pondicherry

5 2012 (10) SCC 575
6 2012(10) SCC 601

Act must also be affirmed. The Court took into consideration the beneficial nature of all the three legislations being to protect the interest of small depositors who invest their life's earning and savings in schemes floated by unscrupulous investment in companies and who end up losing their entire deposit. By all the aforestated authoritative pronouncement from the Apex Court to which we have made a reference have tested the provisions of the respective State legislations enacted by the respective State legislatures to protect the interest of depositors in financial establishments and by taking a consistent view, the legislative competence of the respective State legislatures have been upheld and the decision of the Apex Court in case of ***K.K. Bhaskaran Vs. State,*** was consistently followed. In light of this scenario emerging from the aforesaid judgments and in particular, when we have already recorded that NSEL did not accept deposits and this observation which we have made on the basis of the entire transaction conducted on the platform of NSEL being placed before us, if NSEL itself is not a financial establishment, then, we do not think that there is any propriety in dealing with the

arguments advanced by Shri Seervai and to deal in his challenge to the validity of the enactment on the forefront of Article 300A of the Constitution. We do not intend to touch the validity of the MPID Act on this count by leaving the said challenge and contention of Shri Seervai as regards reading down of Section 4 of the MPID Act, open.

40 As far as the argument of the petitioner in regards to the excessive attachment is concerned, it is to be noted that in a Notice of Motion No.281 of 2018 and 397 of 2018 along with Chamber Summons No.155 of 2018 and 156 of 2018, we had passed a detailed order on 24th October 2018. It is on this day we have admitted the writ petition in order to test the validity of the MPID Act, 1999 and also the challenge to the attachment of the properties of the petitioner by taking recourse to Section 4 of the Enactment. By our detailed interim order, we had expressed that the notification issued by the State Government purporting to attach the properties of the petitioner Company in the year 2018 is in excess of the defaulted amount and we have recorded our reasons before

concluding so. This order was assailed before the Hon'ble Apex Court and the Apex Court refused to interfere in the said order. The petition is then taken up by us for hearing on the main issue about applicability of the provisions of the MPID Act to the petitioner and on the ground that NSEL itself is not a financial establishment and therefore, the properties of the petitioner in capacity as promoter by the impugned notification issued by the State Government under Section 4(1) of the MPID Act is also not sustainable and by this judgment, we have dealt with the same.

We have dealt with the submission on the ground of the inapplicability of the provisions to the subsidiary of the petitioner i.e. NSEL and have also dealt with the submission as far as constitutionality of the provisions of the MPID Act are concerned. Since we have already noted and dealt with the submissions regarding applicability, our attention was also invited to the earlier order passed by this court to which one of us (Justice More) was a party in Writ Petition No.1403 of 2015 decided on 1st October 2015. Criminal Writ Petition was filed by NSEL and the NSEL aggrieved recovery association and the

NSEL investor action group intervened in the same. Criminal Writ Petition came to be filed under Article 226 and 227 of the Constitution of India read with Section 482 seeking quashment of the C.R registered with the EOW and later on, renumbered as case no.1 of 2014 after filing charge-sheet. After examining the contents of the First Information Report and on consideration of the submission of the learned Advocate General who had heavily relied upon the brochure which was portrayed as a promise and assurance to the clients to be entitled to the returns of 14% to 16% per annum, the Division Bench accepted the said statement and recorded that the statements recorded by Investigating Agency prima facie reveal that the petitioner represented to the traders/suppliers of the goods that they would be provided security free loan and there was an assurance of fixed returns @ 14% to 16%. The brochure was the basis of the observations made by the earlier Division Bench. However, since at this stage, the entire functioning of the NSEL along with the actual nature of its transaction along with the bye-laws have been placed before us in great detail, we do not think that we are bound by the said

*prima facie* observation and moresoever, it was also observed that since further investigation was in process, at that relevant stage, the petition could not have been entertained in light of an alternative efficacious remedy to apply for discharge before the trial Court. Further, the Division Bench had also observed that the observations are prima facie in nature and made for the limited purpose to consider the grant of relief for quashing the action of invocation/application of provisions of the MPID Act at that stage. In such circumstances, the judgment relied upon by the state to advance its submission that the issue about the applicability of the provisions of the MPID Act to the NSEL is foreclosed, cannot be accepted.

41 The petitioner has posed a challenge to the various notifications issued by the Home Department of the State of Maharashtra in exercise of power under Section 4 of the MPID Act, thereby attaching the properties of the petitioner in the capacity as promoter. It is the specific contention raised in the petitions that the EOW has also attached the properties of various defaulters. The impugned notifications which have

been assailed before us relate to the action of attachment of the property of the petitioner to the FIR being lodged by Mr.Pankaj Saraf on the basis of which the provisions of MPID Act were invoked and applied. The notification proceeds on a footing that the NSEL is a Company which provides an electronic platform in Spot Trading in commodities and it is promoted by M/s.FTIL (now known as 63 Moons Technologies Limited) which holds 99.99% of the share capital and the National Agricultural Co-operative Marketing Federation of India Limited (NAFED) holds 0.1% of the total share capital of the company. The notifications further proceeds on the footing that NSEL is a financial establishment and it proceeds to state that by unilaterally closing down the exchange, the financial establishment defaulted in payment of approximately Rs.5600 crore to be paid to approximately 13000 investors. It further proceeds on the basis that the money collected by the said financial establishment from the investors falls within the definition of deposit as per section 2(c) of the MPID Act. Considering this as a promise, the State Government then recorded a conclusion that the Financial Establishment i.e.

NSEL does not have sufficient properties which can be attached for the purpose of repayment of deposits and therefore, it invoked the provisions of Section 4(1)(ii) of the MPID Act, which enables the attachment of property of the promoter and then, by issuing several notification, the properties of the petitioner are proceeds to be attached. As far as the sufficiency of attachment is concerned, by our interim order, we have already noted that the properties of the petitioner more than Rs.2200 crore were attached. A submission came to be advanced that the outstanding default amount is Rs.4822.53 crore whereas the authorities have attached the properties worth Rs.8548 crore including the properties of the petitioner. We have dealt with the said submission and noted that in the year 2016, the State had attached properties worth Rs.6115 crore from the defaulter members and property worth Rs.2200 crore of the petitioner came to be attached upto November 2017. It was not disputed that the EOW has thus attached properties worth Rs.8583.04 crore of the alleged defaulters. In view of the undisputed fact that the properties attached were worth Rs.8548 crore, we had granted stay to the impugned

notification dated 7th April 2018 relating to Odin and its receivables and we stayed the notification dated 11th April 2018, 17/4/2018, 19/4/2018, 15/5/2018 which purported to attach the properties in the form of accrued benefits on the investment of the petitioner and we also granted stay to the notification dated 19th September 2018 to the extend of attaching the Odin and its receivables and attachment of accrued benefits on the ground that the said attachments are in excess of the defaulted amounts. The State proceeded under the MPID Act and properties of the petition came to be attached on the gospel belief that NSEL is a financial establishment and the petitioner being its promoter and therefore, when the assets of NSEL are not sufficient to meet the demands of the investors, the Government turned its nelson eye to the petitioner. The entire exercise was carried out on foreclosed premise that NSEL is a financial establishment. The perusal of the FIR by Shri Saraf as well as the charge-sheet filed in the relevant C.R on the contrary, depicts a different scenario. The audit report conducted is a part of investigation clearly point out a finger to the sellers/defaulters and disclose that it is these defaulters

who have utilized the amount received by them for some other business purpose and the audit reports fix the liability pertaining to trade obligation on the said defaulters. The unstarred question raised before the Lok Sabha in relation to the NSEL scam, was answered by the Minister of State, in the Ministry of Finance on 5th August 2016 and it mentioned that the Government of Maharashtra had appointed two Forensic Auditors in order to assist the Economic Offences Wing of Mumbai Police in the investigation of NSEL payment and settlement crisis. In an answer given to the said unstarred question, accusations were made against the key management persons of NSEL, brokers and borrowers. The Ministry of State has also answered as to why the properties of the brokers were not attached by stating that no money trail was found in their bank account The auditor M/S. U.S. Gandhi and Co. has submitted the Forensic Report and has clearly traced the trade obligation of the said defaulters and fixed their liability on this defaulters on the basis of the details extracted from NSEL ledger account provided by the Economic Offences Wing Office. The audit report also include the flow chart diagram of the

funds transfer into settlement account of the individual defaulters and as to how and when the funds came to be transferred to its subsidiary companies or its distinct accounts resulting into a default in discharge of their trade obligations. In this background, merely because the brochure made a faint reference to 14% to 16% of yield and on this very presumption that the NSEL has accepted deposits and since the petitioner is a promoter of NSEL, the axe of the Government agencies by attaching the properties has necessarily fallen on the petitioner, which we see is highly illegal and unsustainable.

42 On examination of the contentions raised by the respective counsel, we are of the view that the clients trading on the NSEL platform did not invest with the NSEL in form of Fixed Deposits, equity or debentures of NSEL but they traded commodities on the platform of NSEL. The NSEL has always voiced its stand by stating that it is not a Financial Establishment and in response o the notices issued to it, it pin pointed towards the defaulters who are responsible for the loss to the investors and the said contention of the NSEL was found

to be substantiated by the audit reports. The NSEL has even instituted recovery suits against the defaulters. Since the investors raised an alarm about the losses caused to them, as a knee jerk reaction, the NSEL and its promoter came to be proceeded under the provisions of the MPID Act without deliberating on the core issue to be determined as a jurisdictional fact as to whether the entity was a Financial Establishment, thereby permitting the authorities to proceed against it under the statue intended to govern Financial Establishments. The fact or the facts upon which the jurisdiction of a Court, a Tribunal or authority depends on and which is referred to as 'jurisdictional fact', the Court exercising the power must be satisfied that such a jurisdictional fact exists and it can then assume jurisdiction to decide the issues revolving around the said fact and if existence of such a fact is lacking, the Court or the authority may restrain itself from exercising its power. The existence of a jurisdictional fact is Investigating Agency *sine qua non* to the assumption of jurisdiction by a Court or Tribunal. The respondent authorities has proceeded on the assumption that NSEL is a Financial

Establishment and the entire course of action that followed by issuing notification under Section 4 attaching the properties and NSEL is a fall out of an assumption that it is dealing with an Financial Establishment. The Apex Court in case of ***Carona Limited Vs. M/s.Parvathy Swaminathan and Sons*** (supra) has succinctly drawn a distinct jurisdictional fact and adjudicatory fact by applying the parameters laid down by the Apex Court. When we have examined the issue in hand, we have no hesitation in concluding that the NSEL is not a Financial Establishment and resultantly, the petitioner who is a promoter of the said establishment cannot be proceeded under the provisions of MPID Act. Resultantly, we are constrained to quash and set aside the action to which the petitioner is subjected to by taking recourse to the provisions of MPID Act.

43 For the reasons recorded above, we pass the following order :-

*Tilak*

**ORDER IN WP NO.1181 OF 2018**

1 We quash and set aside the following impugned notifications :-

(i) Notification dated 4/4/2018

(ii) Notification dated 7/4/2018

(iii) Notification dated 11/4/2018

(iv) Notification dated 19/4/2018

(v) Notification dated 15/5/2018

(vi) Notification dated 19/9/2018

and further notification dated 21/05/2019.

2 As far as prayer clause (a) is concerned, we are not inclined to enter into the said arena of challenge and keep the said challenge open.

3 In light of the aforesaid relief granted, we dispose of the pending Notices of Motion as well as Chamber Summons filed in WP 1181/2018.

**ORDER IN WP NO.508 OF 2017**

4 The impugned notification dated 21st September 2016 is quashed and set aside and prayer clause (b) is made absolute.

5 As far as prayer clause (a) is concerned, we leave the said challenge open.

*Tilak*

6 In light of the aforesaid relief granted, we dispose of the pending Notices of Motion as well as Chamber Summons filed in WP 508/2018.

**(SMT. BHARATI H. DANGRE, J.)** **(RANJIT MORE, J.)**

After we pronounced the judgment, learned senior counsel Shri Dada prays for grant of stay to the effect and operation of the said Judgment. He raise an apprehension that if the attachments are lifted, the properties would be immediately disposed of by the petitioner who is the promoter of NSEL. This prayer is opposed by the learned Senior counsel Shri Rohatgi as well learned Senior counsel Shri Seervai by making a categorical submission that all this while on a pretext that NSEL is a Financial Establishment, they had already suffered the brunt and since now the Court, on merits, has held that NSEL is not a Financial Establishment, the petitioner who is a promoter should not be made to suffer further. The prayer for grant of stay to the Judgment is therefore vehemently opposed.

*Tilak*

We have considered the arguments of the learned senior counsel appearing on both sides and we are of the express view that on exhaustive discussion, we have already concluded that NSEL is not an Financial Establishment within the purview of the Maharashtra Protection of Interests of Depositors in Financial Establishments Act, 1999, and in such circumstances, we decline the prayer made by the learned senior counsel Shri Dada.

**(SMT. BHARATI H. DANGRE, J.)** **(RANJIT MORE, J.)**

*Tilak*