

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

UNDER SECTION 12(3) OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT,
1992 READ WITH REGULATION 27 OF SECURITIES AND EXCHANGE BOARD OF
INDIA (INTERMEDIARIES) REGULATIONS, 2008

In respect of:

Sl. No	NAME	SEBI Registration No
1.	Choice Merchandise Broking Pvt. Ltd.	INZ000025939

In the matter of National Spot Exchange Limited (NSEL)

BACKGROUND

1. Choice Merchandise Broking Pvt. Ltd. (hereinafter referred to as “**CMBPL**”/ “**Noticee**”) was registered with Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) as a stock broker bearing SEBI registration no. INZ000025939. CMBPL was earlier a member of National Spot Exchange Limited (hereinafter referred to as “**NSEL**”).
2. The present proceedings originated from the enquiry report dated November 18, 2019 (hereinafter referred to as “**DA Report**”), submitted by the Designated Authority (hereinafter referred to as “**DA**”) in terms of Regulation 27 of the SEBI (Intermediaries) Regulations, 2008 (hereinafter referred to as “**Intermediaries Regulations**”) as it stood at the relevant point of time prior to its amendment vide SEBI (Intermediaries) (Amendment) Regulations, 2021, w.e.f. January 21, 2021. The DA, based on findings recorded in the said DA Report, recommended that the registration of CMBPL as a trading and clearing member may be cancelled.

SHOW CAUSE NOTICE, REPLY AND HEARING:

3. Pursuant to the DA Report, a post enquiry show cause notice dated January 15, 2020 (hereinafter referred to as “**SCN**”) was issued to the Noticee, alongwith copies of (i) the aforesaid DA Report; (ii) Finance Ministry letter dated December 30, 2014 to Forwards Market Commission (hereinafter referred to as “**FMC**”); and (iii) Hon'ble Bombay HC's order in criminal bail application no. 1263 of 2014 in Jignesh Prakash Shah vs. State of Maharashtra dated August 22, 2014.
4. While the aforesaid enquiry proceedings were pending, SEBI passed five separate orders in NSEL matter during February 2019 rejecting the applications filed by five other entities for registration as commodity brokers. Aggrieved by the said SEBI orders, the entities filed separate appeals before the Hon'ble Securities Appellate Tribunal (“**Hon'ble SAT**”). The Hon'ble SAT, *vide* its common order in the matter of Geofin Comtrade Ltd. And Ors. vs. SEBI (Appeal no. 214 of 2019) dated June 09, 2022 (“**June 2022 SAT Order**”), remanded the aforesaid SEBI orders to decide these matters afresh within six months from the date of the said order. While remanding the said SEBI orders, the Hon'ble SAT *inter alia* held as under:

“42...The matters are remitted to the WTM to decide the matter afresh in the light of the observations made aforesaid in accordance with law after giving an opportunity of hearing to the brokers. All issues raised by the brokers for which a finality has not been reached remains open for them to be raised before the WTM. It will be open to the WTM to rely upon other material such as the complaint letters of NSEL, EOW report, EOW charge sheet, etc. provided such copies are provided to the brokers and opportunity is given to rebut the allegations. Such additional documents relied upon by the respondent should form part of the show cause notice for which purpose, it will be open to the WTM to issue a supplementary show cause notice.....”

SUPPLEMENTARY SCN:

5. Pursuant to the June 2022 SAT Order, it was felt necessary to furnish certain additional documents/ material to the Noticee and grant an opportunity of personal hearing. Accordingly, a supplementary SCN dated February 27, 2023 (hereinafter referred to as “**SSCN**”) was served on the Noticee along with the following documents:
 - 5.1. Copy of SEBI complaint dated September 24, 2018 filed with Economic Offences Wing (hereinafter referred to as “**EOW**”);
 - 5.2. Copy of FIR dated September 28, 2018 pursuant to the complaint filed by SEBI under section 154 of Criminal Procedure Code, 1973 (hereinafter referred to as “**CrPC**”); and
 - 5.3. Amended Schedule II of Intermediaries Regulations.

HEARING:

6. Vide letters dated February 07, 2020 and May 19, 2022, Noticee submitted its reply to the SCN. In compliance with the principles of natural justice, an opportunity of personal hearing was granted to the Noticee on May 24, 2022. Vide e-mail dated March 23, 2023, Noticee submitted its reply to the SSCN. In compliance with the principles of natural justice, an opportunity of personal hearing was granted to the Noticee on August 03, 2023 through video conferencing. The Authorized Representatives (hereinafter referred to as “**ARs**”) of the Noticee appeared online before me on August 03, 2023 and reiterated their submission made vide e-mail dated March 23, 2023. During the course of hearing, the AR also submitted that Noticee has merged with Choice Equity Broking Pvt. Ltd. (hereinafter referred to as “**CEBPL**”) and agreed to submit the documents related to such merger.

REPLY AND WRITTEN SUBMISSION:

7. The reply of the Noticee on the merger of Noticee with CEBPL is summarized hereunder:

- 7.1. Noticee got amalgamated with into CEBPL pursuant to the order dated September 06, 2018 passed by the National Company Law Tribunal, Mumbai (hereinafter referred to as “**NCLT**”).
- 7.2. As the Noticee is not in existence, no investigation stands against the Noticee. Further, the investigation cannot hold good against CEBPL as the status of ‘fit and proper’ does not pass on to the resultant entity. Company Master Data of the Noticee in Ministry of Corporate Affairs (**MCA**) website reflects the Noticee / Company Status as “Amalgamated”.
- 7.3. In this regard, Noticee placed reliance on the Order dated July 04, 2023 passed by SEBI in respect of Prudent Comder Private Limited in the matter of NSEL, wherein the proceedings against the entity was disposed of without issuing any directions.
- 7.4. In view of the aforesaid, the Noticee requested SEBI to drop the SCN and SSCN issued against the Noticee.

CONSIDERATION OF ISSUE AND FINDINGS:

8. I have carefully perused the SCN, SSCN, Enquiry Report, replies submitted by the Noticee and other materials/information as available in the public domain. After considering the same, the issue which arises for consideration in the present proceedings is *whether the instant enquiry proceedings for determining the ‘fit and proper’ status of the Noticee is maintainable, given that it has been amalgamated with CEBPL, and whether the consequences of such determination may be applied to CEBPL, and if so, whether the Noticee satisfies the ‘fit and proper’ criteria as laid down in schedule II of the Intermediaries Regulations.*
9. As per available record, the Noticee was a member of National Commodity & Derivatives Exchange Limited (hereinafter referred to as “**NCDEX**”), Multi Commodity Exchange of India Limited (hereinafter referred to as “**MCX**”) and Indian Commodity Exchange Limited (hereinafter referred to as “**ICEX**”). Therefore, the

said exchanges were asked to provide the status of Noticee's membership. In reply, the exchanges *inter alia* informed that Noticee ceased to be member pursuant to merger/amalgamation with CEBPL and CEBPL was admitted as member of the Exchanges.

10. It is noted that the pursuant to merger, Noticee ceased to be a member of MCX, NCDEX and ICEX. I note that NCLT vide order dated September 06, 2018 sanctioned the Scheme of Amalgamation of the Noticee with CEBPL and the Scheme of Amalgamation came into effect from April 01, 2017. This fact is corroborated from the MCA website where the Noticee's status is shown as 'Amalgamated'.
11. As regards the effect of amalgamation, it is a settled law that upon amalgamation, the transferor company ceases to exist and all its rights and liabilities pass on to the transferee company. Hon'ble Supreme Court vide order dated April 17, 1986 in the matter of *M/s. General Radio and Appliances Co. Ltd. & Ors. v. M.A. Khader (dead) by LRs.* held that under the order of amalgamation, the transferor company ceased to be in existence in the eye of law and it effaced itself for all practical purposes. The Hon'ble Court laid down that after the amalgamation of two companies, the transferor company ceased to have any identity and the amalgamated company acquired a new status.
12. The Hon'ble Supreme Court, vide order dated September 04, 1990, in the matter of *Saraswati Industrial Syndicate v C.I.T.* held that *"....the true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there cannot be any doubt that when two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights of liabilities are determined under scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective."*

13. The implications of amalgamation have also been outlined by the Hon'ble Supreme Court of India in the matter of *Bhagwan Dass Chopra v. United Bank of India and Others* [1987 (Supp) SC 536] as under:

".....

In the circumstances it is reasonable to hold that in every case of transfer, devolution, merger, takeover or a scheme of amalgamation under which the rights and liabilities of one company or corporation stand transferred to or devolve upon another company or corporation either under a private treaty, or a judicial order or under a law the transferee company or corporation as a successor-in-interest becomes subject to all the liabilities of the transferor company or corporation and becomes entitled to all the rights of the transferor company or corporation subject to the terms and conditions of the contract of transfer or merger, the scheme of amalgamation and the legal provisions as the case may be under which such transfer, devolution, merger, take over or amalgamation as the case may be may have taken place..."

14. Further, the Hon'ble Supreme Court of India vide order dated April 05, 2022 in the matter of *Principal Commissioner of Income Tax (Central) – 2 Vs. Mahagun Realtors (P) Ltd.* held that:

"18. Amalgamation, thus, is unlike the winding up of a corporate entity. In the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed; it ceases to exist. Yet, in every other sense of the term, the corporate venture continues-enfolded within the new or the existing transferee entity. In other words, the business and the adventure lives on but within a new corporate residence, i.e., the transferee company. ... Broadly, the quest of legal systems and courts has been to locate if a successor or representative exists in relation to the particular cause or action, upon whom the assets might

have devolved or upon whom the liability in the event it is adjudicated, would fall.”

15. The Hon’ble Supreme Court in *Singer India Ltd. vs. Chander Mohan Chadha*, [(2004) 7 SCC 1] observed that as a result of amalgamation of two companies into one, “*the Transferor Company loses its entity as it ceases to have its business*”.
16. In light of the above observations of the Hon’ble Supreme Court, it is clear that the respective rights or liabilities between the amalgamated entities are determined under the Scheme of Amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective. The transferor in such a case merges with the transferee who becomes the successor of the assets, liabilities and business to the extent contemplated in the Scheme of Amalgamation.
17. In this regard, it is pertinent to mention that in terms of clause 7 of Schedule II of the Intermediaries Regulations (as amended vide the *SEBI (Intermediaries) (Third Amendment) Regulations, 2021*, w.e.f. November 17, 2021), the ‘fit and proper person’ criteria is applicable at the time of application of registration and during the continuity of registration of the intermediary. Thus, “fit and proper” criteria is an essential condition to be met for continued recognition of an entity as a SEBI registered intermediary. But, “fit and proper” is a “status” and cannot be treated either as an asset or a liability.
18. Given this understanding of the “fit and proper” criteria, when a transferor company amalgamates with the transferee company, the “fit and proper” status of the transferor company does not pass on to the resultant company. Consequently, if the resultant entity is / seeking to be an intermediary, it would have to separately fulfil the “fit and proper” criteria. As a corollary to that, even when the transferor company was not a “fit and proper” person, the resultant company would have to separately ensure that it is “fit and proper” in adherence to the requirements under the

Intermediaries Regulations. Any disqualification of the transferor entity, that gets amalgamated, would not have a bearing on the 'fit and proper' person status of the resultant entity. I have also considered earlier orders passed by SEBI in respect of Smart Commodity Brokers Private Limited decision dated March 01, 2023, Prudent Comder Private Limited decision dated July 04, 2023, Tradebulls Commodities Broking Private Limited decision dated July 20, 2023 and Aasma Commodities Private Limited decision dated September 28, 2023, which have also arrived at the same conclusion noted above.

19. Considering the above, I find that determination of the "fit and proper" status of the transferor company (i.e. the Noticee), who had ceased to exist pursuant to the NCLT order dated September 06, 2018 discussed earlier in this Order, would be infructuous.
20. In light of the above discussion and the judgments of the Hon'ble Supreme Court as reproduced earlier, I do not agree with the recommendation of the DA.

ORDER:

21. In view of the facts and circumstances of the case and the conclusions arrived at discussed above, I, in exercise of powers conferred upon me under Section 12(3) read with Section 19 of the SEBI Act and Regulation 27 of the Intermediaries Regulations, hereby dispose of the instant proceedings and the SCN read with SSCN against Choice Merchandise Broking Pvt. Ltd. (bearing registration no. INZ000025939) without issuing any directions.
22. It is however clarified that this order is without prejudice to any other proceedings that are or may be initiated against the Noticee by SEBI or any other authority in accordance with law in respect of the trades executed by it on the spot exchange platform provided by the NSEL.

23. A copy of this Order shall be served on the Noticee and upon all recognized stock exchanges and depositories.

DATE: NOVEMBER 06, 2023

PLACE: MUMBAI

**Sd/-
ANANTH NARAYAN G.
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**