A SECURITIES AND EXCHANGE BOARD OF INDIA

v.

KISHORE R. AJMERA

(Civil Appeal No.2818 OF 2008)

B FEBRUARY 23, 2016

[RANJAN GOGOI AND PRAFULLA C. PANT, JJ.]

Securities and Exchange Board of India Act, 1992 – s. 19 – Securities and Exchange Board of India (Stock Brokers and Sub-Brokers) Regulations, 1992 – Reg 9 – Securities and Exchange C *Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to the Securities Market) Regulations, 2003 – SEBI (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002 – Reg 13(4) – Fraudulent/ manipulative practices under the SEBI Regulations and violation* D *of the Conduct Regulations by the brokers and sub-brokers – Degree of proof required to hold them liable – Power of imposition of penalty – In the first category, sub broker acting through broker, allegedly involved in creating artificial volumes in the illiquid scrips and Member, SEBI held the broker liable and ordered suspension for four months – In second category, sub brokers allegedly* E *synchronized trades in respect of a huge number of illiquid scrip in quick succession of time – In third category, allegation that respondent-broker alongwith other member brokers, indulged in circular trading of the scrip on behalf of one client and suspension of respondent's membership for one month – Tribunal holding that* F *in the absence of any direct proof/evidence showing the involvement of broker and sub-broker, charges not substantiated, and interfered with the penalty – On appeal, held: As regards power of imposition of penalty for manipulative or fraudulent practices or for violation of the Regulation, 1992, no clarity in the parallel provisions contained in the Act and the Regulations – Comprehensive legislation* G *can bring more clarity and certainty on the norms – In the instant case, there is no direct evidence forthcoming – In the first category, inference of negligence/lack of due care etc., not established even on proof of the primary facts alleged so as to make broker liable which was rightly upheld by the tribunal – As regards the second*

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and third category, conclusion has to be gathered from various circumstances like the volume of the trade effected; the period of persistence in trading in the particular scrip; the particulars of the buy and sell orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors – It is clear from all these surrounding facts and circumstances that there has been transgressions by the respondents beyond the permissible dividing line between negligence and deliberate intention – If the primary authority had thought it proper to impose different penalties in different cases involving different set of facts, interference should not be made – Orders of the tribunal set aside and penalty imposed on brokers by SEBI restored.

Disposing of the appeals, the Court

HELD: 1.1 The views are recorded on a somewhat unclear if not a confused picture that emanates from parallel provisions contained in the Act and the Regulations framed thereunder. This is particularly in the context of the power of imposition of penalty on determination of liability either for manipulative or fraudulent practices or for violation of the Code of Conduct Regulation, 1992. The different Regulations including the Regulations that prescribe the procedural course, namely, SEBI (Procedure for Holding Enquiry by Enquiry Officer and imposing Penalty) Regulations 2002 and the successor Regulation i.e. SEBI (Intermediaries) Regulations 2008 contain identical and parallel provisions with regard to imposition of penalty resulting in myriad provisions dealing with the same situation. A comprehensive legislation can bring about more clarity and certainty on the norms governing the security/capital market and, therefore, would best serve the interest of strengthening and securing the capital market. [Para 20][1135-C-E]

1.2 It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to

A take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion. [Para 22][1136-A-C]

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1.3 In the instant case, there is no direct evidence forthcoming. The scrips in which trading had been done were of illiquid scrips meaning thereby that such scrips were not listed in the Stock Exchange and, thus, was not a matter of everyday buy and sell transactions. While it is correct that trading in such C illiquid scrips is *per se* not impermissible, yet, voluminous trading over a period of time in such scrips is a fact that should attract the attention of a vigilant trader engaged/engaging in such trades. The above would stand fortified by the note of caution issued by the Stock Exchange in the form of a notice/memorandum alerting D its members with regard to the necessity of exercising care and caution in case of high volume of trading in illiquid scrips. [Para 23][1136-D-F]

1.4 In *SEBI Vs. Kishore R. Ajmera* case the proved facts are that both the clients are known to each other and were related E entities; this fact was also known to the sub-broker and the respondent-broker; the clients through the sub-broker had engaged in mutual buy and sell trades in the scrip in question, volume of which trade was significant, keeping in mind that the scrip was an illiquid scrip. Apart from this there is no other material to hold either lack of vigilance or *bona fides* on the part F of the sub-broker so as to make respondent-broker liable. An irresistible or irreversible inference of negligence/lack of due care etc., is not established even on proof of the primary facts alleged so as to make respondent-broker liable under the Conduct Regulations, 1992 as has been held in the order of the G Whole Time Member, SEBI which was rightly reversed in appeal by the Tribunal. [Para 24][1136-G-H]

1.5 In the second and third category, the volume of trading in the illiquid scrips was huge. Coupled with the said fact, what has been alleged and reasonably established, is that buy and sell H orders in respect of the transactions were made within a span of

0 to 60 seconds. While the said fact by itself i.e. proximity of time between the buy and sell orders may not be conclusive in an isolated case such an event in a situation where there is a huge volume of trading can reasonably point to some kind of a fraudulent/manipulative exercise with prior meeting of minds. Such meeting of minds so as to attract the liability of the broker/ sub-broker may be between the broker/sub-broker and the client or it could be between the two brokers/sub-brokers engaged in the buy and sell transactions. When over a period of time such transactions had been made between the same set of brokers or a group of brokers a conclusion can be reasonably reached that there is a concerted effort on the part of the concerned brokers to indulge in synchronized trades the consequence of which is large volumes of fictitious trading resulting in the unnatural rise in hiking the price/value of the scrip(s). The trades in question were not "negotiated trades" executed in accordance with the terms of the Board's Circulars issued from time to time. A negotiated trade, it is clarified, invokes consensual bargaining involving synchronizing of buy and sell orders which will result in matching thereof but only as per permissible parameters which are programmed accordingly. [Para 25][1137-C-G]

1.6 The knowledge of who the 2nd party/ client or the broker is, is not relevant at all. While the screen based trading system keeps the identity of the parties anonymous it will be too naive to rest the final conclusions on said basis which overlooks a meeting of minds elsewhere. Direct proof of such meeting of minds elsewhere would rarely be forthcoming. The test, is one of preponderance of probabilities so far as adjudication of civil liability arising out of violation of the Act or the provisions of the Regulations framed thereunder is concerned. Prosecution under Section 24 of the Act for violation of the provisions of any of the Regulations, of course, has to be on the basis of proof beyond reasonable doubt. The conclusion has to be gathered from various circumstances like that volume of the trade effected; the period of persistence in trading in the particular scrip; the particulars of the buy and sell orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors. The fact that the broker himself has initiated the sale of a particular quantity of the scrip on any particular day and at the end of the

A day approximately equal number of the same scrip has come back to him; that trading has gone on without settlement of accounts i.e. without any payment and the volume of trading in the illiquid scrips, all, should raise a serious doubt in a reasonable man as to whether the trades are genuine. The failure of the brokers/sub-
B brokers to alert themselves to this minimum requirement and their persistence in trading in the particular scrip either over a long period of time or in respect of huge volumes thereof, would not only disclose negligence and lack of due care and caution but would also demonstrate a deliberate intention to indulge in trading beyond the forbidden limits thereby attracting the provisions of
C the FUTP Regulations. The difference between violation of the Code of Conduct Regulations and the FUTP Regulations would depend on the extent of the persistence on the part of the broker in indulging with transactions of the kind that has occurred in the instant cases. Upto an extent such conduct on the part of the
D brokers/sub-brokers can be attributed to negligence occasioned by lack of due care and caution. Beyond the same, persistent trading would show a deliberate intention to play the market. The dividing line has to be drawn on the basis of the volume of the transactions and the period of time that the same were indulged in. In the instant cases it is clear from all these surrounding facts
E and circumstances that there has been transgressions by the respondents beyond the permissible dividing line between negligence and deliberate intention. [Para 26][1137-H; 1138-A-H]

1.7 The stage at which the monetary penalty was imposed
F on the two other brokers indulging in circular trading is prior to any determination of liability of the said two brokers who did not contest the charges. In the case of M/s MNC Lmt. the stage has advanced far beyond the above and had culminated in operative findings against the said sub-broker. The imposition of monetary
G penalty in the second and third category cases of for violation of the FUTP Regulations cannot be a basis for alteration of the punishment of suspension imposed on MNC Ltd to one of monetary penalty. In this regard, provisions of Section 15J of the SEBI Act has to be kept in mind and if the primary authority had thought it proper to impose different penalties in different cases
H involving different set of facts, interference should not be made

in instant appeals. [Para 30][1139-H; 1140-A-C] A

1.8 As regards other appeals the orders of the Securities Appellate Tribunal is set aside and the orders and penalty imposed on the respondents-brokers by the respective orders of the Whole Time Member of the SEBI is restored. [Para 31][1140-D]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2818 OF 2008 B

From the Judgment and Order dated 05.02.2008 of the Securities Appellate Tribunal, Mumbai in Appeal No. 13 of 2007.

WITH C

C. A. NO. 8769 OF 2012

C. A. NO. 6719 OF 2013

C. A. NOS. 252 AND 282 OF 2014

Chander Uday Singh, Sr. Adv., Pratap Venugopal, Ms. Surekha Raman, Purushottam K. Jha, Ms. Niharika, (For M/s. K. J. John & Co.) D for the Appellants.

Abhay A. Jena, Ranjit B. Raut, (For Ms. Bina Gupta), Rajesh Kumar, Neeraj Vasu, Devavrath Anand, R. K. Srivastava, Deepak Shah, Senthil Jagadeesan, Govind Manoharan, Ms. Suchitra Kumbhat for the Respondent. E

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The core question of law arising in this group of appeals being similar and the facts involved being largely identical, all the appeals which were heard analogously are being decided by this common order. F

2. The question of law arising in this group of appeals may be summarized as follows.

> What is the degree of proof required to hold brokers/sub-brokers liable for fraudulent/ manipulative practices under the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations and/ or liable for violating the Code of Conduct specified in Schedule II read with Regulation 9 of the Securities and Exchange Board of India (Stock-Brokers and Sub-Brokers) Regulations, 1992? (hereinafter referred to as the 'Conduct Regulations, 1992'). G H

A 3. At the outset facts of each case on which the above question of law have arisen may be taken specific note of.

Civil Appeal No. 2818 of 2008 (SEBI Vs. Kishore R. Ajmera)

B The respondent-Kishore R. Ajmera is a broker registered with the Bombay Stock Exchange. M/s. Prakash Shantilal & Company is one of the sub-brokers through whom the two clients, namely, Mayekar Investments Pvt. Ltd. and M/s. K.P. Investment Consultancy are alleged to have indulged in matching trades thereby creating artificial volumes in the scrip of one Malvica Engineering Ltd. (MEL) during the period C 20.12.1999 to 31.3.2000 and 7.8.2000 to 31.8.2000. The gravamen of the allegations levelled against the sub-broker for which the respondent has been held to be vicariously liable is that during the aforesaid period the two clients, who are related to each other through majority shareholding in the hands of common family members, had through the sub-broker bought 66,300 shares and sold 77,700 shares of MEL during D the first period and a total of 32,500 and 28,800 shares of MEL, respectively, during the second period. Not only both the clients were related but they were also beneficiaries of the allotment of the shares made directly by the parent company i.e. MEL. The said allotment incidentally was made out of the shares that were forfeited on account E of failure to pay call money by the allottees, following a public offer. The scrip in question was a illiquid scrip where the volume of trading is normally minimal. A note of caution had also been struck by the Bombay Stock Exchange by circulating an advice requiring brokers to be aware of any unnatural (voluminous) trading in any such illiquid scrip. Yet, the transaction in question was gone through by the sub-broker acting through F the terminal of the broker i.e. respondent-Kishore R. Ajmera. It is on the said facts that charges of negligence, lack of due care and caution were levelled against the sub-broker and in turn against the broker.

The said charges were found to be proved after holding a due enquiry and by complying with all the procedural requirements under the G Securities and Exchange Board of India Act, 1992 (hereinafter for short 'the SEBI Act'), Securities and Exchange Board of India (Stock Brokers and Sub-Brokers) Regulations, 1992 (hereinafter Code of Conduct Regulations, 1992) and the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to the H Securities Market) Regulations, 2003 (hereinafter for short the 'FUTP

Regulations 2003'). On completion of all aforesaid procedural requirements the Whole Time Member, SEBI found the charges against the broker to be established and under the provisions of Section 19 of the SEBI Act read with Regulation 13(4) of the SEBI (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002 (as then in force) penalty of suspension of registration of the respondent as a broker for a period of four months was ordered.

4. Aggrieved, the respondent filed an appeal before the Securities Appellate Tribunal under Section 15T of the SEBI Act. The aforesaid appeal was answered by the learned Tribunal by order dated 05.02.2008 by holding that in the absence of any direct proof or evidence showing the involvement of the sub-broker in allegedly matching the trades and thereby creating artificial volumes of trading resulting in unnatural inflation of the price of the scrip, the charges are not substantiated. The penalty imposed was accordingly interfered with. It is against the said order that the SEBI has filed the present appeal under Section 15Z of the SEBI Act.

Civil Appeal No.6719 of 2013 (SEBI Vs. Ess Ess Intermediaries Pvt. Ltd.), Civil Appeal No.252 of 2014 (SEBI Vs. M/s. Rajendra Jayantilal Shah, Civil Appeal No.282 of 2014 (SEBI Vs. M/s. Rajesh N. Jhaveri)

5. The scrip involved in these appeals is one of M/s. Adani Export Ltd. (AEL) and the period of investigation involved is 09.07.2004 to 14.01.2005 and 08.08.2005 to 09.09.2005. The respondents are all sub brokers who are alleged to have synchronized trades in respect of a huge number of shares during the periods in question. The volume of shares traded during the two periods in questions is best evident from the following extracts of the orders of the Whole Time Member passed in each of the cases.

ESS ESS INTERMEDIARIES PVT. LTD.

"During the course of the said investigation, it was observed that the Noticee was one of the sub-brokers who had traded substantially in the scrip of AEL during the first and the second period for the said client. The Noticee, for the said client, has allegedly executed synchronized trades for 1,15,870 shares of AEL during the period from July 9, 2004 to July 27, 2004. Further, the said client also entered into self trades for 52,910

shares. The said client also entered into structured trades wherein he reversed the trades with particular clients of other brokers. A total trading of 1,29,422 shares was executed by the said client in such manner between July 16, 2004 and July 27, 2004. This quantity accounted for 12.5% of the total traded quantity during this period. It is further observed that during the period between July 28, 2004 to January 14, 2005 the said client is alleged to have entered synchronized trading for buying 83,45,924 shares and selling 87,60,410 shares. The said client was part of the group which executed trades of 3,48,53,139 shares during the above period which is around 51% of total traded volumes. Of these trades 3,04,68,762 shares (87.39% of their trades) appear to be synchronized.

It is further alleged that the said client along with few other entities executed reverse trades to the extent of 38,21,269 shares during the second period. It is alleged that the said client along with few other entities traded in a manner such that orders for 28,22,240 shares appear to be synchronized as the buy and sell orders were placed within time gap of 1 minute. Moreover, for 18,38,077 shares buy and sell order quantity and rate identical and placed within a time gap of 1 minute from each other. In case of 116 trades for 2183102 shares the time gap between the buy and sell orders was between 0-10 seconds. The said client's contribution to the alleged manipulation is to the extent of 13,21,582 shares on buy side and 15,04,408 on the sell side. Similarly on NSE, for the same period the said client has allegedly entered into synchronized trades to the extent of 12,25,260 shares."

M/S. RAJENDRA JAYANTILAL SHAH

"During the course of the said investigation, it was observed that the Noticee was one of the sub-brokers who had traded substantially in the scrip of AEL during the first period for the said client. The Noticee, for the said client, has allegedly executed synchronized trades for 1,17,601 shares of AEL during the period from July 9, 2004 to July 27, 2004. The said client also entered into structured trades wherein he reversed the trades with particular clients of other brokers. It

was observed that during the period between July 28, 2004 to January 14, 2005 the said client is alleged to have entered synchronized trading for buying 66,20,117 shares and selling 67,44,545 shares. The said client was part of the group which executed trades of 3,48,53,139 shares during the above period which is around 51% of total traded volumes. Of these trades 3,04,68,762 shares (87.39% of their trades) appear to be synchronized."

M/S. RAJESH N. JHAVERI

"During the course of the said investigation, it was observed that the Noticee was one of the sub-brokers who had traded substantially in the scrip of AEL during the first period for the said client. The Noticee, for the said client, has allegedly executed synchronized trades for 1,15,870 shares of AEL during the period from July 9, 2004 to July 27, 2004. The said client was part of the group which executed trades of 3,48,53,139 shares during the above period which is around 51% of total traded volumes. Of these trades 3,04,68,762 shares (87.39% of their trades) appear to be synchronized."

6. It is further alleged that in respect of all the transactions buy and sell orders were placed within a time gap of 0 to 60 seconds. The volume of trading in the illiquid scrip being very high and the sequence of the buy and sell orders being in quick succession of time, the respondents have been held guilty of contravening Regulations 4(1), 4(2)(a), 4(2)(b), 4(2)(e), 4(2)(g) and 4(2)(n) of the FUTP Regulations, 1995 and also the provisions of the Code of Conduct Regulations, 1992. Accordingly, monetary penalty of Rs.9,00,000/- for violation of FUTP Regulations, 2003 and Rs.1,00,000/- for violation of the Code of Conduct Regulations have been imposed.

7. In appeal, the Tribunal by the impugned order dated 19.06.2013 had taken the view that the allegations of fraud under the FUTP Regulations, 2003 can be established only on the basis of clear, unambiguous and unimpeachable evidence which is not available in the instant case. Accordingly, the penalty imposed under the FUTP regulations had been interfered with by the learned Tribunal while the penalty for violation of the provisions of the Code of Conduct Regulation has been maintained.

8. The learned Tribunal had disposed of two other appeals before it by following the order passed in the case of M/s. Ess Ess Intermediaries Pvt. Ltd. (respondent in Civil Appeal No. 6719 of 2013). Consequently the 3 (three) Civil Appeals in question have been filed before this Court.

Civil Appeal No. 8769 of 2012 (SEBI Vs. Networth Stock Broking Ltd.)

9. The scrip involved in the present case is of a company registered as G.G. Automotive Gears Ltd. and the period of investigation undertaken is 1.8.2002 to 16.10.2002. The allegation against the respondent is that alongwith three other member brokers of the Bombay Stock Exchange the respondent had indulged in circular trading of the scrip on behalf of one Indumati Goda. It is alleged that orders to buy and sell in respect of the scrip were placed by one Shrish Shah on behalf of the client Indumati Goda and such circular trading amongst the 4 brokers continued for a period of 38 days resulting in a huge and voluminous trading in the illiquid shares thereby artificially raising its price in the market. The said allegations, on due enquiry, have been found to be established by the order dated 27.12.2011 of the Whole Time Member of SEBI. Holding the respondent liable for contravention of Regulations 4(a), 4(b), 4(c) and 4(d) of the FUTP Regulations 1995 and the Code of Conduct Regulation, 1992, suspension of membership of the respondent for a period of one month had been ordered. The said findings and the penalty imposed have been reversed by the learned Tribunal by the impugned order dated 19.06.2012 giving rise to the instant appeal at the instance of the SEBI.

10. There are certain relevant facts which have to be taken note of with regard to the present case, at this stage.

(i) Circular and synchronized trading *per se* is not prohibited and in fact is regulated by the SEBI regulations in force.

(ii) The client Indumati Goda though required under the relevant norms had not appeared before the respondent at the time of registration for opening an account. The required documents were submitted by one Shri Shirish Shah on his behalf.

(iii) Though proceedings had been initiated against Smt. Indumati Goda she has been exonerated of all charges levelled in respect of the transactions in question.

(iv) Proceedings against Shri Shirish Shah had also been initiated and in the said proceedings Shri Shah had been found liable and had been appropriately dealt with. A

(v) The circular trading involved four brokers and in respect of two of them, monetary penalty has been imposed. The third broker in respect of whom suspension has been ordered has not challenged the penalty imposed. B

(vi) The *modus operandi* of the circular trading involved commencement of trading on a particular day by a sale made by one broker to a second and continuation of such sale in a circular manner until at the end of the day the same or substantially the same number of shares would come back to the first broker who had initiated the sale. This went on for 38 days. C

(vii) The time difference between buy and sell orders was 0 to 60 seconds in most cases. D

11. It is on these facts that after due enquiry and compliance with the laid down procedure that the findings of liability have been recorded and penalty imposed, as noticed above. In appeal, the learned Tribunal took the view, as in the earlier cases, that there is no direct material to show that the respondent sub-broker was aware of the identity of the client on whose behalf the transactions were being carried out. In fact, the consistent view of the learned Tribunal in all the cases, including the present one, has been that "in an on screen based trading it is not possible for the broker to know who the counter party is at the time the trade is being executed." E

12. The further finding of the learned Tribunal in the present case is that though it was urged on behalf of SEBI that trading to the extent (volume) involved in the present case in case of an illiquid scrip is sufficient to indicate gross irregularities and violations, what was ignored is that, "*the client had been regularly trading in the same fashion in as many as 25 different scrips and since inception, the client's trading pattern was primarily by way of day trading whereby she bought and sold equal quantities in respective scrips in the course of the day. All payments were made from her bank account and even for her delivery based trades, deliveries were made from her demat account.*" F G H

13. The learned Tribunal has further held that in the present case the principles of natural justice had been violated on account of the fact that the entire of the trade log as distinct from the extracts therefrom had not been furnished to the respondent; so also the statements of Smt. Indumati Goda and Shri Shirish Shah and that the same had caused prejudice to the respondent.

RELEVANT PROVISIONS OF THE SEBI ACT AND THE REGULATIONS

14. Section 12-A contained in Chapter V-A of the SEBI Act deals with "Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control" and reads as follows:

> ***"12-A. Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.—No person shall directly or indirectly—***
>
> *(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognised stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;*
>
> *(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;*
>
> *(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;*
>
> *(d) engage in insider trading;*
>
> *(e) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner*

which is in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(f) acquire control of any company or securities more than the percentage of equity share capital of a company whose securities are listed or proposed to be listed on a recognised stock exchange in contravention of the regulations made under this Act."

15. Section 15-HA of the Act which deals with penalty for fraudulent and unfair trade practices and Section 15J which lay down the factors to be taken into account while adjudging the quantum of penalty reads as follows :

"**15-HA.** ***Penalty for fraudulent and unfair trade practices.***— If any person indulges in fraudulent and unfair trade practices relating to securities he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher."

"**15J.** ***Factors to be taken into account by the adjudicating officer.***- *While adjudging the quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely :-*

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the respective nature of the default."

16. Section 12-A has to be read along with the provisions of FUTP Regulations, 2003, SEBI (Stock-Brokers and Sub-Brokers) Regulations, 1992 and the SEBI (Procedure for Holding Enquiry by Enquiry Officer and imposing Penalty) Regulations, 2002. Regulation 3 and 4 of the FUTP Regulations reads as follows:

"**3.** ***Prohibition of certain dealings in securities.***—*No person shall directly or indirectly—*

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

A *(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognised stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made thereunder;*

B

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognised stock exchange;

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

D

***4. Prohibition of manipulative, fraudulent and unfair trade practices.**—(1) Without prejudice to the provisions of Regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.*

E

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely—

(a) indulging in an act which creates false or misleading appearance of trading in the securities market;

F

(b)-(d) * * *

(e) any act or omission amounting to manipulation of the price of a security;

(f) publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;

G

(g)-(j) * * *

H

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

(l)-(q) * * *

(r) planting false or misleading news which may induce sale or purchase of securities."

Regulation 12 of the FUTP Regulation also contemplates suspension or cancellation of registration of intermediaries. For the sake of brevity the provision (Regulation 12) is not being quoted.

17. The SEBI (Stock Brokers and Sub-brokers) Regulations, 1992 in Schedule II provides for Code of Conduct for stock brokers in the following terms :-

"SCHEDULE II

Securities and Exchange Board of India

(Stock Brokers and Sub-brokers)

Regulations, 1992

CODE OF CONDUCT FOR STOCK BROKERS

[Regulation 9]

*A. **General.***

*(1) **Integrity**: A stock-broker, shall maintain high standards of integrity, promptitude and fairness in the conduct of all his business.*

*(2) **Exercise of due skill and care** : A stock-broker shall act with due skill, care and diligence in the conduct of all his business.*

*(3) **Manipulation** : A stock-broker shall not indulge in manipulative, fraudulent or deceptive transactions or schemes or spread rumours with a view to distorting market equilibrium or making personal gains.*

*(4) **Malpractices**: A stock-broker shall not create false market either singly or in concert with others or indulge in any act detrimental to the investors interest or which leads to*

A *interference with the fair and smooth functioning of the market. A stockbroker shall not involve himself in excessive speculative business in the market beyond reasonable levels not commensurate with his financial soundness.*

(5) ***Compliance with statutory requirements****: A stock-broker*
B *shall abide by all the provisions of the Act and the rules, regulations issued by the Government, the Board and the Stock Exchange from time to time as may be applicable to him."*

18. The Code of Conduct for Stock Brokers, inter alia, lays down that the stock-broker shall maintain high standards of integrity, promptitude
C and fairness in the conduct of all investment business and shall act with due skill, care and diligence in the conduct of all investment business. The code also enumerates different shades of the duties of a stock-broker towards the investor, details of which are not being extracted herein except to say that all such duties pertain to the high standards of integrity that the stock-broker is required to maintain in the conduct of
D his business.

19. Chapter VI of the Conduct Regulation, 1992 deals with liability for contravention of the provisions of the Act, Rules or the Regulations in the following terms :-

E *"CHAPTER VI*

PROCEDURE FOR ACTION IN CASE OF DEFAULT

[Liability for contravention of the Act, rules or the regulations-

25. A stock broker or a sub-broker who contravenes any of
F ***the provisions of the Act, rules or regulations framed thereunder shall be liable for any one or more of the following actions—***

(i) Monetary penalty under Chapter VIA of the Act.

(ii) Penalties as specified under 59[Chapter V of the
G *Securities and Exchange Board of India (Intermediaries) Regulations, 2008] including suspension or cancellation of certificate of registration as a stock broker or a sub-broker,*

(iii) Prosecution under section 24 of the Act.

H

LIABLE FOR MONETARY PENALTY

26. A stock broker or a sub-broker shall be liable for monetary penalty in respect of the following violations, namely-

(i) to (x) * * *

(xi) Indulging in fraudulent and unfair trade practices relating to securities.

(xii) to (xv) * * *

(xvi) Failure to exercise due skill, care and diligence."

20. Before embarking upon the necessary discussions, we would like to record our views on a somewhat unclear if not a confused picture that emanates from parallel provisions contained in the Act and the Regulations framed thereunder, as referred to above. This is particularly in the context of the power of imposition of penalty on determination of liability either for manipulative or fraudulent practices or for violation of the Code of Conduct Regulation, 1992. The different Regulations including the Regulations that prescribe the procedural course, namely, SEBI (Procedure for Holding Enquiry by Enquiry Officer and imposing Penalty) Regulations 2002 and the successor Regulation i.e. SEBI (Intermediaries) Regulations 2008 contain identical and parallel provisions with regard to imposition of penalty resulting in myriad provisions dealing with the same situation. A comprehensive legislation can bring about more clarity and certainty on the norms governing the security/capital market and, therefore, would best serve the interest of strengthening and securing the capital market.

21. The SEBI Act and the Regulations framed thereunder are intended to protect the interests of investors in the Securities Market which has seen substantial growth in tune with the parallel developments in the economy. Investors' confidence in the Capital/Securities Market is a reflection of the effectiveness of the regulatory mechanism in force. All such measures are intended to preempt manipulative trading and check all kinds of impermissible conduct in order to boost the investors' confidence in the Capital market. The primary purpose of the statutory enactments is to provide an environment conductive to increased participation and investment in the securities market which is vital to the growth and development of the economy. The provisions of the SEBI Act and the Regulations will, therefore, have to be understood and interpreted in the above light.

22. It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion.

23. Let us apply the aforesaid test to the facts of the present cases before us wherein admittedly there in no direct evidence forthcoming. The first relevant fact that has to be taken note of is that the scrips in which trading had been done were of illiquid scrips meaning thereby that such scrips were not listed in the Bombay Stock Exchange and, therefore, was not a matter of everyday buy and sell transactions. While it is correct that trading in such illiquid scrips is *per se* not impermissible, yet, voluminous trading over a period of time in such scrips is a fact that should attract the attention of a vigilant trader engaged/ engaging in such trades. The above would stand fortified by the note of caution issued by the Bombay Stock Exchange in the form of a notice/ memorandum alerting its members with regard to the necessity of exercising care and caution in case of high volume of trading in illiquid scrips, as already noted.

24. Insofar as first case (C.A. No.2818 of 2008 SEBI Vs. Kishore R. Ajmera) is concerned the proved facts are as follows:

(i) Both the clients are known to each other and were related entities.

(ii) This fact was also known to the sub-broker and the respondent – broker.

(iii) The clients through the sub-broker had engaged in mutual buy and sell trades in the scrip in question, volume of which trade was significant, keeping in mind that the scrip was an illiquid scrip.

Apart from the above there is no other material to hold either lack of vigilance or *bona fides* on the part of the sub-broker so as to make respondent-broker liable. An irresistible or irreversible inference of negligence/lack of due care etc., in our considered view, is not established even on proof of the primary facts alleged so as to make respondent-broker liable under the Conduct Regulations, 1992 as has been held in the order of the Whole Time Member, SEBI which, according to us, was rightly reversed in appeal by the Securities Appellate Tribunal.

25. This will take us to the second and third category of cases i.e. M/s Ess Ess Intermediaries Pvt. Ltd., M/s Rajesh N. Jhaveri and M/s Rajendra Jayantilal Shah [second category] and M/s Monarch Networth Capital Limited (earlier known as Networth Stock Broking Limited) [third category]. In these cases the volume of trading in the illiquid scrips in question was huge, the extent being set out hereinabove. Coupled with the aforesaid fact, what has been alleged and reasonably established, is that buy and sell orders in respect of the transactions were made within a span of 0 to 60 seconds. While the said fact by itself i.e. proximity of time between the buy and sell orders may not be conclusive in an isolated case such an event in a situation where there is a huge volume of trading can reasonably point to some kind of a fraudulent/manipulative exercise with prior meeting of minds. Such meeting of minds so as to attract the liability of the broker/sub-broker may be between the broker/sub-broker and the client or it could be between the two brokers/sub-brokers engaged in the buy and sell transactions. When over a period of time such transactions had been made between the same set of brokers or a group of brokers a conclusion can be reasonably reached that there is a concerted effort on the part of the concerned brokers to indulge in synchronized trades the consequence of which is large volumes of fictitious trading resulting in the unnatural rise in hiking the price/value of the scrip(s). It must be specifically taken note of herein that the trades in question were not "negotiated trades" executed in accordance with the terms of the Board's Circulars issued from time to time. A negotiated trade, it is clarified, invokes consensual bargaining involving synchronizing of buy and sell orders which will result in matching thereof but only as per permissible parameters which are programmed accordingly.

26. It has been vehemently argued before us that on a screen based trading the identity of the 2nd party be it the client or the broker is not known to the first party/client or broker. According to us, knowledge of who the 2nd party/ client or the broker is, is not relevant at all. While

A the screen based trading system keeps the identity of the parties anonymous it will be too naive to rest the final conclusions on said basis which overlooks a meeting of minds elsewhere. Direct proof of such meeting of minds elsewhere would rarely be forthcoming. The test, in our considered view, is one of preponderance of probabilities so far as adjudication of civil liability arising out of violation of the Act or the B provisions of the Regulations framed thereunder is concerned. Prosecution under Section 24 of the Act for violation of the provisions of any of the Regulations, of course, has to be on the basis of proof beyond reasonable doubt.

C The conclusion has to be gathered from various circumstances like that volume of the trade effected; the period of persistence in trading in the particular scrip; the particulars of the buy and sell orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors. The fact that the broker himself has initiated the sale of a particular quantity of the scrip on any particular day and at the D end of the day approximately equal number of the same scrip has come back to him; that trading has gone on without settlement of accounts i.e. without any payment and the volume of trading in the illiquid scrips, all, should raise a serious doubt in a reasonable man as to whether the trades are genuine. The failure of the brokers/sub-brokers to alert themselves to this minimum requirement and their persistence in trading in the E particular scrip either over a long period of time or in respect of huge volumes thereof, in our considered view, would not only disclose negligence and lack of due care and caution but would also demonstrate a deliberate intention to indulge in trading beyond the forbidden limits thereby attracting the provisions of the FUTP Regulations. The difference F between violation of the Code of Conduct Regulations and the FUTP Regulations would depend on the extent of the persistence on the part of the broker in indulging with transactions of the kind that has occurred in the present cases. Upto an extent such conduct on the part of the brokers/ sub-brokers can be attributed to negligence occasioned by lack of due care and caution. Beyond the same, persistent trading would show a G deliberate intention to play the market. The dividing line has to be drawn on the basis of the volume of the transactions and the period of time that the same were indulged in. In the present cases it is clear from all these surrounding facts and circumstances that there has been transgressions by the respondents beyond the permissible dividing line between H negligence and deliberate intention.

27. Insofar as the plea of violation of principles of natural justice, as raised on behalf of the respondent in C.A.No.282/2014 (Monarch Networth Capital Ltd.) is concerned, we do not think the same to be justified in any manner. The relevant extracts of the trade log which have been perused by us, in view of the clear picture disclosed with regard to the particulars of the offending transactions, must be held to be sufficient compliance of the requirement of furnishing adverse materials to the affected party. It is not the case of the respondents that such trading in the scrips in question had been a regular feature all along. Insofar as the statement of Indumati Gowda is concerned, it is the stand of the SEBI that the same was not relied upon to come to the impugned conclusions and findings. The statement of Shirish Shah, who admittedly was behind the manipulative practices in question through the brokers, was definitely not the foundation of the impugned findings recorded by the Whole Time Member of SEBI. The statement of Shirish Shah, even if not furnished to the respondent brokers, would not materially alter the situation inasmuch as it is the liability of the respondent-brokers, on account of their failure to correct the huge irregularities that were going on through their terminals, that was the subject matter of consideration of the Whole Time Member.

28. The fact that on behalf of the client Indumati Gowda similar transactions were entered into in respect of other illiquid scrips which did not disclose any irregularities can hardly be a ground to overlook what has happened in case of the scrip involved in which the respondent Monarch Networth Capital Limited had indulged in.

29. There is yet another argument advanced on behalf of the respondent - Monarch Networth Capital Limited, namely, that two of the brokers who were allegedly involved in circular trading were let off with monetary penalty. It is also argued that in case of M/s Ess Ess Intermediaries Pvt. Ltd., M/s Rajesh N. Jhaveri and M/s Rajendra Jayantilal Shah [second category] monetary penalty has been imposed for indulging in manipulative trading under the FUTP Regulations. On the said basis, it is submitted that a lesser penalty of monetary compensation would be justified.

30. We disagree with the above contention. The stage at which the monetary penalty was imposed on the two other brokers indulging in circular trading is prior to any determination of liability of the said two brokers who did not contest the charges. In the case of M/s Monarch

A Networth Capital Limited the stage has advanced far beyond the above and had culminated in operative findings against the said sub-broker. The imposition of monetary penalty in the case of M/s. Ess Ess Intermediaries Pvt. Ltd., M/s. Rajesh N. Jhaveri and M/s. Rajendra Jayantilal Shah [second category] for violation of the FUTP Regulations cannot be a basis for alteration of the punishment of suspension imposed on M/s. Monarch Networth Capital Limited to one of monetary penalty. In this regard, provisions of Section 15J of the SEBI Act has to be kept in mind and if the primary authority had thought it proper to impose different penalties in different cases involving different set of facts, we do not see how and why interference should be made in present appeals.

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31. In the light of the above discussions, we dismiss the Civil Appeal No.2818 of 2008 (SEBI Vs. Kishore R. Ajmera) and affirm the order dated 05.02.2008 passed by the Securities Appellate Tribunal, Mumbai.

Insofar as the remaining appeals are concerned, we allow the same and set aside the orders of the Securities Appellate Tribunal, Mumbai passed in each of the appeals and restore the orders and penalty imposed on the respondents - brokers by the respective orders of the Whole Time Member of the SEBI.

Nidhi Jain Appeals disposed.