

WTM/AB/WRO/WRO/18307/2022-23

SECURITIES AND EXCHANGE BOARD OF INDIA

FINAL ORDER

Under Sections 11(1), 11(4), 11B and 11D of the Securities and Exchange Board of India Act, 1992

In respect of:

Sr. No.	Name of the Entity	PAN
1	MSS Trading System Centre and its Proprietor Shri Valerian Louis Mendanha	ANOPM8570A

In the matter of unregistered portfolio manager services by MSS Trading System Centre (Prop: Shri Valerian Louis Mendanha)

1. The present proceedings emanate from an *ad interim ex parte order* cum show cause notice dated July 29, 2020 (hereinafter referred to as “**the interim order**” or “**SCN**”) passed by the Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) against MSS Trading System Centre (hereinafter referred to as “**MSS**”) and its sole Proprietor, Shri Valerian Louis Mendanha, as its activities were *prima facie* found to be those of an unregistered portfolio manager, in violation of the provisions of Section 12(1) of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “**SEBI Act, 1992**”) and Regulation 3 of SEBI (Portfolio Managers) Regulations, 1993 (since repealed) (hereinafter referred to as “**PMS Regulations, 1993**”). Further, it was *prima facie* found that MSS and its Proprietor promised assured returns to its clients, in violation of the provisions Regulations 3 (a), (b), (c), (d), 4(2)(k) and 4(2)(s)(i) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (hereinafter referred to as “**PFUTP Regulations, 2003**”) and 12A(a), (b) and (c) of SEBI Act, 1992. It was also found that MSS (proprietor: Mr. Valerian Louis Mendanha), as an Authorized Person of R.K. Global, a SEBI registered stock broker, had *prima facie* violated the provisions of SEBI circular MIRSD/ DR-1/ Cir- 16 /09 dated November

06, 2009. By the interim order, *inter alia* following directions were issued to MSS and its Proprietor, Shri Valerian Louis Mendanha (hereinafter referred to as the “Noticee”):

“

- 39.1.1. *to cease and desist from acting as an portfolio manager including the activity of acting and representing through any media (physical or digital) as a portfolio manager, directly or indirectly, and cease to solicit or undertake such activity or any other activities in the securities market, directly or indirectly, in any matter whatsoever, until further orders;*
- 39.1.2. *not to divert any funds raised from investors, kept in bank account(s) and/or in their custody until further orders;*
- 39.1.3. *not to dispose of or alienate any assets, whether movable or immovable, or any interest or investment or charge on any of such assets held in their name, including money lying in bank accounts except with the prior permission of SEBI.*
- 39.1.4. *to immediately withdraw and remove all advertisements, representations, literatures, brochures, materials, publications, documents, websites, digital contents, communications etc., in relation to their portfolio management services activity or any other unregistered activity in the securities market until further orders.*
- 39.1.5. *not to access the securities market and buy, sell or otherwise deal in securities or associate themselves with securities market, either directly or indirectly, in any manner whatsoever, until further orders;*
- 39.1.6. *If MSS and Mr. Valerian Louis Mendanha have any open position in any exchange traded derivative contracts, as on the date of the order, they can close out/ square off such open positions within 3 months from the date of order or at the expiry of such contracts, whichever is earlier. MSS and Mr. Valerian Louis Mendanha are permitted to settle the pay-in and pay-out obligations in respect of transactions, if any, which have taken place before the close of trading on the date of this order.*
- 39.1.7. *to provide a full inventory of all assets held in their name, whether movable or immovable, or any interest or investment or charge on any of such assets, including details of all bank accounts, demat accounts and mutual fund investments, immediately but not later than 5 working days from the date of receipt of this order.*
- 39.2. *The Depositories are directed to ensure that till further directions no debits are made in the demat accounts of MSS, proprietor Mr. Valerian Louis Mendanha held jointly or severally.*

- 39.3. *The Registrar and Transfer Agents are also directed to ensure that till further directions the securities, including Mutual Funds units, held in the name of MSS, proprietor Mr. Valerian Louis Mendanha, jointly or severally, are not transferred or redeemed.*
- 39.4. *Banks including Union Bank, wherein bank account is held in the name of MSS, proprietor Mr. Valerian Louis Mendanha (PAN: ANOPM8570A), are directed not to allow any debits / withdrawals and credits from the bank account number 611401010050109, without the permission of SEBI, until further orders. The Banks are also directed to ensure that this direction is strictly enforced..."*
2. The interim order was also in the nature of a show cause notice wherein the Noticee was provided with the opportunity to file his objections/reply, if any, within 21 days from the date of service of the interim order and were also to be provided with an opportunity of personal hearing before SEBI, on a date and time to be fixed on a specific request to be made by the Noticee. In this regard, Interim Order directed as under:

"40.This Order shall also be treated as a Show Cause Notice and MSS, proprietor Mr. Valerian Louis Mendanha are show caused as to:

- 40.1. *why the act of MSS, proprietor Mr. Valerian Louis Mendanha promising assured returns to its Clients in securities market may not be treated as a fraudulent practice/ act/ conduct, in terms of PFUTP Regulations;*
- 40.2. *why the services floated by MSS, proprietor Mr. Valerian Louis Mendanha should not be held as "Portfolio Management Services" in terms of the PM Regulations and thereby the activity of MSS, proprietor Mr. Valerian Louis Mendanha be treated as unregistered activity under the SEBI Act and relevant Regulations;*
- 40.3. *why suitable directions / prohibitions under Sections 11(1), 11(4), 11B and 11D of the SEBI Act and relevant SEBI Rules/Regulations, including the following, should not be issued / imposed against MSS, proprietor Mr. Valerian Louis Mendanha, for the alleged violation of provision of SEBI Act, PFUTP Regulations and PM Regulations as discussed above in this order:*
- 40.3.1. *Suitable directions for prohibition from buying, selling or otherwise dealing in securities market, either directly or indirectly, in any manner whatsoever, for an appropriate period;*
- 40.3.2. *Directions to not be associated with any registered intermediary/ listed entity in the securities market, in any manner whatsoever;*
- 40.3.3. *Direction to refund the amount collected along with the promised returns from the subscribers / investors / clients for its various services / activity; and*

40.3.4. Any other directions as it deemed necessary..."

3. The interim order was served on the Noticee by way of registered post. Thereafter, the Noticee, vide letter dated August 20, 2020 requested for inspection of documents. The request of the Noticee was acceded to and he was granted an opportunity to inspect the documents available on record on August 31, 2020. However, after the inspection, no reply was received from the Noticee. The file was placed before the then Competent Authority for granting a hearing date on October 16, 2020. An opportunity for personal hearing was granted to the Noticee on January 27, 2021. However, vide email dated January 25, 2021, the Noticee sought an adjournment in the matter, stating that he was unable to suitably brief a lawyer, since he had recently been diagnosed with Covid-19. The request of the Noticee was granted, however, in view of the then Whole Time Member's term coming to an end, the matter was placed before the undersigned on August 24, 2021 for granting date for personal hearing in the matter, and a hearing was scheduled on October 22, 2021. However, the Noticee again sought an adjournment on account of some personal difficulties. The request of the Noticee was acceded to, and the hearing was rescheduled to November 22, 2021. The Noticee again requested that the hearing be adjourned, and was telephonically advised to attend the hearing and make his submissions. However, on the scheduled date and time of hearing, the Noticee did not appear for the hearing. Accordingly, the Noticee was advised to file his written submissions/ reply in the matter within ten days, failing which the matter would be proceeded on the basis of the material available on record. However, on the repeated request of the Noticee, a last and final opportunity for personal hearing was granted to him on December 24, 2021. On the scheduled date and time of hearing, the Noticee appeared for the hearing in person. The Noticee stated that he had filed an application for settlement with SEBI. The Noticee also submitted that he had filed a written reply dated December 24, 2021 and had nothing further to add to it. Subsequently, the application for settlement filed by the Noticee was rejected, and the Noticee was informed by SEBI of the same vide email dated May 24, 2022.

4. I note that the following facts have *inter alia* been recorded in the interim order dated July 29, 2021 against the Noticee:

- a. *SEBI had received a reference letter dated June 27, 2019 from Economic Offences Cell ('EOC') of Panaji Goa, forwarding a complaint of Shri Deron Almeida against the Noticee for accepting investment of Rs. 2.25 lakh from the complainant for conducting Bank Nifty Future trading on intra-day basis. EOC also mentioned that trading was conducted by the Noticee through M/s. R.K. Global Shares & Securities Ltd. (hereinafter referred as "R.K. Global"), a SEBI registered stock broker who was handling Demat account of the complainant, Shri Deron Almeida.*
- b. *Upon receipt of the complaint, SEBI conducted an examination in relation to the affairs of MSS, Proprietor Shri Valerian Louis Mendanha to ascertain possible violation, if any, of the provisions of SEBI Act, 1992.*
- c. *Agreements entered between MSS and its client were examined and it was prima facie observed that clients had to maintain funds in their trading account and MSS would execute intraday trades on behalf of its clients. The total amount / fees received in the bank account of MSS from April 17, 2012 to September 09, 2019 is Rs.1,60,90,091/-. It was prima facie observed that, MSS, on behalf of its clients, has undertaken the management of funds as well as the securities of its clients and executed intraday trades on behalf of its clients since April 2012. It was noted that MSS, proprietor Shri Valerian Louis Mendanha was not registered with SEBI in the capacity as a portfolio manager.*
- d. *There was reasonable evidence that the Noticee was acting as portfolio manager without obtaining certificate of registration and carrying out unregistered portfolio management services, thereby, prima facie, is in violation of the provisions of Section 12(1) of the SEBI Act and regulation 3 of the PM Regulations.*
- e. *It prima facie appeared that the Noticee was knowingly making false representations in its agreement with clients about assured returns on investment / trading in securities market, thereby luring and inducing investors to deal in securities by availing their services. Thus, it was found*

that the Noticee, had prima facie violated the provisions of Section 12A(a), (b) and (c) of the SEBI Act, 1992 and Regulations 3 (a), (b), (c), (d), 4(2)(k) and 4(2)(s)(i) of the PFUTP Regulations.

- f. Further, Shri Valerian Louis Mendanha is an Authorised Person (AP) of R.K. Global, a SEBI registered stock broker. Being an AP, in terms of the agreement between the broker (R.K. Global) and the Noticee read with SEBI circular MIRSD/ DR-1/ Cir- 16 /09 dated November 06, 2009, the Noticee was not permitted to receive any amount such as fees, charges, commission, salary, etc from its clients. However, as per the MSS letter dated July 19, 2019, Bank statement of MSS and agreement of MSS with clients, it is noted that MSS had charged fees and other charges from its clients to the tune of Rs.1,60,90,091/- from April 17, 2012 to September 09, 2019. Hence, it was found that the Noticee has prima facie violated the provisions of SEBI circular MIRSD/ DR-1/ Cir- 16 /09 dated November 06, 2009.*

5. I note that the Noticee, vide his reply dated December 24, 2021, has *inter alia* submitted as follows:

- a. That the operations of MSS Trading System Centre started in the year 2013. I had made the MSS Trading System after intense research for over seven years and after trying various development models. MSS Trading System is dependent on two things i.e. an Advisory Chart and Technical Chart.*
- b. I had specifically approached SEBI to enquire if any sought of registration/compliance will be required for the software/trading system. However, the same was answered in the negative. Infact, a similar attempt to solicit advise from SEBI on registration of the software was also left unanswered by SEBI in the year 2019.*
- c. While on boarding users for the trading system, a disclaimer was issued to the user that the subscription to the Trading system has to be made knowing fully well the risk of stock market and that the user alone shall*

be responsible for trades carried out on the basis of calls generated by the system.

- d. As per Regulation 2(cb) of PMS Regulations, for a person to be a Portfolio Manager he/she has to manage or administer the portfolio securities or the funds of the user. In the present case, the intra-day trades were executed in the accounts of the user on the advice/recommendation by the MSS Trading System, however the trades were executed either by the users themselves or by a staff employed on their behest.*
- e. The staff/person appointed by or on behalf of the user, used to do the trading in the user's account. The only facility provided by MSS Trading Centre was limited to training of the staff and providing advisory services through the software.*
- f. The monthly return as mentioned in some of the agreements with the users cannot be treated as assured return. The users were only given a tentative figure based on the amount of investment made by them with MSS Trading System Centre.*
- g. The users were never assured any fixed returns to investors. I only promoted the MSS Trading System developed by me, through which the investors can invest money in securities market and make certain profit without taking much risk and not relying on market speculations or rumours or tips.*
- h. Every agent or intermediary promotes return on investment, I did the same. I gave the disclaimer about the risks involved in trading in securities market and that no profit is guaranteed. By this logic SEBI will hold the acts of each and every person to be fraudulent who has promoted general public to invest in securities market.*
- i. The fees provided to MSS Trading System Centre under the Agreement executed with the user was for the services, and is completely independent having no relation with me being an authorized person of R.K. Global. Therefore, the same is clear from a perusal of the*

Agreement executed between MSS Trading System Centre and the user.

- j. It is again reiterated that the amount collected from the users with respect to the services provided and agreement executed by MSS Trading System Centre is only Rs.1,04,07,000/- and the remaining excess money figure is not the fees received by MSS Trading System Centre.*

Consideration of submissions and findings:

6. I have considered the allegations made in the interim order along with the findings of the examination by SEBI stated therein and reply received in the matter and submissions made by the Noticee during hearing.

Unregistered Portfolio Management Activities

7. I note that the definition of portfolio manager as given in Regulation 2(cb) of the PMS Regulations, 1993 (since repealed) is as follows:

“portfolio manager “means any person who pursuant to a contract or arrangement with a client, advises or directs or undertakes on behalf of the client (whether as a discretionary portfolio manager or otherwise) the management or administration of a portfolio of securities or goods or the funds of the client, as the case may be”

8. The SCN notes that upon receipt of the complaint against the Noticee, SEBI conducted an examination to ascertain any possible violation, if any, of the provisions of SEBI Act, 1992 and rules and regulations made thereunder. Vide a letter dated June 28, 2019, SEBI had sought certain documents / information from the Noticee, pertaining to its business.
9. Vide letter dated July 15, 2019, MSS submitted that Valerian Louis Mendanha (PAN: ANOPM8570A) is the proprietor of MSS. It was submitted that MSS started its operations in the year 2013. Further, that the MSS Trading System is a proprietary advisory software developed by Valerian Louis Mendanha for intra-day

trading only, and is the only product offered by the Noticee. MSS has no branches, group or associate company linked to the firm. The Noticee also provided a list of 80 clients to whom such services were provided since start of operations and in lieu of fees.

10. Vide its letter dated August 01, 2019, the Noticee submitted some copies of agreements entered between MSS and its clients. From the same, the following terms were noted:

- a. MSS through its proprietary advisory software (MSS Trading System) will make intraday trading calls.
- b. Trading shall be done on NSE only (F&O) by MSS.
- c. Clients are not allowed at the centre.
- d. A prospective client has to pay towards:
 - i. booking a seat (Rs.25,000/- or Rs.50,000/- one time);
 - ii. MSS subscription fee (Rs.1,00,000/- or Rs.2,00,000/- MSS Trading System Centre fee for 1 year);
 - iii. funding of trading account (Rs.50,000/- or Rs.75,000/-);
 - iv. training fee (Rs.25,000/- one time);
 - v. staff salary (Rs.7,500/- or Rs.10,000/- per month); and
 - vi. thereafter, a fee of 15% shall be charged for the subsequent profits above 100%.
- e. Client shall authorize the use of their ODIN trading account by the staff appointed at the centre.

11. From the above terms of the agreement, the interim order *prima facie* observed that clients have to maintain funds in their trading account and MSS would execute intraday trades on behalf of its clients.

12. Vide letter dated July 15, 2019, the Noticee had provided a list of 80 clients who had availed of the MSS Trading System since start of operations and paid fees. However, since no amount was mentioned against 29 clients, the interim order *prima facie* concluded that MSS had collected fees from 51 clients. Further, MSS

vide letter dated July 19, 2019 had submitted year-wise details of fees collected from 51 clients, which is summarized as under:

Calendar Year	No. of clients	Fees collected
2013	5	3,85,000
2014	7	10,70,000
2015	7	5,70,000
2016	5	9,57,000
2017	20	44,80,000
2018	4	18,25,000
2019 (upto 19.07.2019)	3	11,20,000
Total	51	1,04,07,000

13. The interim order notes that MSS held a bank account with Union Bank of India, Mapusa, Goa bearing CAGEN a/c no. 611401010050109. As per the bank statement obtained from Union Bank, the total amount received in the aforesaid bank account from April 17, 2012 to September 09, 2019 was Rs.1,60,90,091.
14. Thus, while the Noticee vide letter date July 15, 2019 had submitted that the operations were started in 2013, however, as per the bank statement of MSS, amounts were received in the account since April 2012. Hence, it was observed that MSS had started its operation since April 2012.
15. It was observed that clients had to maintain funds in their trading account. Employees of MSS would execute intraday trades on behalf of these clients. Hence, the Noticee had undertaken the management of funds as well as the securities of its clients and executed intraday trades on behalf of its clients since April 2012.
16. In this regard, I note that the Noticee has stated that while on-boarding users for the trading system, a disclaimer was issued to them that the subscription to the trading system should be made keeping in mind the risk of stock market. It was also stated that the user alone shall be responsible for trades carried out on the basis of calls generated by the system. Further, the Noticee has submitted that as per Regulation 2(cb) of the PMS Regulations, for a person to be a Portfolio Manager he/she has to manage or administer the portfolio securities or the funds of the user. In the present

case, the intra-day trades were executed in the accounts of the user on the advice/recommendation by the MSS Trading System. The trades, however, were executed either by the users themselves or by a staff employed on their behest. The Noticee has also submitted that the staff/ person appointed by or on behalf of the user, used to do the trading in the user's account. The only facility provided by the Noticee was limited to training of the staff and providing advisory services through the software.

17. I note that the definition of portfolio manager includes undertaking of management of the portfolio of securities or funds of the clients. As noted above, the very first term in the Agreement entered into by MSS with its clients stated that no client was allowed at the centre. The client also had to authorize the use of his/ her ODIN trading account by the staff appointed at the centre. The client had to fund his trading account. The trades would be done everyday (as far as possible) by the employees of the Noticee and the record would be sent to the client through the broker via SMS or email. From the same, I note that while the client had to maintain the funds, the trades were undertaken by the staff who were authorized by the client, to use the client's trading account. The Noticee has stated that the clients could execute the trades on their own or through the staff, but he has not given any further details about how the clients could track the recommendations of the software to execute trades on the basis thereof, without the involvement of the Noticee, as they were not even allowed in the centre and were informed of the trades executed through their broker. Moreover, the line in the Agreement that *"Trades are done everyday as far as possible..."* indicates that the client had given the management of the portfolio of funds and securities to the Noticee. The Agreement also states that the staff salary had to be paid 3 days before the month ends. If this amount was not paid, a retraining fee of Rs.25,000 would have to be paid by the client. Hence, while the Noticee has stated that the staff/ person was appointed at the behest of the client, such terms indicate that the staff were employees of MSS and not of the client, as MSS was deciding the date of payment of their salary, though it was chargeable to the clients. The fact that the trades were executed as per the recommendations of the system developed by the Noticee by the employees of

MSS further shows that the Noticee had undertaken the management of the portfolio of securities and funds of his client. I note from the terms of the agreements entered between MSS and investors, as discussed in para 10 above, that MSS would invest the funds of its clients at its discretion.

18. I note that there are two types of portfolio management services. In discretionary portfolio management service, the portfolio manager individually and independently manages the funds and securities of each client in accordance with the needs of the client. Under the non-discretionary portfolio management service, the portfolio manager manages the securities or goods or funds in accordance with the directions of the client. As noted above, the client was not allowed at the centre. Further, the agreement stated that the *trades are done everyday as far as possible and the record comes to you through your broker via sms or email*, which implies that the client was informed of the trade after it was concluded. While brokers can retain funds for pay-in and margin requirements, the Noticee required its clients to maintain funds in their account even though the Noticee was not a registered broker. From the same, it appears that the investors did not purchase, sell or deal in any securities on his or her own discretion. Hence, I note that MSS was offering discretionary portfolio management services to its clients. Further, even if it is presumed that the clients of the Noticee gave the directions to the staff for execution of the trades, the same would be in the nature of non-discretionary portfolio management service, and would require registration.

19. The Noticee has also referred to the disclaimer that the user alone shall be responsible for trades carried out on the basis of calls generated by the system. However, a blanket disclaimer cannot alter the fact that the Noticee had actually undertaken the management of the portfolio of the client's funds and securities as shown above.

20. Hence, I am of the view that the Noticee was acting as a Portfolio Manager, as defined under Regulation 2(cb) of the PMS Regulations, 1993 (since repealed).

21. I also note that, any person carrying out portfolio management activities has to necessarily obtain registration from SEBI and conduct its activities in accordance with the provisions of SEBI Act, 1992 and Regulations framed thereunder. Section 12(1) of SEBI Act, 1992 reads as under:

“No stock broker, sub broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary who may be associated with securities market shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act.”

22. I note that for seeking a certificate of registration for acting as portfolio manager, the entity was required to satisfy *inter alia* the various requirements, as provided under the PMS Regulations, 1993. The activities engaged in by the Noticee, as brought out from the various materials described above, seen in the backdrop of the regulatory provisions show that the Noticee was acting as a portfolio manager, although the Noticee was not registered with SEBI in the capacity of a portfolio manager. Hence, I find that these activities, without holding the mandatory certificate of registration as portfolio manager, are in violation of Section 12(1) of SEBI Act, 1992 read with Regulation 3 of the PMS Regulations, 1993 and Regulation 42 of the PMS Regulations, 2020.

23. I note that the Noticee have been found to be in violation of the provisions of the PMS Regulations, 1993. I note that the PMS Regulations, 1993 have been repealed by Regulation 42 of the PMS Regulations, 2020. Regulation 42(2)(a) of the PMS Regulations, 2020 provides as under:

“Notwithstanding such repeal, — (a) anything done or any action taken or purported to have been done or taken including registration or approval granted, fees collected, registration or approval, suspended or cancelled, any adjudication, enquiry or investigation

commenced or show-cause notice issued under the repealed regulations, prior to such repeal, shall be deemed to have been done or taken under the corresponding provisions of these regulations;”

24. In this regard, it would be appropriate to refer to the judgment of Hon'ble Supreme Court of India in **Sahara Real Estate Corporation and Others Vs. SEBI (2013) 1 SCC1**, wherein, it was held that:

103. Repeal and Saving Clause under ICDR 2009 would clearly indicate that the violation under DIP Guidelines was a continuing one. Regulation 111 of ICDR reads as follows:

“Repeal and Savings

111. (1) On and from the commencement of these regulations, the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 shall stand rescinded.

(2) Notwithstanding such rescission;

(a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations;

(b) any offer documents, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of these regulations.”

104. Regulation 111(1) of ICDR 2009 rescinded the DIP Guidelines from 26.8.2009 and clause (2) of Regulation 111 contains the saving clause. The expression “anything done” or “any action taken” under Regulation 111(1) are of wide import and would take anything done by the company omitted to be done which they legally ought to have done. Non-performance of statutory obligations purposely or otherwise may also fall within the above mentioned expressions. Failure to take any action by SEBI under DIP Guidelines, in spite of the fact that Saharas did not discharge their statutory obligation, would not be a ground to contend that 2009 Regulations would not apply as also the saving clause. 2009 Regulations, in my view, will apply to all companies whether listed or unlisted. Further, in the instant case, SEBI was not informed of the issuance of securities by the Saharas while the DIP Guidelines were in force and Saharas continued to mobilize funds from the public which was nothing but continued violation which started when the DIP Guidelines were in force and also when they were replaced by 2009 Regulations. Further, it may also be

recalled that any solicitation for subscription from public can be regulated only after complying with the requirements stipulated by SEBI, in fact, an amendment was made to Schedule II of the Companies Act vide notification No. GSR 650(3) dated 17.9.2002 by inserting a declaration which has to be signed by the directors of the company filing the prospectus, which reads as under:

“That all the relevant provisions of the Companies Act, 1956, and the guidelines issued by the Government or the guidelines issued by the Securities and Exchange Board of India established under Section 3 of the Securities and Exchange Board of India Act, 1992, as the case may be, have been complied with and no statement made in prospectus is contrary to the provisions of the Companies Act, 1956 or the securities and Exchange Board of India Act, 1992 or rules made there-under or guidelines issued, as the case may be.”

25. I find that ratio of the aforesaid judgment of Hon’ble Supreme Court in Sahara case (*supra*) with respect to interpretation of repeal and saving clause of ICDR 2009 squarely applies to the facts of the present case. Therefore, violation of PMS Regulations, 1993 can be pursued under the corresponding provisions of the PMS Regulations, 2020.

26. As per the bank statement obtained from Union Bank, the total amount received by the Noticee from April 17, 2012 to September 09, 2019 was Rs.1,60,90,091/, as observed above. Further, the interim order notes that though MSS vide its letter dated July 15, 2019 submitted that all operations have been stopped, the bank statement for September – October 2019, shows that there is a credit transaction of Rs. 1,09,000/- from Edna Mendhana on September 19, 2019, one of the clients of MSS as per client list attached to its letter dated July 15, 2019. Further, during September – October 2019, debit transactions are also noted from the following persons, who are the clients of MSS.

Sl. No.	Date of debit transaction	Name of the client	Amount (Rs.)
1	19.09.2019	Lazarces D’Souza	50,000
2	23.09.2019	Claudio Pacheco	75,000
3	03.10.2019	Danzil Carasco	1,50,000
4	04.10.2019	Ranjit Usgaonkar	30,000
5	13.11.2019	Bosco M. D’Souza	50,000

27. I note that the Noticee has stated that the amount received from Edna Mendhana was a loan. Further, he has also stated before me that the amount collected from users with respect to the services provided and agreement executed by MSS Trading System Centre is only Rs.1,04,07,000/- and the remaining excess money figure is not the fees received by MSS Trading System Centre. The Noticee has also included a list of clients and amounts to support his submission. However, the submission of the Noticee neither gives any reason for the difference in the amount given by him to SEBI and the actual amount received in the account, nor does the list of clients and amounts throw any light on the same. In view of the same, I am unable to accept the submission of the Noticee in the absence of any supporting evidence. Hence, the total amount collected by the Noticee from his clients is Rs. 1,61,99,091 as on September 19, 2019.

Promising Assured Returns

28. I note that 'fraud' and 'fraudulent' are defined in Regulation 2(1)(c) of the PFUTP Regulations state as under:

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

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

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

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

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

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

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

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

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

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

And “fraudulent” shall be construed accordingly ...”

29. It has been alleged that the Noticee violated the provisions of Section 12A(a), (b) and (c) of the SEBI Act, 1992 and Regulations 3 (a), (b), (c), (d), 4(2)(k) and 4(2)(s)(i) of the PFUTP Regulations, which are reproduced below:

SEBI Act, 1992

“12A. 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 recognized 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 recognized stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;”

PFUTP REGULATIONS

“Prohibition of certain dealings in securities

3. No person shall directly or indirectly—

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

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

(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 recognized stock exchange;

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

4. Prohibition of manipulative, fraudulent and unfair trade practices

(1).....

(2) Dealing in securities shall be deemed to be a manipulative fraudulent or an unfair trade practice if it involves any of the following:—

.....

(k) disseminating information or advice through any media, whether physical or digital, which the disseminator knows to be false or misleading and which is designed or likely to influence the decision of investors dealing in securities

(s) mis-selling of securities or services relating to securities market;

Explanation- For the purpose of this clause, "mis-selling" means sale of securities or services relating to securities market by any person, directly or indirectly, by—

(i) knowingly making a false or misleading statement

30. The interim order observes that MSS had offered / provided three types of services to its clients, details of which are as under:

a. Type 1

- i. Rs. 25,000/- on booking the seat. This is for setting up only (incl. equipment) and not for staff training (one time only).
- ii. Rs. 50,000/- funding of trading account (your trading capital).
- iii. Rs. 1,00,000/- MSS fee for one year for first 100% returns calculated cumulatively, inclusive of salary @ Rs. 90,000/- per year. Thereafter a fee of 15% will be charged for the subsequent profit over 100%.
- iv. Rs. 25,000/- training fee (one time only).
- v. Staff salary: Rs. 7,500/- per month.

b. Type 2

- i. Rs. 50,000/- on booking the seat (one time only).
- ii. Rs. 75,000/- funding of your trading account.
- iii. Rs. 2,00,000/- MSS fee for one year for first 200% returns calculated cumulatively. Thereafter a fee of 15% will be levied on the profits above the limit.
- iv. Rs. 25,000/- training fee (one time only).

v. Staff salary: Rs. 10,000/- per month

c. **Type 3**

- i. Rs.1,50,000/- full payment.
- ii. The account is created and trading done with a monthly return of Rs. 20,000/-.
- iii. The validity is for a period of one year only.

31. As can be seen above, *Type 3* agreements entered between MSS and its clients had a clause for assured / guaranteed returns. For example, on page 6 Schedule 3 of agreement dated June 24, 2019 between MSS and Shri Vijay D. Tahmankar it is stated that “Rs. 1,50,000/- full payment. The account is created and trading done with a monthly return of Rs. 20,000/-”. In view of the above the interim order observed that there was *prima facie* evidence that MSS, proprietor Mr. Valerian Louis Mendanha promised assured returns to its clients.

32. In this regard, the Noticee has stated that the monthly return as mentioned in some of the agreements with the users cannot be treated as assured return. The users were only given a tentative figure based on the amount of investment made by them with MSS Trading System Centre. The users were never assured any fixed returns. The Noticee has also submitted that every agent or intermediary promotes return on investment, and that he did the same. The Noticee has stated that the disclaimers in the agreements mentioned the risks involved in trading in securities market and that no profit is guaranteed. By this logic SEBI will hold the acts of each and every person to be fraudulent who has prompted general public to invest in securities market.

33. I note that the *disclaimers* mentioned by the Noticee mention the risk of the stock market and that the client will be responsible for losses. The disclaimer *inter alia* also mentions that there is no guarantee that the trading signals or method of analysis would be profitable. However, despite the same, in the type 3 agreement, as mentioned above, a monthly return of Rs. 20,000 was promised. Thus, it once again appears that the Noticee was using the disclaimer as a smoke screen while

continuing his operations and assuring returns in violation of SEBI regulations. As noted above, under the type 3 agreement an account was created on full payment of Rs.1,50,000 with a validity of one year and trading was done with a monthly return of Rs.20,000. The Noticee has also stated that this was only a tentative figure. However, from the above it is seen that the Noticee was assuring returns of Rs.20,000 per month to his clients. Further, the submission of the Noticee that every agent or intermediary promises returns, and the Noticee did the same, is nothing but a tacit admission that he assured returns to his clients. Hence, the submission of the Noticee does not have any merit.

34. The assurance of profit was false and misleading, and the Noticee who was a seasoned operative with several years' experience in the securities market, knew it as such. Returns and profits while trading in securities market cannot be predicted, and are subject to market risks. The information that returns would be assured was deceptive, and the Noticee knew of the same and yet disseminated such claims to prospective clients. Such an assurance of profit was meant to induce clients to enlist the services of the Noticee.

35. Further, without holding any registered portfolio manager certificate, they offered portfolio management services to investors / clients with the objective of raising money through subscriptions / fees. A portfolio manager whether registered or unregistered cannot offer assured returns to investors as was being done by the Noticee.

36. In view of the above, I am of the view that the Noticee has violated the above mentioned provisions of Regulations 4(2)(k) and 4(2)(s) of the PFUTP Regulations.

Authorized Person of R.K. Global

37. The interim order notes that the Noticee conducted the trades through R.K. Global, a SEBI registered stock broker. Information was sought from R.K. Global regarding

its relationship with the Noticee. R.K. Global, vide email dated August 16, 2019, submitted following documents:

- i. An agreement between R.K. Global and the Noticee dated November 14, 2013.
- ii. Details of 81 clients introduced by Shri Valerian Mendanha / MSS since 2013 and the details of volume of business done by MSS since inception.

38. The agreement between R.K. Global and Shri Valerian Louis Mendanha (Prop. of MSS) dated November 14, 2013, showed that Shri Valerian Louis Mendanha was entitled to act as an 'Authorized Person' within the meaning and subject to the SEBI Circular MIRSD/ DR-1/ Cir- 16 /09 dated November 06, 2009. Thus, the Noticee is an Authorised Person of R.K. Global.

39. The interim order notes that the SEBI circular MIRSD/ DR-1/ Cir- 16 /09 dated November 06, 2009 provides that *"The authorised person shall receive his remuneration - fees, charges, commission, salary, etc. - for his services only from the stock broker and he shall not charge any amount from the clients."* The interim order found that the Noticee, had *prima facie* violated the provisions of SEBI circular MIRSD/ DR-1/ Cir- 16 /09 dated November 06, 2009 by receiving money directly from clients.

40. In this regard, the Noticee has submitted that the fees provided by clients to MSS Trading System Centre under the Agreement executed with them was for the services, *i.e.* for providing the software, and was completely independent and had no relation with him being an authorized person of R.K. Global.

41. I note that RK Global has submitted that 81 clients were introduced to the broker by the Noticee as an AP. I also note that the total number of clients that the Noticee had in respect of his unregistered portfolio management services was 80. Thus, it is a reasonable inference that the very same clients who availed his services for portfolio management were also introduced to RK Global. As an AP, he was required by SEBI's circular MIRSD/ DR-1/ Cir- 16 /09 dated November 06, 2009 to

not accept any amount from the clients. However, as noted above the Noticee offered portfolio management services without obtaining registration, he also directly received payment for the same from the very same clients. Hence, the Noticee violated the provisions of SEBI circular MIRSD/ DR-1/ Cir- 16 /09 dated November 06, 2009.

42. It is observed that, vide the interim order dated July 29, 2020, the Noticee had been *inter alia* directed to not access the securities market and buy, sell or otherwise deal in securities or associate themselves with securities market, either directly or indirectly, in any manner whatsoever, until further orders, and the said directions are still in force.

Directions:

43. In view of the foregoing, I, in exercise of the powers conferred upon me in terms Sections 11, 11(4) and 11B read with of Section 19 of the SEBI Act, 1992, hereby direct that:

- a) The Noticee shall, within a period of three months from the date of coming into force of this order, refund the money received from any complainants and/or investors, as fees or consideration or in any other form, in respect of their unregistered portfolio management activities;
- b) The Noticee shall issue public notice in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact person such as names, addresses and contact details, within 15 days of coming into force of this order;
- c) The repayments to the complainants and/or investors shall be effected only through Bank Demand Draft or Pay Order or electronic fund

transfer or through any other appropriate banking channels, which ensures audit trails to identify the beneficiaries of repayments;

- d) The Noticee is prevented from selling his assets, properties and holding of mutual funds/shares/securities held by him in demat and physical form except for the sole purpose of making the refunds as directed above. Further, the banks are directed to allow debit only for the purpose of making refunds to the clients/ investors/ complainants who were availing the portfolio management services from the Noticee, as directed in this order, from the bank accounts of the Noticee;
- e) After completing the aforesaid repayments, the Noticee shall file a report of such completion with SEBI addressed to the Division Chief, Investment Management Department, SEBI Bhavan, Plot no. C-4A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai -400 051, within a period of 15 days, after completion of three months from the coming into force of this order, duly certified by an independent Chartered Accountant and the direction at paragraph 43(d) above shall cease to operate upon filing of such report on completion of refunds to complainants/ investors;
- f) The Noticee is debarred from accessing the securities market, directly or indirectly and is prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in any manner whatsoever, for a period of six months from the date of this order or till the expiry of 6 months from the date of completion of refunds to complainants/ investors as directed in paragraph 43(a) above, whichever is later;
- g) The Noticee shall not undertake, either during or after the expiry of the period of debarment/restraint as mentioned in paragraph 43 (f) above,

either directly or indirectly, portfolio management services or any activity in the securities market without obtaining a certificate of registration from SEBI as required under the securities laws.

44. The direction for refund, as given in paragraph 43(a) above, does not preclude the clients/investors to pursue the other legal remedies available to them under any other law, against the Noticee for refund of money or deficiency in service before any appropriate forum of competent jurisdiction.

45. This order comes into force with immediate effect.

46. A copy of this order shall be sent to the Noticee, recognized Stock Exchanges, the relevant banks, Depositories and Registrar and Transfer Agents of Mutual Funds to ensure that the directions given above are strictly complied with.

Date: August 18, 2022

Place: Mumbai

ANANTA BARUA

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA