

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under Sections 11(1), 11(4), 11B(1), 11B(2) and 11(4A) of the SEBI Act, 1992, read with Rule 5 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995

In Re: SEBI (Stock Brokers) Regulations, 1992, and SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to the Securities Market) Regulations, 2003

In respect of SCN SEBI/HO/IVD/ID3/OW/P/2019/32853/1 dated December 09, 2019

Name of Noticee	PAN
IL&FS Securities Services Limited	AABCI5580K

In the matter of IL&FS Securities Services Limited

BACKGROUND

1. SEBI conducted an investigation into the alleged fraudulent/ unauthorized transfer of mutual fund units from the accounts of certain clients by Allied Financial Services Pvt. Ltd., a Depository Participant of NSDL. The role of IL&FS Securities Services Limited (hereinafter referred to as “**ISSL/ Noticee**”), a clearing member of NSE Clearing Limited, in this context and related matters were also examined. Subsequent to investigation, the Noticee was served with Show Cause Notice (SCN) SEBI/HO/IVD/ID3/OW/P/2019/32853/1 dated December 09, 2019.
2. It was alleged that the Noticee was in violation of certain provisions of the SEBI (Stock Brokers) Regulations, 1992, and certain Regulations and Bye-Laws of the NSE

Clearing Limited. It was also alleged that the Noticee has violated Regulations 3(a) and 4(1) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to the Securities Market) Regulations, 2003.

3. In view of the above allegations, the Noticee was called upon to show cause as to why appropriate directions under (a) Sections 11B(1) and 11(4) read with Section 11(1) and under (b) Sections 11B(2) and 11(4A) read with Sections 15HA and 15HB of the SEBI Act, 1992, should not be issued against it for the alleged violations.

REPLY AND PERSONAL HEARING:

4. The Noticee provided its written submissions on the matter vide its letter dated January 16, 2020. An opportunity of personal hearing was initially granted to the Noticee on May 21, 2020, and subsequently on June 26, 2020, which were adjourned due to administrative exigencies. Thereafter, an opportunity of hearing was granted to the Noticee on November 2, 2020, which was subsequently adjourned to November 18, 2020, at the request of the Noticee, due to non-availability of senior counsel of the Noticee.
5. Prior to the personal hearing, the Noticee raised issues related to jurisdiction of SEBI due to presence of orders of the Hon'ble NCLAT in respect of the IL&FS Group. The personal hearing took place as scheduled on November 18, 2020, wherein the Noticee reiterated the issues of jurisdiction and declined to appear before SEBI on merits citing their stand that by doing so, they would be in contempt of court. During the personal hearing, the Noticee made the following submissions on jurisdiction:

- 5.1. The Hon'ble NCLAT, vide its order dated October 15, 2018, granted interim stay *qua* IL&FS and its group companies, including ISSL, on, *inter alia*, institution/continuation of suits or proceedings against them. The relevant extract of the order is as below:

“Taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the Company and 348 group companies, there shall be stay of

(i) The institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against ‘IL&FS’ and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and”

The order dated October 15, 2018, was challenged before the Hon’ble Supreme Court, which dismissed the appeal vide its order dated November 19, 2019, stating that there was no need to interfere with the order. Thereafter, the order dated October 15, 2018, was confirmed by the Hon’ble NCLAT, vide its judgement and order dated March 12, 2020. As submitted by the Noticee, the order dated March 12, 2020 passed by the Hon’ble NCLAT has been challenged before the Hon’ble Supreme Court and the appeals filed against this order are pending.

5.2. Following case laws/ judgments/ reports were relied upon to show that SEBI has the *“trappings of a court”*:

5.2.1. The 272nd Report on the “Assessment of Statutory Frameworks of Tribunals in India” prepared by the Law Commission of India,

5.2.2. Decision of the Hon’ble Supreme Court, Constitutional Bench (5 Judge Bench), in *The Engineering Mazdoor Sabha Representing Workmen Employed Under the Hind Cycles Ltd. and Ors. vs. The Hind Cycles Ltd., Bombay AIR 1963 SC 874*,

5.2.3. Decision of the Hon’ble Supreme Court, Constitutional Bench (5 Judge Bench), in *Rojer Mathew v. South India Bank Limited & Ors.* 2019 (15),

5.2.4. Decision of the Hon’ble Supreme Court, Constitutional Bench (6 Judge Bench), *Province of Bombay v. Kusaldas S. Advani & Ors. AIR 1950 SC 222*,

5.3. It was submitted that:

5.3.1. SEBI acts as a statutory regulator.

5.3.2. The present SCN proceedings are also in its capacity as a statutory adjudicatory authority wherein

5.3.3. SEBI is required to follow due process of law and principles of natural justice.

5.3.4. SEBI in the eyes of law is acting as a statutory Tribunal and / or is deemed to be a Tribunal.

5.3.5. SEBI's decisions are also open to challenge before the Securities Appellate Tribunal.

5.4. In the case of *Clairant International Limited & Anr. v. SEBI* (2004) 8 SCC 524, the Hon'ble Supreme Court has held that SEBI acts in three capacities i.e., legislative, executive and judicial capacity. In the present case, by conducting a hearing pursuant to the SCN, SEBI is acting in its judicial capacity. This decision has also been followed by the Hon'ble Supreme Court in *National Securities Depository Limited v. SEBI* (2017) 5 SCC 517.

5.5. It is submitted that the present proceedings before the WTM of SEBI are quasi-judicial proceedings and thus constitute proceedings before an authority which falls within the category of a tribunal and/or is deemed to be a tribunal. Thus, the present proceedings are covered by the moratorium granted vide the order of the Hon'ble NCLAT.

5.6. The decision of the Hon'ble Securities Appellate Tribunal in the case of *Dewan Housing Finance Corporation Limited v. SEBI*, is applicable in the present case:

5.6.1. A moratorium (albeit under Section 14 of the IBC) was operative when SEBI issued a SCN to institute proceedings for violations under securities laws.

5.6.2. The board of directors of Dewan Housing had been suspended and an administrator had been appointed to resolve Dewan Housing.

5.6.3. SEBI's argument that a moratorium order (i) does not prevent the adjudicating officer from determining the liability of the corporate debtor; and (ii) is only applicable to enforcement/recovery of determined liability, was rejected by the Hon'ble SAT.

5.6.4. The Hon'ble SAT has held that once a moratorium is declared (albeit under Section 14 of the IBC), SEBI/AO will have no jurisdiction to institute any proceedings and where proceedings have already been initiated/instituted, it will be prohibited from continuing with such proceedings. Instituting and/or continuing proceedings despite the existence of a moratorium order may amount to contempt of court.

5.7. In the instant case, the SCN was issued on December 09, 2019, i.e., after the moratorium order dated October 15, 2018 (as confirmed by the order dated March 12, 2020), was issued. Hence, the institution/ commencement of these proceedings is without jurisdiction. In any case, the moratorium order would have the effect of taking away the jurisdiction of SEBI to adjudicate on the issues under SCN.

6. In view of the above submissions, the Noticee prayed that SEBI should first pass an order deciding whether it has the jurisdiction to adjudicate on the issues under the SCN in view of the moratorium order against IL&FS Group and its subsidiaries. It was further submitted that the Noticee has been instructed not to appear before SEBI to argue on the matter on merits unless an order deciding the jurisdiction is first passed.

ISSUES FOR CONSIDERATION:

7. I have perused the submissions made by the Noticee. In view of the facts and circumstances of the case and the orders of the Hon'ble NCLAT, I note that it would be appropriate to first determine whether SEBI has the jurisdiction to adjudicate the

proceedings in the SCN. Hence, the present order is limited only to the issue of whether SEBI has the jurisdiction to proceed with the instant SCN in view of the NCLAT order dated October 15, 2018, which was confirmed on March 12, 2020.

8. At the outset, it is noted that the SEBI Board has been established under Section 3 of the SEBI Act as a statutory Regulatory Authority. It is further noted that the Board consists of a Chairman and other members as stipulated under Section 4 of the SEBI Act, which also includes Whole Time Members (WTMs). The WTMs discharge the functions of the Board as delegated to them under Section 19 of the SEBI Act. In the sphere of delegated powers, the performance of the duties by the WTMs is equivalent to the performance of the duties of the Board/ SEBI. As the instant proceedings are conducted under the delegated powers under Section 19 of the SEBI Act, the act of the WTM is equivalent to the act of the Board/ SEBI. Hence, SEBI and WTM of SEBI have been used interchangeably in this Order.

Key Issue: Whether SEBI has the jurisdiction to adjudicate the proceedings in the current SCN in view of the order of the Hon'ble NCLAT?

9. In order to determine the above mentioned key issue, I note that the following sub-issues need to be determined first:

9.1. Whether Regulatory Authorities are directly covered under the order of the Hon'ble NCLAT?

9.2. If not, whether SEBI is a Tribunal and/ or is a deemed Tribunal?

9.2.1. Whether there are any key features of a tribunal that can be culled out from relevant court pronouncements.

9.2.2. If so, whether SEBI, as a statutory Regulatory Authority, has these key features?

9.3. Even if the answer to issues at either paragraphs 9.1 or 9.2 above is in the affirmative, whether the current proceedings come under the sweep of the term 'proceedings' mentioned in the order of the Hon'ble NCLAT?

Whether Regulatory Authorities are directly covered under the order of the Hon'ble NCLAT?

10. I note that the October 15, 2018, order of the Hon'ble NCLAT has been passed in exercise of the powers conferred under Section 242(1)(b) read with Section 242(2)(m) and Section 242(4) of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016, and is an order similar but not identical to an order under Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**").

11. Before proceeding further, I would like to refer to the relevant extract of the order of the Hon'ble NCLAT dated October 15, 2018:

"Taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the Company and 348 group companies, there shall be stay of

(i) The institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against 'IL&FS' and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and"

12. A bare reading of the direction mentioned above indicates that there shall be a stay on the "*institution of any other proceedings*" by "*any party or person*" against IL&FS and its group companies, which includes the Noticee, in any "*Court of Law/ Tribunal/ Arbitration Panel or Arbitration Authority*". In other words, the order of the Hon'ble

NCLAT prevents institution of proceedings by any party/ person against the Noticee before a Court of Law, Tribunal, Arbitration Panel or Arbitration Authority.

13. I note here that the present proceedings initiated vide SCN dated December 09, 2019, have not been initiated by any party/ person against the Noticee before a Court of Law, Tribunal, Arbitration Panel or Arbitration Authority. I note here that while the Companies Act, 2013, does not define the word “person”, in absence of the same, I refer to the definition of “person” under the General Clauses Act, 1897, wherein “person” shall “include any company or association or body of individuals, whether incorporated or not”. I note here that SEBI does not fall within this definition of “person”. I also note here that there is no third party which has initiated the proceedings against the Noticee before SEBI.

14. Further, I note that the Hon’ble NCLAT has held that it has the powers to pass an order of moratorium similar to an order under Section 14 of the IBC. However, here, I would like to refer to the relevant extract of Section 14 of the IBC, which is reproduced below:

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

*(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or **other authority**; (emphasis supplied)*

15. From the above, it is clear that for the purpose of moratorium, even the IBC recognizes that “tribunals” are different from “statutory and regulatory authorities”, as Section 14 provides for both “tribunals” and “other authorities”.

16. Reading the relevant operative part of the order of the Hon'ble NCLAT and Section 14(1)(a) of the IBC, it is clear that the Hon'ble NCLAT has conspicuously not covered "other authorities" within the ambit of its order. I also note here that the Hon'ble NCLAT has recorded in its confirmatory order dated March 12, 2020, that its interim order dated October 15, 2018, does not require any modification/ recall.
17. Hence, I note that SEBI, as a statutory Regulatory Authority, is not covered under the order of the Hon'ble NCLAT.

Whether SEBI is a Tribunal and/ or is a deemed Tribunal?

18. As per the text of Section 14(1)(a) of the IBC, SEBI as a forum gets covered only under "other authorities" as it is not a court of law, arbitration panel or a tribunal. However, the Noticee has contended that in the present proceedings, SEBI is a Tribunal and/ or is deemed to be a Tribunal and hence, these proceedings are covered under the order of the Hon'ble NCLAT.
19. The thrust of the argument of the Noticee is that when a statutory authority who is empowered to take a decision affecting the rights of persons and is required to make enquiry and hear the parties before taking such a decision, then such an authority is quasi-judicial and the decision rendered by it is a quasi-judicial act. The Noticee submitted the relevant paras of the 272nd Report on the "Assessment of Statutory Frameworks of Tribunals in India" prepared by the Law Commission of India (hereinafter referred to as the "**272nd Law Report**") in support of the same. Elaborating this argument, it was further argued that if a statutory authority has the power to do an act which will prejudicially affect the subject, then, the final determination of the authority is quasi-judicial in nature, whether there are two parties before it or the contest is between the statutory authority proposing to do the act and subject is opposing it. The Noticee submitted the decision of the Hon'ble Supreme Court Constitutional Bench (6 Judge Bench) in the *Province of Bombay v. Kusaldas S.*

Advani & Ors. AIR 1950 SC 222 (hereinafter referred to as the “**Kusaldas judgment**”) in support of this proposition.

20. Extending further, the Noticee argued that anybody or any authority which is tasked with the discharge of quasi-judicial function or has the “*trappings of a court*”, falls within the definition of “tribunal”. In order to buttress this position, the Noticee submitted certain case laws, such as, judgments of the Constitutional Bench (5 Judge Bench) of the Hon’ble Supreme Court in the matter of *Roger Mathew v. South India Bank Limited & Ors.* 2019 (15) (hereinafter referred to as the “**Roger Mathew judgment**”) and in the matter of *Engineering Mazdoor Sabha Representing Workmen Employed Under the Hind Cycles Ltd. and Ors. vs. The Hind Cycles Ltd., Bombay* AIR 1963 SC 874 (hereinafter referred to as the “**Mazdoor Sabha judgment**”). The Noticee has also referred to certain extracts from the 272nd Law Report. Therefore, it needs to be examined whether SEBI is a Tribunal and/ or is a deemed Tribunal.

21. In view of the above submission, I proceed to examine and test the basis of the submission and applicability of the judgments cited in support of its arguments. In order to appreciate the essential features of a tribunal, we need to see how the tribunals have been created in order to substitute courts. It further needs to be examined, whether there are common features between courts and tribunals. It also needs to be seen how, during the evolution of tribunals, the Hon’ble Supreme Court of India has raised concerns, for bringing parity between the features of an “independent judiciary” embedded in the courts, within the tribunals.

Whether there are any key features of a tribunal that can be culled out from relevant court pronouncements.

22. In this context, reference may be made to the decision of the Hon’ble Supreme Court in the matter of *State of Gujarat & ANR. Vs. Gujarat Revenue Tribunal Bar Association & ANR. [Civil Appeal No.7208 of 2012]* (hereinafter referred to as the “**Gujarat Revenue judgment**”), which stresses on the aspect of the nature of the work

performed by tribunals, which was hitherto performed by the “courts”. In the words of the Hon’ble Supreme Court, *“The legislature, in its wisdom has created tribunals and transferred the work which was regularly done by the civil courts to them, as it was found necessary to do so in order to provide efficacious remedy and also to reduce the burden on the civil courts and further, also to save the aggrieved person from bearing the burden of heavy court fees etc.”*

A. Independence of Tribunals:

23. Since tribunals have been established in substitution of courts, the Constitution Bench of five judges of the Hon’ble Supreme court in the matter of *Union of India vs. R. Gandhi, President, Madras Bar Association* (hereinafter referred to as the **“Madras Bar Association judgment”**), while observing some concerns relating to constitution of tribunals, observed that if tribunals are established in substitution of courts, they must also possess independence, security and capacity. Additionally, with transfer of jurisdiction from a traditional court to a tribunal, it would be imperative to include members of the judiciary as presiding officers/members of the tribunal. Technical members could only be in addition to judicial members and that also only when specialized knowledge or know-how is required. Any inclusion of technical members in the absence of any discernible requirement of specialization would amount to dilution and encroachment upon the independence of the judiciary.

24. The 272nd Law Report also mentions at para 5.5, the following, *“As the Tribunals are vested with the judicial powers which had been hitherto vested in or exercised by Courts, the Tribunals should possess the same independence, security and capacity which are possessed by the judges. However, if the Tribunals are intended to serve an area which requires specialised knowledge or expertise, the appointment of Technical members in addition to judicial members must always be welcomed, as they can provide an input which may not be available with the judicial members. When any jurisdiction is shifted from Courts to Tribunals on the ground of pendency and delayed*

Court proceedings and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only the judicial members. But when the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, the presence of Technical members would be useful and necessary”

25. In consonance with addressing these concerns, the Hon’ble Supreme Court in the matter of *Madras Bar Association vs. Union of India (2014)* (hereinafter referred to as the “**NTT judgment**”), struck down the newly created National Tax Tribunal under the National Tax Tribunals Act, 2005, and observed that procedure of appointment and conditions of service of members must be akin to that of judges of the courts which were sought to be substituted by the tribunal(s).

26. The above discussion of judgments of the Hon’ble Supreme Court and contents of the 272nd Law Report brings out that tribunals evolved as a substitute to courts. It also brings forth, the independence of tribunals as one of the essential feature of “tribunals”. In that context, the procedure of appointment and conditions of service of members of a tribunal become relevant criteria to assess the feature of independence of the tribunal.

B. Created by Statute for exercise of the judicial power of the State:

27. In order to ascertain other features of a tribunal, reference may be made to the Hon’ble Supreme Court in the matter of *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjunwala & Ors., AIR 1961 SC 1669* (hereinafter referred to as the “**Harinagar Sugar judgment**”) which observed that “*These Tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary Courts of Civil Judicature. They share the **exercise of the judicial power of the State**, but they are brought into existence to implement some administrative policy or to determine controversies arising out of*

some administrative law. They are very similar to Courts, but are not Courts.”
(emphasis supplied)

28. Further, in the Gujarat Revenue judgment, the Hon’ble Supreme Court observed that
*“Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore, a particular Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, **which provide for the basic administration of justice.**”* (emphasis supplied)

29. Similarly in the matter of *Associated Cement Companies Ltd vs P. N. Sharma And Another* (hereinafter referred to as the “**ACC judgment**”), the Hon’ble Supreme Court observed “ *the **State transfers its judicial functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to tribunals** by entrusting to them the task of adjudicating upon special matters and disputes...*” (emphasis supplied).

30. In the ACC judgment, the Hon’ble Supreme Court has further observed as follows:

“...According to this test, the adjudicating body must be constituted by the State and be vested with judicial functions. In other decided cases, other learned Judges conveyed the same idea in a somewhat different form; they have said that in order to be a tribunal, the body must be "invested with part of the judicial functions of the State", "delegates of the judicial power of the State", "invested with the State's inherent judicial powers", " exercise judicial powers of the State."

31. The Hon’ble Supreme Court further, stressing upon the importance of *judicial functions of the State*, in the matter of *Jaswant Sugar Mills Ltd., Meerut vs Lakshmichand And Others* (hereinafter referred to as the “**Jaswant Sugar Mills judgment**”) observed as follows:

*“But every decision or order by an authority under a duty to act judicially is not subject to appeal to this Court. Under Art. 136, an appeal lies to this Court from adjudications of courts and tribunals only. Adjudication of a court or tribunal must doubtless be judicial: **but every authority which by its constitution or authority specially conferred upon it is required to act judicially, is not necessarily a tribunal for the purpose of Art. 136.** A tribunal, adjudication whereof is subject to appeal, must beside being under a duty to act judicially, **be a body invested with the judicial power of the State.**” (emphasis supplied)*

32. A perusal of the Gujarat Revenue and ACC judgments shows that an essential feature of a “tribunal” is creation of the same under a statute and there exists the feature of the *basic administration of justice* and the *inherent judicial power of the State*, which has been transferred from courts to tribunals.

33. Thus, it is observed from the above that a key feature of tribunals is that *they have been created by statute for basic administration of justice* and a tribunal exercises the *inherent judicial power of the State*.

C. Adjudication of dispute as main function:

34. In order to ascertain other features of a tribunal, reference may be made to the *The Bharat Bank Ltd., Delhi vs The Employees Of The Bharat Bank* (hereinafter referred to as the “**Bharat Bank judgment**”), where the Hon’ble Supreme Court, in order to determine whether an industrial tribunal is a “tribunal” or not, raised the question “...what are the **main functions of the tribunal** and how it proceeds to discharge those functions”. The Hon’ble Supreme Court observed that “...The main function of this tribunal is to adjudicate on industrial disputes which implies that there must be two or more parties before it with conflicting cases, and that it has also to arrive at a conclusion as to how the dispute is to be ended.”

35. This judgement brings out one of the other key feature of a “tribunal” that its main function is adjudicatory in nature.

D. Trappings of a court:

36. Reference is also made to the **Mazdoor Sabha judgment** submitted by the Noticee. The relevant observation of the Hon'ble Supreme court is mentioned below:

“The procedural rules which regulate the proceedings before the Tribunals and the powers conferred on them in dealing with matters brought before them, are sometimes described as the ‘trappings of a court’ and in determining the question as to whether a particular body or authority is a Tribunal or not, sometimes a rough and ready test is applied by enquiring whether the said body or authority is clothed with the trappings of a court.”

37. The feature of “trappings of court” was further discussed in the Jaswant Sugar Mills and Roger Mathew judgements. A perusal of these judgements would show that “trappings of court” is also one of the features of a “tribunal”. Relating to weightage of the feature of “exercise of inherent judicial power of state” over the “trappings of court”, the Hon'ble Supreme Court, while referring to the ratio pronounced in the Bharat Bank judgment, observed in the Mazdoor Sabha judgment that *“It would thus be noticed that apart from the importance of the trappings of a Court, the basic and essential condition which makes an authority or a body a tribunal under Art. 136, is that it **should be constituted by the State and should be invested with the State's inherent judicial power**”.* (emphasis supplied)

38. The Hon'ble Supreme Court, in the ACC judgment, while dealing with the “trappings of court”, further cautioned in the following lines: *“If it has one or more of such trappings, it may be easier to pronounce the body to be a tribunal. But we must not forget that the investiture of the trappings of a Court is not an essential attribute of a*

tribunal. The basic test of a tribunal is that it is a body vested with the judicial power of the State. Unless this basic concept is borne in mind, the trappings of a Court may well become a trap and a snare for the unwary.” (emphasis supplied)

39. Thus, it is observed from the above that while a tribunal may have the “trappings of a court”, the same is not an essential feature of a Tribunal.

40. All of the above discussions brings to the fore the following features of a “tribunal”:

40.1. Independence of tribunal, including appointment/ removal of members.

40.2. Created by Statute for exercise of the judicial power of the State.

40.3. Adjudication of dispute as its main function.

41. Further, the above discussions also show that “trappings of a court” is an incidental but not an essential feature of a tribunal.

If so, whether SEBI, as a statutory Regulatory Authority, has these key features?

42. After having ascertained the basic features of a tribunal, I now proceed to examine whether SEBI/ the Whole-Time Member (WTM) of SEBI satisfies the basic requirements of a tribunal.

43. In this context, it is noted that the Securities and Exchange Board of India is a statutory body established under the SEBI Act, 1992 (the “**Act**”). The preamble to the Act clearly states that it is “*An Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto*”. The Act also provides for the composition of the Board and the procedure to be followed for appointment of members of the Board. The same Act also establishes the Securities Appellate Tribunal.

44. The first feature of independence may be seen through the qualifications, appointment and removal of the members of the SEBI Board. This would be scrutinised in comparison with the Securities Appellate Tribunal.

44.1. The appointment of members of a regulatory authority, including SEBI, does not require consultation with the Chief Justice of India. However, the appointment of the Presiding Officer/ Chairperson of a tribunal is done by the Central Government in consultation with the Chief Justice of India.

44.2. There is a difference in the procedure for removal of members of a regulatory authority, including SEBI, as compared to that of a tribunal. For e.g., in the case of the Hon'ble SAT, the Presiding Officer or Judicial/ Technical Member may be removed by the Central Government only after an inquiry is made by a Judge of the Supreme Court, while there is no requirement of such inquiry when removing any member of the SEBI Board.

44.3. The Central Government can supersede the Board of a statutory authority, including SEBI, and conduct its functions. Provision of supersession of tribunals is conspicuously absent.

44.4. In the case of members of a regulatory authority, including SEBI, having knowledge/ experience of law is considered as useful but is not a prerequisite for appointment. A tribunal consists of a Presiding Officer/ Chairperson along with two or more members. The composition is such that at least one member of the tribunal has legal knowledge. For e.g., the Hon'ble SAT, apart from the Presiding Officer, shall compulsorily have a Member who is designated as a Judicial Member. Similarly, the Hon'ble NCLAT also has Judicial Members.

45. The above shows the judicial nature of the "Securities Appellate Tribunal" with respect to appointment and removal of its members. The removal of SAT Members is also

preceded by a judicial enquiry. However, similar features of “independence of tribunal” are not present regarding the appointment and removal of the Members of the SEBI Board.

46. As regards the second feature mentioned at paragraph 40.2, it is noted that SEBI has not been created by statute as a judicial authority. It performs various statutory functions, which are in the nature of delegated legislation and execution of the delegated and parent legislation. While it determines issues quasi-judicially, the purpose of creation of SEBI is not to discharge the inherent judicial functions of the State and neither is it vested with the judicial power of the State. The WTM of SEBI is merely exercising power delegated by the Board and is required to act quasi-judicially and the same does not make SEBI or the WTM a “tribunal”, as exercise of such power by the WTM is not the essential judicial function of the State.

47. Similarly, adjudication of disputes is not the main function of SEBI, unlike tribunals created under special laws such as the SEBI Act. An examination of the provisions relating to Securities Appellate Tribunal shows that the said authority was created with the main function of adjudication of disputes. An examination of Section 11 of the SEBI Act clearly indicates the multifarious executive and delegated legislative functions performed by SEBI as being distinct from also acting quasi-judicially.

48. As regards the trappings of court, in the ACC judgment, the Hon’ble Supreme Court stressed that it is not an essential feature of a tribunal. Further, in the Mazdoor Sabha judgment, the Hon’ble Supreme Court has observed the lesser significance of “trappings of court”, while stressing the greater significance of the feature of exercise of inherent judicial power of the state. I consider, therefore, that the examination of whether there exists the “trappings of a court” is not material. The same has also been stressed upon by the Hon’ble Supreme Court in the Jaswant Sugar Mills judgment.

49. In addition to the above, it is further noted that merely because the nomenclature says that Securities Appellate Tribunal is an “Appellate Tribunal”, and hears appeals against SEBI, it does not imply that SEBI becomes a “Tribunal”. It is not necessary that all Appellate Tribunals hear appeals only against orders of a tribunal. For example, while the Hon’ble NCLAT is an Appellate Tribunal for hearing appeals against orders of the Hon’ble NCLT passed under the Companies Act, 2013, and the IBC, it is also an Appellate Tribunal for hearing appeals against the orders passed by the Insolvency and Bankruptcy Board of India and the Competition Commission of India, both of which are statutory and regulatory authorities.

50. It may also be mentioned that Annexure II to the 272nd Law Report, cited by the Noticee, also identifies the Securities Appellate Tribunal as the “Tribunal” under the SEBI Act and not “SEBI” as the “Tribunal”. While making reference to the pendency of the tribunals, at page 33 of the said report, reference is made to tribunals, such as, the Central Administrative Tribunal, the Railway Claims Tribunal, the Debt Recovery Tribunal, Customs, Excise and Service Tax Appeal Tribunal and the Income Tax Appellate Tribunal. Nowhere has the report made any reference to the Railway Board, the Central Board of Indirect Taxes and Central Board of Excise and Customs. Similarly, at Sr. No. 7 in the Schedule to the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017, the Hon’ble Securities Appellate Tribunal has been identified as the “Tribunal” under the SEBI Act.

51. The Hon’ble Supreme Court in the Rojer Mathew judgment, in the context of noting that direct appeal lies to the Supreme Court from “tribunals”, observed that *“Presently, there are more than two dozen statutes which provide direct appeals to the Supreme Court from various Tribunals and High Courts.* The Rojer Mathew judgment clearly, in express terms, identifies the Securities Appellate Tribunal as the “Tribunal” under the SEBI Act. The observations quoted by the Noticee find their place in the judgment of the Hon’ble Supreme Court where the Court expressly indicated the “Securities

Appellate Tribunal” as Tribunal. Therefore, any argument on the basis of the Rojer Mathew judgment to state that SEBI is the “Tribunal” is incorrect and unsustainable.

52. Without prejudice to the above, it is noteworthy that the 272nd Law Report has specifically dealt with the case laws on “*trappings of court*” while identifying and dealing with tribunals such as the Hon’ble Securities Appellate Tribunal. Therefore, the argument of “*the trappings of the court*” is applicable only to the tribunals such as those mentioned in the judgment of Rojer Mathew and the 272nd Law Report.

53. The contention of the Noticee that since SEBI acts quasi-judicially therefore it is a “tribunal” also is not sustainable. The Kusaldas judgement cited by the Noticee only lays down that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially. This judgment only states when the final determination by a statutory authority takes the character of a quasi-judicial act and does not state that the authority, which is required to act quasi-judicially, is a “tribunal”. Therefore, this decision is not helpful to the Noticee. Here, it is also relevant to refer to the judgment of the Hon’ble Supreme Court in the Jaswant Sugar Mills judgment, which is reproduced below:

*“But every decision or order by an authority under a duty to act judicially is not subject to appeal to this Court. Under Art. 136, an appeal lies to this Court from adjudications of courts and tribunals only. Adjudication of a court or tribunal must doubtless be judicial: **but every authority which by its constitution or authority specially conferred upon it is required to act judicially, is not necessarily a tribunal for the purpose of Art. 136.** A tribunal, adjudication whereof is subject to appeal, must beside being under a duty to act judicially, **be a body invested with the judicial power of the State.**” (emphasis supplied)*

In other words, every authority, which is required to act judicially, is not a tribunal.

54. It requires no special mention that SEBI, while making determinations on regulatory violations, acts in a quasi-judicial capacity.

55. As discussed comprehensively above, the various essential features of a tribunal are not present in the case of SEBI/ its WTM. The requirement to act quasi-judicially does not alone confer the character of a tribunal to SEBI/ its WTM.

56. There is also no sustainable basis to hold that order of the Hon'ble NCLAT dated October 15, 2018, is applicable to the present proceedings merely because they are quasi-judicial in nature.

57. In view of the above discussion, I hold that SEBI/ its Whole-Time Member does not come under the definition of "Tribunal" and/ or a "deemed Tribunal", as has been contended by the Noticee, as the key characteristics of the tribunal are not present.

Even if the answer to issues at either paragraphs 9.1 or 9.2 above is in the affirmative, whether the current proceedings come under the sweep of the term 'proceedings' mentioned in the order of the Hon'ble NCLAT?

58. Without prejudice to the finding in paragraph 57 above, the next question that arises for consideration is whether, even if SEBI were to be considered as a tribunal, the present proceedings come under the sweep of the term "proceeding" as mentioned in the order dated October 15, 2018, of the Hon'ble NCLAT or not.

59. The Hon'ble High Court of Bombay in the matter of *Tayal Cotton Pvt. Ltd. Vs. The State of Maharashtra & Others* (hereinafter referred to as the "**Tayal Cotton judgment**"), while interpreting the meaning of the term "proceedings" in the context of whether criminal proceedings are covered in the scope of the "proceedings", as

provided for in Section 14 of the IBC, arrived at the conclusion that they are not covered. The Court observed as below:

*“So interpreted, the word 'proceedings' used therein and even the words 'order' and 'in Court of law' will have to be interpreted as a proceeding arising in the nature of a suit and orders passed in such proceedings and suits. Apart from the fact that the Legislature has not conspicuously used the words 'criminal' as an adjective to the word 'proceedings' and as an adjective to the noun 'Court of law', it must be assumed that the Legislature in its wisdom has consciously omitted to use such adjectives **since it must have intended to prohibit only the suits and execution of the judgments and decrees or a proceeding of the like nature**”.* (emphasis supplied)

60. It may be noted here that SEBI exercises its powers under the SEBI Act, 1992, with the aim to protect the interest of investors in the securities market and to promote the development, regulation and the integrity of the securities market. The instant moratorium on the institution/ continuation of suits/ proceedings does not prevent SEBI from exercising its own jurisdiction with respect to inquiring, especially into the allegations of fraud and breach of regulatory provisions of the SEBI Act and the Rules and Regulations framed thereunder. I note that the present proceedings are being conducted by SEBI against ISSL, in the capacity of ISSL as a regulated intermediary, for possible violations of certain regulatory provisions, and not as a Corporate Debtor.

61. I note that the moratorium covers the indebtedness of the corporate debtor and any claims/ disputes related to the indebtedness of the corporate debtor. The moratorium aims to keep the corporate debtor's assets together during the insolvency resolution process and facilitate orderly completion of the processes envisaged during the insolvency resolution process and ensure that the company may continue as a going concern while the creditors take a view on resolution of default. However, the intent of IBC cannot be to protect entities who have indulged in possible violations of **regulatory provisions or indulged in fraudulent activities and then seek refuge**

from the action that follow for such violations, using the moratorium clause under the IBC.

62. Proceedings for determination of fraud by any entity in the securities market is the result of the regulatory objective of minimising the risk of fraud in the securities market. The PFUTP Regulations are in the statute book for the avowed objective of creating a securities market which is free from fraud. The present proceedings are not in the nature of debt recovery proceedings or in the nature of any recovery proceedings at all or in other words, these are not proceedings of a like nature which the moratorium aims to prohibit from being initiated against the Noticee.

63. Therefore, in my considered view, the instant proceedings for the determination of whether the Noticee has committed “fraud” under the PFUTP Regulations or has violated other provisions of securities laws, does not fall within the ambit of the term “proceedings”, as mentioned in the order of the Hon’ble NCLAT.

64. In the current case, adjudication on merit would first involve determination of whether the Noticee has violated the regulatory provisions mentioned in the SCN. If it is determined that the Noticee has indeed violated the said provisions, then the next step would be to determine the liability of the Noticee for having violated these provisions. I am cognizant of the fact that in the SCN issued, the Noticee has been show caused as to why directions under Sections 11 of the SEBI Act may not be issued against it. The determination of liability for these regulatory violations can lead to monetary as well as non-monetary outcomes. The next step to be taken pursuant to determination of liability of the Noticee in terms of monetary as well as non-monetary outcomes would be to enforce the same.

65. Notwithstanding the view that the present proceedings do not fall within the ambit of “proceedings” mentioned in the order of the Hon’ble NCLAT, I am of the view that the present proceedings against the Noticee be limited only to determination of violations,

if any, and the determination of liability for the violations of regulatory provisions, if any. I note that a mere determination of the liability does not threaten or impede the resolution proceedings *qua* the Noticee. The enforcement of the non-monetary and monetary outcomes, however, could acquire the colour of “like proceedings” and thus, shall be subject to the proceedings under Section 241 of the Companies Act, 2013, for resolution *qua* the Noticee.

66. I note here that as mentioned in the order of the Hon’ble NCLAT dated March 12, 2020, the Noticee is part of the list of “Green Entities”, i.e., it is one of those domestic entities of the IL&FS Group that can continue to meet all its payment obligations, both financial and operational, as and when they become due.

67. The determination of violations, if any, and the liability, if any, is essential from the perspective of development and integrity of the securities market and protection of the rights of all market participants, including investors. For instance, if an entity is alleged to have committed a securities laws violation such as fraud and is undergoing a resolution process, then determination of the violation as soon as possible is important in order to let market participants of the securities market make an informed decision while dealing with that entity. For e.g., if the entity undergoing resolution is a registered intermediary and SEBI has reasons to allege that it has committed a fraud in the securities market, then it is in the interest of all market participants that the determination should be made as soon as possible and all participants should be aware of the dealings of this entity in the securities market. Determination of fraud at a later stage, after lifting of the moratorium, puts market participants, especially investors, at a disadvantageous position, as they will not have the benefit of the information while dealing with the entity during the entire period of resolution until determination of the violation after lifting of the moratorium. Disclosure of violations made by registered intermediaries enables market participants, especially investors, to make an informed choice while dealing with such entities. If determination of such regulatory violation is not made due to the reason that the intermediary takes shelter

under the process of resolution, then such an entity would stand at an advantageous position with respect to dealings with market participants, as compared to say, another registered intermediary, which is not undergoing resolution, but against whom similar allegation of securities laws violation have been determined.

68. The Noticee has also referred to the judgment of the Hon'ble SAT in the matter of *Dewan Housing Finance Ltd. Vs. SEBI*. I note that the facts in the case of *Dewan Housing Finance Ltd. vs. SEBI*, rendered by the Hon'ble SAT in support of Dewan Housing Finance Ltd., are different from the facts of the instant case. The present Noticee is a registered intermediary whose responsibility under securities laws as an intermediary are far more stringent than a person merely associated with the securities market. Therefore, determination of fraud assumes greater significance in the context of integrity of the securities market, which relies upon the integrity of intermediaries. Further, the violations involved in the Dewan Housing Finance Ltd. Case are of the provisions of the SEBI (Issue of Listing of Debenture Securities) Regulations, 2008, and the SEBI (Listing Obligations and Disclosure Requirements), 2015, while in the instant matter allegation of fraud has been made against the Noticee. Moreover, the question of law that was involved in the said case was the effect of moratorium under Section 14 of the IBC, while order passed by NCLAT in the present case is under Sections 241 and 242 of the Companies Act, 2013. In addition, as already noted earlier, the order of the Hon'ble NCLAT does not cover "other authorities", which is the category under which SEBI falls. Therefore, in my humble opinion, the case law rendered by Hon'ble SAT is not applicable to the facts and circumstances of the present case.

69. In view of the above discussion, I hold that the order dated October 15, 2018, of the Hon'ble NCLAT does not cover the instant proceedings at this stage. I further observe that SEBI has jurisdiction to continue the present proceedings till the stage of determination of regulatory violation alleged against the Noticee, if any, and determination of monetary and non-monetary outcome for the said violation, if any.

ORDER

70. In view of the above, I hold the following:

70.1. SEBI has the jurisdiction to proceed to determine whether the Noticee has violated the regulatory provisions mentioned in the SCN dated December 09, 2019.

70.2. SEBI has the jurisdiction to determine the monetary and non-monetary liabilities of the Noticee in the event it is found that the Noticee is in violation of regulatory provisions.

70.3. The enforcement of the liability, if any, shall be subject to the orders of the Hon'ble NCLT/ Hon'ble NCLAT/ Appellate Authority from NCLAT.

71. I note here that this Order is passed to expressly decide the stand of SEBI on jurisdiction related issues in the present case. In view of the facts and circumstances of the case and the order of the Hon'ble NCLAT in the matter of the IL&FS Group and its subsidiaries, including the Noticee, this Order does not stand as a precedent in other matters.

72. A copy of this order shall be served upon the Noticee.

Sd/-

DATE: JANUARY 08, 2021

MADHABI PURI BUCH

PLACE: MUMBAI

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA