

GAHC010015952022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/530/2022

SUNITA AGARWAL
W/O- SRI SANJAY AGARWAL, R/O- 65, BILPAR, REHABARI, GUWAHATI-
781008.

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN,
PLOT NO. C4-A, G- BLOCK, BANDRA KURLA COMPLEX, BANDRA (EAST),
MUMBAI-400051.

2:THE DEPUTY GENERAL MANAGER AND THE ADJUDICATING OFFICER
WESTERN REGIONAL OFFICE
SEBI BHAVAN
PANCHVATI 1ST LANE
GULBAL TEKRA ROAD
AHMEDABAD- 380006

Advocate for the Petitioner : DR. A SARAF

Advocate for the Respondent : SC, SEBI

Linked Case : WP(C)/1434/2022

SANDEEP AGARWAL
S/O. SRI NIRMAL AGARWAL
R/O. 65
BILPAR

REHABARI
GUWAHATI-781008.

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN
PLOT NO. C4-A
(G)-BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST)
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2:THE DEPUTY GENERAL MANAGER AND THE ADJUDICATING OFFICER

WESTERN REGIONAL OFFICE
SEBI BHAVAN
PANCHVATI 1ST LANE
GULBAL TEKRA ROAD
AHMEDABAD-380006.

Advocate for : DR. ASHOK SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA AND
ANR

Linked Case : WP(C)/764/2022

KANTA DIDWANIA
W/O SRI BISHNU KUMAR DIDWANIA
KAMRUP CHAMBER ROAD
FANCY BAZAR
GUWAHATI-781001

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN
PLOT NO. C 4-A
G- BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST) MUMBAI-400051.

Advocate for : DR. A SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA

Linked Case : WP(C)/765/2022

KAVITA DIDWANIA
W/O SRI KISHAN KUMAR DIDWANIA
KAMRUP CHAMBER ROAD
FACNY BAZAR
GUWAHATI-781001.

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN
PLOT NO. C 4-A
G- BLOCK BANDRA KURLA COMPLEX
BANDRA (EAST) MUMBAI-400051.

Advocate for : DR. A SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA

Linked Case : WP(C)/1455/2022

BANDANA AGARWAL
W/O- SRI- SANDEEP AGARWAL
R/O 65
BILPAR
REHABARI
GUWAHATI-781008

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR (B)
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN
PLOT NO. C4-A
G- BLOCK

BANDRA KURLA COMPLEX
BANDRA(EAST)
MUMBAI- 400051.

2:THE DEPUTY GENERAL MANAGER AND THE ADJUDICATING OFFICER
WESTERN REGIONAL OFFICE
SEBI BHAVAN
PANCHVATI 1ST LANE
GULBAL TEKRA ROAD
AHMEDABAD- 380006

Advocate for : DR. A SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA AND
ANR (B)

Linked Case : WP(C)/1427/2022

USHA DEVI AGARWAL
W/O- SRI NIRMAL AGARWAL
R/O- 65
BILPAR
REHABARI
GUWAHATI-781008.

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR
REPRESENTED BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI
BHAVAN
PLOT NO. C4-A
G-BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST)
MUMBAI-400051.

2:THE DEPUTY GENERAL MANAGER AND THE ADJUDICATING OFFICER
WESTERN REGIONAL OFFICE
SEBI BHAVAN
PANCHVATI 1ST LANE
GULBAL TEKRA ROAD
AHMEDDABAD-380006.

Advocate for : DR. A SARAF
Advocate for : SC

SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR

Linked Case : WP(C)/1179/2022

SMT. ROSHNI DIDWANIA
W/O SRI PARAS DIDWANIA
KAMRUP CHAMBER ROAD
FANCY BAZAR
GUWAHATI-781001

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA
REPRESENTED BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI
BHAVAN
PLOT NO. C 4-A
G-BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST)
MUMBAI-400051

Advocate for : DR. A SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA

Linked Case : WP(C)/1533/2022

SANJAY AGARWAL
S/O- SRI NIRMAL AGARWAL
R/O 65
BILPAR
REHABARI
GUWAHATI-781008

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN
PLOT NO. C4-A

G- BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST)
MUMBAI- 400051.

2:THE DEPUTY GENERAL MANAGER AND THE ADJUDICATING OFFICER
WESTERN REGIONAL OFFICE
SEBI BHAVAN
PANCHVATI 1ST LANE
GULBAL TEKRA ROAD
AMHEDABAD-380006

Advocate for : DR. A SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA AND
ANR

Linked Case : WP(C)/766/2022

ANKITA DIDWANIA
W/O SRI RAJIV DIDWANIA
KAMRUP CHAMBER ROAD
FANCY BAZAR
GUWAHATI-781001

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN
PLOT NO. C 4-A
G- BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST) MUMBAI-400051.

2:THE ADJUDICATING OFFICER

SEBI BHAVAN
PLOT NO. C 4-A
G- BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST) MUMBAI-400051.

Advocate for : DR. A SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA AND

ANR

Linked Case : WP(C)/767/2022

NIRMALA DIDWANIA
W/O SRI SAJJAN KUAR DIDWANIA
KAMRUP CHAMBER ROAD
FANCY BAZAR
GUWAHATI-781001.

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN
PLOT NO. C 4-A
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BANDRA KURLA COMPLEX
BANDRA (EAST) MUMBAI-400051.

2:THE ADJUDICATING OFFICER

SEBI BHAVAN
PLOT NO. C 4-A
G- BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST) MUMBAI-400051.

Advocate for : DR A SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA AND
ANR

Linked Case : WP(C)/852/2022

SWETA DIDWANIA
W/O- VIKRAM DIDWANIA
KAMRUP CHAMBER ROAD
FANCY BAZAR
GUWAHATI-01

VERSUS

THE SECURITIES AND EXCHANGE BOARD OF INDIA AND ANR
REP. BY ITS CHAIRMAN HAVING ITS OFFICE SITUATED AT SEBI BHAVAN
PLOT NO. C4-A
G- BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST)
MUMBAI-51

2:THE ADJUCATING OFFIDER
SEBI BHAVAN
PLOT NO. C4-A
G- BLOCK
BANDRA KURLA COMPLEX
BANDRA (EAST)
MUMBAI-51

Advocate for : DR. A SARAF
Advocate for : SC
SEBI appearing for THE SECURITIES AND EXCHANGE BOARD OF INDIA AND
ANR

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

JUDGMENT & ORDER (ORAL)

Date: 06.09.2022

Heard Dr. Ashok Saraf, learned senior counsel assisted by Mr. A. Goyal, learned counsel for the petitioners and Ms. M. Hazarika, learned senior counsel assisted by Mr. D. Khan, learned counsel for the respondents in the SEBI in WP(C) No. 530/2022, WP(C) No. 765/2022, WP(C) No. 767/2022, WP(C) No. 852/2022, WP(C) No. 1179/2022, WP(C) No. 1427/2022, WP(C) No. 1434/2022,

WP(C) No. 1455/2022 and WP(C) No. 1533/2022 and Mr. A. Choudhury, learned senior counsel assisted by Mr. A Mahadevan Sethi learned counsel for the respondents in the SEBI in WP(C) No. 766/2022 and WP(C) No. 764/2022.

2. All the writ petitioners herein are engaged in the activity of purchasing and selling of shares listed under the Securities and Exchange Board of India (for short 'SEBI'). According to the respondents in the SEBI, the persons engaged in buying and selling of the shares also indulges in buying of a particular share of a listed company and immediately thereafter, sell the purchased share at a price which would be lower than the price at which the shares were purchased, and the time gap between the purchase and sell of the shares at times may also be a fraction of a second. It came to the notice of the authorities of the SEBI that such manner of purchases and sell of shares were prevalent under the SEBI which came to be called by the authorities to be reversal trading.

3. The concept of reversal trading came under the consideration of the Supreme Court in *Securities and Exchange Board of India Vs. Rakhi Trading Private Ltd.* reported in (2018) 13 SCC 753. In *Rakhi Trading (Supra)*, certain decisions of the Adjudicating Officer were assailed before the Securities Appellate Tribunal (for short, SAT), which also included a decision of an Adjudicating Officer in respect of Rakhi Trading Pvt. Ltd. The SAT by its respective orders had set aside the decisions of the Adjudicating Officer. Being aggrieved by the order of the SAT, the SEBI preferred an appeal before the Supreme Court under Section 15Z of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act-1992'). In respect of Rakhi Trading Pvt. Ltd., a show cause notice dated 05.10.2007 was issued alleging execution of certain non-trading transactions and the Adjudicating Officer

analyzed the trade logs and observed that the trades executed by Rakhi Trading matched with the counter-party, namely, Kasam Holding Pvt. Ltd. within a few seconds and that the trade reversals took place in a matter of minutes/hours. The relevant propositions of the Supreme Court in *Rakhi Trading (Supra)* are extracted as below:

“28. According to SAT, the synchronisation and reversal of trades effected by the parties with a significant price difference, some in a few seconds and majority, in any case, on the same day had no impact on the market and it has not affected the NIFTY index in any manner or induced investors. SAT has held that such trades are illegal only when they manipulate the market in any manner and induce investors. It has also taken a view that there being no physical delivery of any asset, there is no change of beneficial ownership and what is traded in the F&O segment are only contracts and hence, such synchronised and reverse trades in NIFTY options in the F&O segment “can never manipulate the market”. It has also held that the trades being settled in cash through a stock exchange mechanism, are genuine and therefore cannot create a false or misleading appearance of trading in the F&O segment. Further, any trade to be objectionable must result in influencing the market one way or the other. SAT held that these trades were for the purpose of tax planning which is not violative of any regulation. We are not inclined to get into the issue of tax planning as it was not mentioned in the show-cause notices.

29. We find it difficult to appreciate the stand taken by SAT which is endorsed by the learned Senior Counsel appearing for the respondents. Mr Chidambaram, learned Senior Counsel appearing for Rakhi Trading argues that the SAT decision is valid and proper. Reliance is also placed on Ketan Parekh [Ketan Parekh v. SEBI, 2006 SCC OnLine SAT 221] in which SAT held that synchronised trades are not per se illegal. As far as reversal of trades is concerned, the Senior Counsel has sought to distinguish Ketan Parekh [Ketan Parekh v. SEBI, 2006 SCC OnLine SAT 221] as it pertained to dealings in the cash segment whereas the present case deals with the F&O segment. The learned Senior Counsel has strenuously argued that no rules of the game have been violated.

30. We are unable to agree with the arguments of the learned Senior Counsel appearing for Rakhi Trading. Regulation 4(1) in clear and unmistakable terms has provided that “no person shall indulge in a fraudulent or an unfair trade practice in securities”. In SEBI v. Kanaiyalal Baldevbhai Patel [SEBI v. Kanaiyalal Baldevbhai Patel, (2017) 15 SCC 1] , it has been held by this Court that a trade practice is unfair if the conduct undermines the ethical standards and good faith dealings between the parties engaged in business transactions. To quote: (SCC pp. 22 & 31, paras 31 & 60)

“31. Although unfair trade practice has not been defined under the regulations, various other legislations in India have defined the concept of unfair trade practice in different contexts. A clear-cut generalised definition of the “unfair trade practice” may not be

possible to be culled out from the aforesaid definitions. Broadly, trade practice is unfair if the conduct undermines the ethical standards and good faith dealings between parties engaged in business transactions. It is to be noted that unfair trade practices are not subject to a single definition; rather it requires adjudication on case-to-case basis. Whether an act or practice is unfair is to be determined by all the facts and circumstances surrounding the transaction. In the context of this regulation a trade practice may be unfair, if the conduct undermines the good faith dealings involved in the transaction. Moreover the concept of "unfairness" appears to be broader than and includes the concept of "deception" or "fraud".

60. Coupled with the above, is the fact, the said conduct can also be construed to be an act of unfair trade practice, which though not a defined expression, has to be understood comprehensively to include any act beyond a fair conduct of business including the business in sale and purchase of securities. However the said question, as suggested by my learned Brother, Ramana, J. is being kept open for a decision in a more appropriate occasion as the resolution required presently can be made irrespective of a decision on the said question."

(emphasis supplied)

31. Having regard to the fact that the dealings in the stock exchange are governed by the principles of fair play and transparency, one does not have to labour much on the meaning of unfair trade practices in securities. Contextually and in simple words, it means a practice which does not conform to the fair and transparent principles of trades in the stock market. In the instant case, one party booked gains and the other party booked a loss. Nobody intentionally trades for loss. An intentional trading for loss per se, is not a genuine dealing in securities. The platform of the stock exchange has been used for a non-genuine trade. Trading is always with the aim to make profits. But if one party consistently makes loss and that too in preplanned and rapid reverse trades, it is not genuine; it is an unfair trade practice. Securities market, as the 1956 Act provides in the Preamble, does not permit "undesirable transactions in securities". The Act intends to prevent undesirable transactions in securities by regulating the business of dealing therein. Undesirable transactions would certainly include unfair practices in trade. The SEBI Act, 1992 was enacted to protect the interest of the investors in securities. Protection of interest of investors should necessarily include prevention of misuse of the market. Orchestrated trades are a misuse of the market mechanism. It is playing the market and it affects the market integrity.

32. Ordinarily, the trading would have taken place between anonymous parties and the price would have been determined by the market forces of demand and supply. In the

instant case, the parties did not stop at synchronised trading. The facts go beyond that. The trade reversals in this case indicate that the parties did not intend to transfer beneficial ownership and through these orchestrated transactions, the intention of which was not regular trading, other investors have been excluded from participating in these trades. The fact that when the trade was not synchronising, the traders placed it at unattractive prices is also a strong indication that the traders intended to play with the market.

33. We also find it difficult to appreciate the stand of SAT that the rationale of change of beneficial ownership does not arise in the derivatives segment. No doubt, as in the case of trade in a scrip in the cash segment, there is no physical delivery of the asset. However, even in the derivative segment there is a change of rights in a contract. In the instant case, through reverse trades, there was no genuine change of rights in the contract. SAT has erred in its understanding of change in beneficial ownership in reverse trades. Even in derivatives, the ownership of the right is restored to the first party when the reverse trade occurs. In this context, the discussion in Ketan Parekh [Ketan Parekh v. SEBI, 2006 SCC OnLine SAT 221] assumes significance: (SCC OnLine SAT para 20)

“20. ... As already observed “synchronisation” or a negotiated deal ipso facto is not illegal. A synchronised transaction will, however, be illegal or violative of the Regulations if it is executed with a view to manipulate the market or if it results in circular trading or is dubious in nature and is executed with a view to avoid regulatory detection or does not involve change of beneficial ownership or is executed to create false volumes resulting in upsetting the market equilibrium. Any transaction executed with the intention to defeat the market mechanism whether negotiated or not would be illegal. Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism will depend upon the intention of the parties which could be inferred from the attending circumstances because direct evidence in such cases may not be available. The nature of the transaction executed, the frequency with which such transactions are undertaken, the value of the transactions, whether they involve circular trading and whether there is real change of beneficial ownership, the conditions then prevailing in the market are some of the factors which go to show the intention of the parties. This list of factors, in the very nature of things, cannot be exhaustive. Any one factor may or may not be decisive and it is from the cumulative effect of these that an inference will have to be drawn.”

(emphasis supplied)

From the facts before us, it is clear that the traders in question did not intend to transfer beneficial ownership and therefore these trades are non-genuine.

34. Rather than allowing the market forces to operate in their natural course, the traders repeatedly carried out the impugned transactions which deprived other market players from full participation. The repeated reversals and predetermined arrangement to book profits and losses respectively, made it clear that the parties were not trading in

the normal sense and ordinary course. Resultantly, there has clearly been a restriction on the free and fair operation of market forces in the instant case.

35. Regulation 2(1)(c) defines "fraud". Under Regulation 2(1)(c)(2) a suggestion as to a fact which is not true while he does not believe it to be true is fraud. Under Regulation 2(1)(c)(7), a deceptive behaviour of one depriving another of informed consent or full participation is fraud. And under Regulation 2(1)(c)(8), a false statement without any reasonable ground for believing it to be true is also fraud. In a synchronised and reverse dealing in securities, with predetermined arrangement to book loss or gain between pre-arranged parties, all these vices are attracted.

37. According to SAT, only if there is market impact on account of sham transactions, could there be violation of the PFUTP Regulations. We find it extremely difficult to agree with the proposition. As already noted above, SAT has missed the crucial factors affecting the market integrity, which may be direct or indirect. The stock market is not a platform for any fraudulent or unfair trade practice. The field is open to all the investors. By synchronisation and rapid reverse trade, as has been carried out by the traders in the instant case, the price discovery system itself is affected. Except the parties who have pre-fixed the price nobody is in the position to participate in the trade. It also has an adverse impact on the fairness, integrity and transparency of the stock market.

38. We are fortified in our conclusion by the judgment of this Court in SEBI v. Kishore R. Ajmera [SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368] , though it is a case pertaining to brokers, wherein it has been held at para 25: (SCC p. 383)

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

In this case, it was also held that in the absence of direct proof of meeting of minds elsewhere in synchronised transactions, the test should be one of preponderance of probabilities as far as adjudication of civil liability arising out of the violation of the Act or the provision of the Regulations is concerned. To quote: (SCC p. 385, para 31):

“31. The conclusion has to be gathered from various circumstances like that volume of the trade effected; the period of persistence in trading in the particular scrip; the particulars of the buy and sell orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors.”

We do not think that those illustrations are exhaustive. There can be several such situations, some of which we have discussed hereinabove.

39. The traders thus having engaged in a fraudulent and unfair trade practice while dealing in securities, are hence liable to be proceeded against for violation of Regulations 3(a), 4(1) and 4(2)(a) of the PFUTP Regulations. Appeals Nos. 1969 of 2011, 3175 of 2011 and 3180 of 2011 are hence allowed. The orders of the Securities Appellate Tribunal are set aside and that of SEBI are restored to the extent indicated above.

41. Before concluding, we would like to reiterate the observations made by this Court in Kishore R. Ajmera [SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368] and Kanaiyalal Patel [SEBI v. Kanaiyalal Baldevbhai Patel, (2017) 15 SCC 1] regarding the need for a more comprehensive legal framework governing the securities market. As the market grows, ingenious means of manipulation are also employed. In such a scenario, it is essential that SEBI keeps up with changing times and develops principles for good governance in the stock market which ensure free and fair trading.

Synchronised Trading:

55. As per Oxford Dictionary, the word "synchronise" means "cause to occur at the same time; be simultaneous". A synchronised trade is one where the buyer and seller enter the quantity and price of the shares they wish to transact at substantially the same time. This could be done through the same broker (termed a cross deal) or through two different brokers. (Ketan Parekh v. SEBI [Ketan Parekh v. SEBI, 2006 SCC OnLine SAT 221])

56. Synchronised trade is one wherein "buy and sell" orders are placed simultaneously for the same quantity and price they wish to transact at substantially the same time. Synchronised trades are not illegal provided that they are executed on the screens of the exchange in the price and order matching mechanism of the exchanges just like any

other normal trade. As per SEBI's Circular No. SMDRP/POLICY/CIR-32/99 dated 14-9-1999, "All negotiated deals.... shall be executed only on the screens of the exchanges in the price and order matching mechanism of the exchanges just like any other normal trade." In the said circular, it was stated that "the above decision was taken as negotiated deals avoid transparency requirements, do not contribute to price discovery and some investors do not have benefit of the best possible price and militate against the basic concept of stock exchanges, which are meant to bring together a large number of buyers and sellers in an open manner."

57. In Ketan Parekh v. SEBI [Ketan Parekh v. SEBI, 2006 SCC OnLine SAT 221] the Securities Appellate Tribunal (SAT) has considered the circumstances under which "synchronised trade" will be legal and held as under: (SCC OnLine SAT para 20):

"20. There are yet another type of transactions which are commonly called synchronised deals. The word "synchronise" according to Oxford Dictionary means "cause to occur at the same time; be simultaneous". A synchronised trade is one where the buyer and seller enter the quantity and price of the shares they wish to transact at substantially the same time. This could be done through the same broker (termed a cross deal) or through two different brokers. Every buy and sell order has to match before the deal can go through. This matching may take place through the stock exchange mechanism or off market. When it matches through the stock exchange, it may or may not be a synchronised deal depending on the time when the buy and sell orders are placed. There are deals which match off market i.e. the buyer and the seller agree on the price and quantity and execute the transaction outside the market and then report the same to the exchange. These are also called negotiated transactions.... It has recently issued a circular requiring all bulk deals to be transacted through the exchange even if the price and quantity are settled outside the market. When such deals go through the exchange, they are bound to synchronise. It would, therefore, follow that a synchronised trade or a trade that matches off market is per se not illegal. Merely because a trade was crossed on the floor of the stock exchange with the buyer and seller entering the price at which they intended to buy and sell respectively, the transaction does not become illegal. A synchronised transaction even on the trading screen between genuine parties who intend to transfer beneficial interest in the trading stock and who undertake the transaction only for that purpose and not for rigging the market is not illegal and cannot violate the regulations."

(emphasis supplied)

58. A synchronised transaction will become illegal or violative of the Regulations if it is executed with a view to manipulate the market or if it results in circular trading or is dubious in nature and with a view to manipulate the price or volume of the scrip or with some ulterior purpose. In Ketan Parekh case [Ketan Parekh v. SEBI, 2006 SCC OnLine

SAT 221] , SAT held as under: (SCC OnLine SAT para 20)

“20. ... A synchronised transaction will, however, be illegal or violative of the Regulations if it is executed with a view to manipulate the market or if it results in circular trading or is dubious in nature and is executed with a view to avoid regulatory detection or does not involve change of beneficial ownership or is executed to create false volumes resulting in upsetting the market equilibrium. Any transaction executed with the intention to defeat the market mechanism whether negotiated or not would be illegal. Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism will depend upon the intention of the parties which could be inferred from the attending circumstances because direct evidence in such cases may not be available. The nature of the transaction executed, the frequency with which such transactions are undertaken, the value of the transactions, whether they involve circular trading and whether there is real change of beneficial ownership, the conditions then prevailing in the market are some of the factors which go to show the intention of the parties. This list of factors, in the very nature of things, cannot be exhaustive. Any one factor may or may not be decisive and it is from the cumulative effect of these that an inference will have to be drawn.”

(emphasis supplied)

63. “By manipulation and synchronisation”, it is meant that two parties have premeditated; as such a drastic movement in price within few seconds could have been only through prior understanding between the parties concerned only to fulfil an unlawful objective through misuse of the stock exchange. That is, prior arrangement/prior understanding with each other wherein one will make profit and other will lose and thereby as soon as one party opens up its trade in the market, the other party will buy it. Though the trading is shown on the screen, but prior arrangement is very well possible behind the screen. This is what has been done in the case in hand. Buy and sell orders were placed at a difference of few seconds/minutes, while “sell” by respondent to Kasam Holding at a high price and “buy” by the respondent from Kasam Holding Pvt. Ltd. at a low price. The transactions wherein the “buy and sell” orders entered almost simultaneously and the transactions matched in time and quantity with significant price variation and the respondent consistently making profit but Kasam Holding Pvt. Ltd. consistently making loss. Number of reversal trades between the respondent and Kasam Holding Pvt. Ltd. and such reversal trade taking place repeatedly over a period of time only indicates that there was pre-arrangement between the parties before the trade was executed. The transactions involving only the same two parties within few seconds with huge difference in “buy and sell” value, though there is no difference in the underlying security, can take place only with prior understanding between the two parties. The Board who is the regulator of the market, can always lift the veil of such transactions to show the non-genuineness of such transactions.

64. *Buying and selling of equal quantities within the day may not be wrong but the trades with ulterior purpose are not genuine for sure. In the present case, every time one party is making profit and other party is facing loss. Further, there was proximity in the time of sell orders at a high price to the party Kasam Holding Pvt. Ltd. and the same quantity being reversed by Kasam Holding Pvt. Ltd. to the same party Rakhi Trading Pvt. Ltd. at a low price through the same set of brokers. As discussed earlier, during March 2007 thirteen Nifty Option Contracts got matched between the same parties through the same brokers. I fail to understand as to why Kasam Holding has made the transactions repeatedly by incurring losses. It seems improbable that Kasam Holding which was facing loss in each transaction by trading with the respondent, was still eager to trade with the same repeatedly for about four days which is not in consonance with the market trend and human conduct; more so, when there has not been any major difference in the underlying price. It is thus difficult to accept that several such sell and buy orders between the respondent and Kasam Holding being within a gap of "1", "2" or "3" or few seconds were by mere coincidence. As contended by the appellant SEBI, it was too much of coincidence that there were number of transactions of "buy and sell orders" between the same parties with same quantity of stock with significant variation in price.*

67. *In the quasi-judicial proceeding before SEBI, the standard of proof is preponderance of probability. In a case of similar synchronised trading involving same set of brokers emphasising that the standard of proof is "preponderance of probability" in paras 26 and 27, in Kishore R. Ajmera case [SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368] , this Court held as under: (SCC p. 383)*

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

(emphasis supplied)

68. *There was no possibility of such perfect matching of quantity, timing, prices, etc. between the same parties unless there was prior meeting of minds or a specific*

understanding/arrangement between the parties. After referring to Ketan Parekh [Ketan Parekh v. SEBI, 2006 SCC OnLine SAT 221] and Nirmal Bang [Nirmal Bang Securities (P) Ltd. v. SEBI, 2003 SCC OnLine SAT 37 : (2004) 49 SCL 421] cases, in Accord Capital Markets Ltd., In re [Accord Capital Markets Ltd., In re, 2007 SCC OnLine SEBI 181] , SEBI held as under: (Accord Capital case [Accord Capital Markets Ltd., In re, 2007 SCC OnLine SEBI 181] , SCC OnLine SEBI para 4):

“4.12. I note that most of the synchronised trades executed by the Broker were perfectly matched with the counter-party orders even with respect of the price to the extent of two decimal points. The proximity in placing the orders at the same price and for the same quantity almost at the same time (in majority of the cases) resulted in the matching of the aforesaid transactions, with all the ingredients i.e. quantity, price and the time, required to conclude the trades. The time difference (between the buy and sell orders) of majority of the synchronised trades was very less with the price and quantity matching. The said synchronisation cannot take place in the absence of any specific understanding/arrangement between the clients at the first instance, especially when the shares of the company were highly liquid at the time of the trades.

4.24. The proof of manipulation in the circumstances always depends on inferences drawn from a mass of factual details. Findings must be gathered from patterns of trading data and the nature of the transactions, etc. Several circumstances of a determinative character coupled with the inference arising from the conduct of the parties in a major market manipulation could reasonably lead to conclusion that the Broker was responsible in the manipulation. The evidence, direct or circumstantial, should be sufficient to raise a presumption in its favour with regard to the existence of a fact sought to be proved. As pointed out by Best in "Law of Evidence", the presumption of innocence is no doubt presumptio juris; but everyday practice shows that it may be successfully encountered by the presumption of guilt arising from circumstances, though it may be a presumption of fact. Since it is exceedingly difficult to prove facts which are especially within the knowledge of the parties concerned, the legal proof in such circumstances partakes the character of a prudent man's estimate as to the probabilities of the case. Hon'ble Securities Appellate Tribunal (SAT) has observed in the matter of Ketan Parekh v. SEBI [Ketan Parekh v. SEBI, 2006 SCC OnLine SAT 221] : (SCC OnLine SAT para 20):

‘20. ... Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism will depend upon the intention of the parties which could be inferred from the attending circumstances because direct evidence in such cases may not be available....’

4.25. Presumption plays a critical role in coming to a finding as to the involvement or otherwise of a market participant in any manipulation. For instance, while trading, a lip service can be paid to a screen based trading system while agreement is reached beforehand between brokers to effect the transaction. Anonymity

can be a cloak to cover anastomosis of interest. Therefore, the hackneyed plea based on intentions in the market place cannot pass muster in all circumstances, more so when such intentions are in the special/peculiar knowledge of the parties to the transactions. Also any suggestion attributing innocence to the parties involved in such transactions would give rise to an untenable situation where certain other third persons/entities alone would be responsible for the manipulation and none else."

69. Applying the test laid down in Kishore R. Ajmera case [SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368] to the present case, I find that by cumulative analysis of the reversal transactions between the respondent and Kasam Holding, quantity, time and significant variation of prices, without major variation in the underlying price of the securities clearly indicate that the respondent's trades are not genuine and had only misleading appearance of trading in the securities market, without intending to transfer beneficial ownership.

75. Once the reversal transactions are shown to be non-genuine or shown to be fictitious creating a false or misleading appearance in the market for ulterior purpose and that the stock market was misused by such manipulative device, this is in clear violation of the provisions of the PFUTP Regulations, 2003. Regulations 3(a), 4(1) and 4(2)(a) of the PFUTP Regulations prohibit such manipulative trades, unfair trade practices.

80. The smooth operation of the securities market and its healthy growth and development depends upon large extent on the quality and integrity of the market. Unfair trade practices affect the integrity and efficiency of the securities market and the confidence of the investors. Prevention of market abuse and preservation of market integrity are the hallmark of securities law. In N. Narayanan v. SEBI [N. Narayanan v. SEBI, (2013) 12 SCC 152] it was held as under: (SCC p. 168, para 33):

"33. Prevention of market abuse and preservation of market integrity is the hallmark of securities law. Section 12-A read with Regulations 3 and 4 of the 2003 Regulations essentially intended to preserve "market integrity" and to prevent "market abuse". The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors' protection. Securities market is based on free and open access to information, the integrity of the market is predicated on the quality and the manner on which it is made available to market. "Market abuse" impairs economic growth and erodes investor's confidence. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into

conclusions, on wrong premises, which is known to be wrong to the abusers. The statutory provisions mentioned earlier deal with the situations where a person, who deals in securities, takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality". The same can be achieved by inflating the company's revenue, profits, security deposits and receivables, resulting in price rise of the scrip of the company. Investors are then lured to make their "investment decisions" on those manipulated inflated results, using the above devices which will amount to market abuse."

82. Stock market is regulated mainly by SEBI and to some extent by the Departments of Economic Affairs and Company Affairs of the Government of India. Market manipulation can occur in a variety of ways. Manipulations/unfair trade practices reduce the market efficacy. Section 11 of the SEBI Act, 1992 provides for the functions of the Board, as per which it shall be the duty of the Board to protect the interests of the investors in securities and to promote the development and to regulate the securities market by such measures as it thinks fit. Main function of SEBI in this regard is to make inquiry, investigation and to give directions, to promote the orderly and healthy growth of the securities market. With a view to curb unfair trade practices, market manipulation, price rigging and other frauds in securities market, SEBI is empowered to make inquiries and inspection.

84. The capital market regulator, SEBI has a significant role to play in safeguarding the interest of investors and to ensure strict compliance of all the relevant SEBI Rules and Regulations targeting at safeguarding the interest of small investors. In order to protect the interests of the investors and the integrity of the markets, as a regulator, SEBI has to make the marketplace efficient and clean, wherein all the participants play their role diligently and professionally within the four corners of the system, without there being any scope for market abuse. Where certain unscrupulous elements are trying to manipulate the market to serve their own interest, it becomes imperative on the part of SEBI to intervene and to curb further mischief and to take necessary action to maintain public confidence in the integrity of the securities market.

Conclusion:

88. Considering the reversal transactions, quantity, price and time and sale, parties being persistent in a number of such trade transactions with huge price variations, it will be too naïve to hold that the transactions are through screen-based trading and hence anonymous. Such conclusion would be overlooking the prior meeting of minds involving synchronisation of buy and sell order and not negotiated deals as per the Board's circular. The impugned transactions are a manipulative/deceptive device to create a desired loss and/or profit. Such synchronised trading is violative of transparent norms of trading in securities. If the findings of SAT are to be sustained, it would have serious

repercussions undermining the integrity of the market and the impugned order of SAT is liable to be set aside. On the above additional reasonings also, I agree with the conclusion allowing the appeal preferred by SEBI against the traders. I also agree with the conclusion dismissing the appeal preferred by SEBI against the brokers."

4. The propositions laid down by the Supreme Court in *Rakhi Trading (supra)* are as follows:

- i. According to SAT, the synchronization and reversal of trades effected by the parties with a significant price difference, some in a few seconds and majority, in any case, on the same day had no impact on the market and it had not affected the NIFTY index in any manner or induced investors and such trades are illegal only when they manipulate the market in any manner and induce the investors. The Supreme Court did not appreciate the said stand of the SAT and was of the view that under Regulation 4(1) of the *Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (for short 'the PFUTP Regulations')*, which provides in clear and unmistakable terms that no person shall indulge in a fraudulent or an unfair trade practice in securities, a trade practice would be unfair if the conduct undermines the ethical standards and good faith dealings between the parties engaged in the business transactions.
- ii. As the dealings in the stock exchange are governed by the principles of fair play and transparency, one does not

have to labour much on the meaning of unfair trade practices in securities. In other words, it means a practice which does not conform to the fair and transparent principles of trades in the stock market. In a case where one party booked a gain and another party booked a loss, where in a situation, nobody intentionally trades for loss, an intentional trading for loss, *per se*, would not be a genuine dealing in securities. Trading in securities is always with the aim to make profits, but if one party consistently makes loss and that too in a pre-planned rapid reverse trades, it would be not genuine, but an unfair trade practice.

- iii. Protection of interest of investors should necessarily include prevention of misuse of the market. Orchestrated trades are a misuse of the market mechanism. It is playing the market and it affects the market integrity. The trade reversals indicate that the parties did not intend to transfer beneficial ownership and through these orchestrated transactions, the intention was not of regular trading, and other investors have been excluded from participating in these trades.
- iv. Rather than allowing the market force to operate in their natural course, the traders involving in synchronization and reversal trading repeatedly carried out the transactions which deprived other market players from full participation and the pre-determined arrangement of reversal trading to book profit

and losses, made it clear that the parties were not trading in the normal sense and ordinary course. In a synchronized and reverse dealing in securities, with predetermined arrangement to book loss or gain between pre-arranged parties, all the aforesaid vices are attracted.

While synchronization and rapid reverse trade are being carried out by the traders, the price discovery system itself is affected and except the parties who have pre-fixed the price nobody else is in the position to participate in the trade.

- v. In the absence of any direct proof of meeting of minds elsewhere in a synchronized transaction, a test should be one of preponderance of probabilities as far as adjudication of civil liabilities arising out of the violation of the Act or the provisions of the Regulations are concerned.
- vi. All such traders who are engaged in a fraudulent and unfair trade practice while dealing in securities are hence liable to be proceeded against for violation of Regulations 3(a), 4(1) and 4(2)(a) of the PFUTP Regulations.
- vii. A synchronized transaction will become illegal or would violate the Regulations if it is executed with a view to manipulate the market or if it results in circular trading or is dubious in nature and with a view to manipulate the price or volume of the scrip and done with some ulterior purpose by

manipulation or synchronization between two parties in a premeditated manner, resulting in drastic movement in price within few seconds which could have been possible only through prior understanding and to fulfill an unlawful objective through misuse of the stock exchange.

- viii. The transactions involving the same two parties within a few seconds with huge difference in 'buy and sell' value though there is no difference in the underlying security, can take place with prior understanding between the two parties and the SEBI who is the regulator of the market, can always lift the veil of such transactions to show the non-genuineness of such transactions.
- ix. In the case before the Supreme Court, every time one of the parties was making profit and the other was facing loss. It seemed improbable that one of the parties namely Kasam Holding who was facing loss in each transaction by trading with the other party was still eager to trade with the same repeatedly for about four days, which was not in consonance with the market trend and human conduct.
- x. In a quasi judicial proceeding before the SEBI, the standard of proof was preponderance of probability and further that there would be no possibility of such perfect matching of quantity, timing, prices, etc., between the same parties unless there was prior meeting of minds or a specific understanding/arrangement between the parties.

- xi. Reversal transactions are shown to be non-genuine or fictitious creating false or misleading appearance in the market for ulterior purpose and it is construed to be a clear violation of the provisions of Regulations 3(a), 4(1) and 4(2) (a) of the PFUTP Regulations.
- xii. The smooth operation of the securities market and its healthy growth and development to a large extent depends on the quality and integrity of the market and unfair trade practices which affect the integrity and efficiency of the securities market and prevention of market abuse and preservation of market integrity are the hallmarks of securities law.
- xiii. Market manipulation can occur in a variety of ways requiring to make inquiry, investigation and to give directions, so as to promote the orderly and healthy growth of the securities market. Where certain unscrupulous elements are trying to manipulate the market to serve their own interest, it becomes imperative on the part of SEBI to intervene and to curb further mischief and to take necessary action to maintain public confidence in the integrity of the securities market.
- xiv. Accordingly, it was concluded by the Supreme Court that in reversal transactions, quantity, price and time and sale being persistent in a number of such trade transactions with huge price variations, it would be too naive to hold that the transactions are through screen-based trading and hence

anonymous and such conclusion would lead to over-looking the prior meeting of minds involving synchronization of buy and sell order and that it was not a negotiated deal. Such transactions are manipulative/deceptive device to create a desired loss and/or profit and such synchronized trading would violate the transparent norms of trading in securities.

- xv. As per the propositions laid down by the Supreme Court in Rakhi Trading(supra) we have to understand that in a synchronized trading or reversal trading where there is a buying and selling of the shares within a very short span of time and one party gains while the other loses and it happens repeatedly over a period of time, it would have to be construed to be a manipulation and unfair trade practice under the laws which requires enquiry, investigation and appropriate directions to be given by the SEBI to promote orderly and healthy growth of the securities market.

5. The respondents in the SEBI had initiated certain proceedings under Sections 11(1), 11(4) and 11B of the SEBI Act in respect of 59 entities and in such proceeding, an interim order dated 20.08.2015 was passed with reference to the proceeding WTM/RKA/ISD/106/2015. In paragraph 40 of the said order, a conclusion was arrived in the facts of that case that certain misuse of stock options involved therein displayed not only unreal pictures of market activities, but also defeated the basic premises of screen based electronic trading system and price discovery mechanism by repeated execution of pre-decided reversal trades at irrational/arbitrary prices. Accordingly, a view was formed that the

abuse of such financial instruments which were made available to the investors for the purpose of protection of their investment portfolios or the reasons of adverse price movement, cannot be tolerated and needs to be dealt with. In view of the prevalence of the pre-decided reversal trades at irrational/arbitrary prices in respect of 59 such entities, in paragraph 5 of the said order, the authorities in the SEBI was also of the view that a detailed investigation of the entire scheme employed in that case was necessary to find out the rationale behind the entities to have indulged in such suspicious/artificial trades, including the tracing of fund trails and the role of the intermediaries in allowing such fictitious trades to enter the system. Accordingly, a view was formed that the investigation to be done shall also cover the examination of any other entity executing similar fictitious trades in the stock option segment. In the aforesaid background, the respondents in the SEBI had undertaken a detailed investigation and it is claimed that in course of such detailed investigation, involvement of several other persons in such pre-decided reversal trades were noticed from the records maintained in the system.

6. It is the stand of the respondents in the SEBI that pursuant to such detailed investigation that was conducted, the notices impugned in this batch of writ petitions were issued. In the instant case, the notices under Rule 4(1) of the Securities and Exchange Board of India (Procedure for holding enquiry and imposing penalties) Rules, 1995 (in short PR- 1995) issued by the authorities in the respondent SEBI are being assailed.

7. Dr. Ashok Saraf, learned senior counsel for the writ petitioners by referring to various provisions of the SEBI Act and the Rules made thereunder has raised a contention that the procedure adopted by the respondents in the SEBI leading

to the impugned notices under Rule 4(1) of the PR-1995 were in violation/aberration of the procedure prescribed in the statutes for the purpose.

8. On the other hand, Ms. M Hazarika, learned senior counsel and Mr. A Choudhury, learned senior counsel for the respondents in the SEBI raised a counter contention that all the procedures as required by the statutes for the purpose have been duly followed and therefore, no interference is required in respect of the impugned notices.

9. Before adventing into the detailed submissions being raised by the rival parties as regards the violation/compliance of the necessary procedures, we are of the view that it would be pertinent to refer to the judgment of the Supreme Court in *T Takano Vs. Securities and Exchange Board of India and Another* reported in 2022 SCC Online SC 210 which are extracted as below:

By a judgment dated 29 September 2020, a Division Bench of the Bombay High Court dismissed the petition instituted by the appellant under Article 226 of the Constitution for challenging a show cause notice which was issued by the first respondent¹ alleging a violation of the provisions of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations 2003. A petition seeking a review of the judgment of the Division Bench was disposed of by an order dated 22 October 2020. The appellant moved a Special Leave Petition against the judgment in the writ petition and the order in review. The principal issue is whether an investigation report under Regulation 9 of the PFUTP Regulations must be disclosed to the person to whom a notice to show cause is issued.

9. The appellant claims that he received the show cause notice by email on 4 August 2020. The appellant responded to the show cause notice on 6 August 2020 stating that though he had received the forensic audit report submitted by Pipara & Co. LLP, he had not received the report of the investigation conducted by SEBI. The appellant sought an opportunity to inspect the following records:

“[...] including but not limited to all material on which reliance was placed Pipara & Co. LLP for the purpose of preparing the forensic audit report, all material on which reliance has been placed while issuing the Show Cause Notice, and on which reliance is intended to be placed while making any adjudication on the Show Cause Notice (“material”).”

10. By its communication dated 13 August 2020, the first respondent stated that the investigation report is an 'internal document' which cannot be shared. The appellant was provided time until 9 August 2020 to inspect the other documents. The first respondent enclosed soft copies of the annexures to the forensic report and called upon the appellant to submit a reply. The appellant reiterated the demand to inspect the investigation report. By an email dated 4 September 2020, the appellant was informed that the investigation report of SEBI was not relied on to issue the show cause notice and hence, would not be provided.

12. By its judgment dated 29 September 2020, the High Court held that the investigation report prepared under Regulation 9 of PFUTP Regulations is solely for internal purposes. In concluding that the investigation report need not be furnished while issuing a show cause notice, the High Court has relied on the decision of this Court in *Natwar Singh v. Director of Enforcement*. In sum and substance, the High court has held that the report does not form the basis of the show cause notice and therefore need not be disclosed. The review petition challenging the judgment of the Division Bench of the High Court was rejected.

24. While the respondents have submitted that only materials that have been relied on by the Board need to be disclosed, the appellant has contended that all relevant materials need to be disclosed. While trying to answer this issue, we are faced with a multitude of other equally important issues. These issues, all paramount in shaping the jurisprudence surrounding the principles of access to justice and transparency, range from identifying the purpose and extent of disclosure required, to balancing the conflicting claims of access to justice and grounds of public interest such as privacy, confidentiality and market interest. An identification of the purpose of disclosure would lead us closer identifying the extent of required disclosure. There are three key purposes that disclosure of information serves: (i) Reliability: The possession of information by both the parties can aid the courts in determining the truth of the contentions. The role of the court is not restricted to interpreting the provisions of law but also determining the veracity and truth of the allegations made before it. The court would be able to perform this function accurately only if both parties have access to information and possess the opportunity to address arguments and counter-arguments related to the information; (ii) Fair Trial: Since a verdict of the Court has far reaching repercussions on the life and liberty of an individual, it is only fair that there is a legitimate expectation that the parties are provided all the aid in order for them to effectively participate in the proceedings; (iii) Transparency and accountability: The investigative agencies and the judicial institution are held accountable through transparency and not opaqueness of proceedings. Opaqueness furthers a culture of prejudice, bias, and impunity - principles that are antithetical to transparency. It is of utmost importance that in a country grounded in the Rule of Law, the institutions adopt those procedures that further the democratic principles of transparency and accountability. The principles of fairness and transparency of adjudicatory proceedings are the cornerstones of the principle of open justice. This is the reason why an adjudicatory authority is required to record its reasons for every judgement or order it passes. However, the duty to be transparent in the adjudicatory process does not begin

and end at providing a reasoned order. Keeping a party bereft of the information that influenced the decision of an authority undertaking an adjudicatory function also undermines the transparency of the judicial process. It denies the concerned party and the public at large the ability to effectively scrutinise the decisions of the authority since it creates an information asymmetry.

25. The purpose of disclosure of information is not merely individualistic, that is to prevent errors in the verdict but is also towards fulfilling the larger institutional purpose of fair trial and transparency. Since the purpose of disclosure of information targets both the outcome (reliability) and the process (fair trial and transparency), it would be insufficient if only the material relied on is disclosed. Such a rule of disclosure, only holds nexus to the outcome and not the process. Therefore, as a default rule, all relevant material must be disclosed.

32. Now in the above context, it would be material to advert to the decision of this court in Natwar Singh (supra). The issue before the two-judge Bench of this Court was whether a noticee who is served with a show cause notice under Rule 4(1) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules 2000, is entitled to demand all the documents in the possession of the adjudicating authority including those documents upon which no reliance has been placed while issuing a notice to show cause as to why an enquiry should not be initiated against him. Rule 4 is in the following terms: "4. Holding of inquiry.— (1) For the purpose of Adjudicating under section 13 of the Act whether any person has committed any contravention as specified in that section of the Act, the Adjudicating Authority shall, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why an inquiry should not be held against him. (2) Every notice under sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him. (3) After considering the cause, if any, shown by such person, the Adjudicating Authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorised by him."

33. Rule 4(1) of the FEMA Rules 2000 indicates that in the first instance, the adjudicating authority has to issue a notice requiring the person to show cause why an enquiry should not be held against him. The stage of the notice under Rule 4(1) is not for adjudication but is for the purpose of deciding whether an enquiry should be held. If after considering the cause which is shown, the adjudicating authority is of the opinion that an enquiry should be held, thereupon under Rule 4(3), a notice is issued for the appearance of the person. Sub-Rule (4) provides that on the date fixed, the adjudicating authority shall explain the contravention alleged to have been committed and under sub-Rule (5) an opportunity of producing documents or evidence has to be given. Under sub-Rule (8), the adjudicating authority is empowered to impose a penalty if it is satisfied, upon considering the evidence produced that there has been a contravention.

34. Now in this backdrop, Justice B. Sudarshan Reddy speaking for the two-judge Bench of this Court interpreted Rule 4 as follows: "23. The Rules do not provide and empower the Adjudicating Authority to straightaway make any inquiry into allegations of contravention against any person against whom a complaint has been received by it. Rule 4 of the Rules mandates that for the purpose of adjudication whether any person has committed any contravention, the Adjudicating Authority shall issue a notice to such person requiring him to show cause as to why an inquiry should not be held against him. It is clear from a bare reading of the rule that show cause notice to be so issued is not for the purposes of making any adjudication into alleged contravention but only for the purpose of deciding whether an inquiry should be held against him or not. Every such notice is required to indicate the nature of contravention alleged to have been committed by the person concerned. That after taking the cause, if any, shown by such person, the Adjudicating Authority is required to form an opinion as to whether an inquiry is required to be held into the allegations of contravention. It is only then the real and substantial inquiry into allegations of contravention begins."

35. The above extract clearly indicates that the show cause notice under Rule 4(1) is not for the purpose of making an adjudication into the alleged contravention but only for deciding whether an enquiry must be conducted. The stage when an enquiry is held is subsequent to the initial stage contemplated by Rule 4(1). During the course of the adjudication, the fundamental principle is that material which is used against a person must be brought to notice. As this Court observed: "30. The right to fair hearing is a guaranteed right. Every person before an authority exercising the adjudicatory powers has a right to know the evidence to be used against him. This principle is firmly established and recognised by this Court in *Dhakeswari Cotton Mills Ltd. v. CIT* [AIR 1955 SC 65 : (1955) 1 SCR 941]. However, disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future (see *R. v. Secy. of State for Home Deptt., ex p H* [[1995] Q.B. 43 : [1994] 3 WLR 1110 : (1995) 1 All ER 479 (CA)]). 31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A noticee is always entitled to satisfy the adjudicating authority that

those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute.” (emphasis supplied)

36. The decision of this Court distinguishes between the initial stage under Rule 4 (1) which is only for the purpose of deciding whether an enquiry has to be held and the subsequent stage of adjudication into the allegations of contravention. This Court further held: “34. As noticed, a reasonable opportunity of being heard is to be provided by the adjudicating authority in the manner prescribed for the purpose of imposing any penalty as provided for in the Act and not at the stage where the adjudicating authority is required merely to decide as to whether an inquiry at all be held into the matter. Imposing of penalty after the adjudication is fraught with grave and serious consequences and therefore, the requirement of providing a reasonable opportunity of being heard before imposition of any such penalty is to be met. In contradistinction, the opinion formed by the adjudicating authority whether an inquiry should be held into the allegations made in the complaint are not fraught with such grave consequences and therefore the minimum requirement of a showcause notice and consideration of cause shown would meet the ends of justice. A proper hearing always include, no doubt, a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.”

37. On the facts of that case, the Court held that the enquiry against the noticee was yet to commence: “36. In the present case, the inquiry against the noticee is yet to commence. The evidence as may be available upon which the adjudicating authority may place reliance, undoubtedly, is required to be furnished to the person proceeded against at the second stage of inquiry into allegations of contravention. It is at that stage, the adjudicating authority is not only required to give an opportunity to such person to produce such documents as evidence as he may consider relevant to the inquiry, but also enforce attendance of any person acquainted with the facts of the case to give evidence or to produce any document which in its opinion may be useful for or relevant to the subject-matter of the inquiry. It is no doubt true that natural justice often requires the disclosure of the reports and evidence in the possession of the deciding authority and such reports and evidence relevant to the subject-matter of the inquiry may have to be furnished unless the scheme of the Act specifically prohibits such disclosure.”

39. The issue in Natwar Singh (supra) was whether the authority was bound to disclose to the noticee all the documents in its possession before forming an opinion on whether an enquiry is required to be held into the alleged contravention by the noticee. The Court held that at that stage there was no requirement of furnishing all such documents to the noticee since the only purpose of the notice under Rule 4(1) was for deciding whether an enquiry should be held. Rule 4(1), in other words, was not a final

adjudication and consequently the requirement of a disclosure of all materials in the possession of the authority was not attracted. At that stage, it was sufficient that only documents that have been relied on are disclosed.

40. The High Court in the present case has palpably misconstrued the judgment in Natwar Singh (supra). The High Court has failed to notice that the issue in that case was whether at the stage when the authority decides under Rule 4(1) of the FEMA Rules 2000 whether an enquiry should be held, a disclosure of all documents in the possession of the authority to the noticee is warranted. This was answered in the negative. This Court distinguished the stage of adjudication as distinct from the initial stage under Rule 4(1). At the stage of adjudication, all documents useful or relevant to the subject-matter have to be disclosed to the notice, subject to exceptions noticed by the court.

41. On behalf of the Board, it has been urged that the investigation report is in the nature of an inter-departmental communication and need not be disclosed. Reliance was placed on the judgment of this Court in Krishna Chandra Tandon (supra) to buttress the submission. However, it is clear from the judgment that even if the documents are merely inter-departmental communications, there is a duty to disclose such documents if they have been relied upon by the enquiry officer. A two-Judge Bench of this observed: "16. Mr. Hardy next contended that the appellant had really no reasonable opportunity to defend himself and in this connection he invited our attention to some of the points connected with the enquiry with which we have now to deal. It was first contended that inspection of relevant records and copies of documents were not granted to him. The High Court has dealt with the matter and found that there was no substance in the complaint. All that Mr. Hardy was able to point out to us was that the reports received by the CIT from his departmental subordinates before the charge-sheet was served on the appellant had not been made available to the appellant. It appears that on complaints being received about his work the CIT had asked the Inspecting Assistant Commissioner Shri R.N. Srivastava to make a report. He made a report. It is obvious that the appellant was not entitled to a copy of the report made by Mr. Srivastava or any other officer unless the enquiry officer relied on these reports. It is very necessary for an authority which orders an enquiry to be satisfied that there are prima facie grounds for holding a disciplinary enquiry and, therefore, before he makes up his mind he will either himself investigate or direct his subordinates to investigate in the matter and it is only after he receives the result of these investigations that he can decide as to whether disciplinary action is called for or not. Therefore, these documents of the nature of interdepartmental communications between officers preliminary to the holding of enquiry have really no importance unless the Enquiry Officer wants to rely on them for his conclusions. In that case it would only be right that copies of the same should be given to the delinquent. It is not the case here that either the Enquiry Officer or the CIT relied on the report of Shri R.N. Srivastava or any other officer for his finding against the appellant. Therefore, there is no substance in this submission." (emphasis supplied)

42. However, merely because the investigating authority has denied placing reliance

on the report would not mean that such material cannot be disclosed to the noticee. The court may look into the relevance of the material to the proposed action and its nexus to the stage of adjudication. Simply put, this entails evaluating whether the material in all reasonable probability would influence the decision of the authority. The above position was laid down by this Court in Khudiram Das v. State of West Bengal . Ruling in the context of preventive detention, a four-judge Bench of this Court observed: "15. Now, the proposition can hardly be disputed that if there is before the District Magistrate material against the detenu which is of a highly damaging character and having nexus and relevancy with the object of detention, and proximity with the time when the subjective satisfaction forming the basis of the detention order was arrived at, it would be legitimate for the Court to infer that such material must have influenced the District Magistrate in arriving at his subjective satisfaction and in such a case the Court would refuse to accept the bald statement of the District Magistrate that he did not take such material into account and excluded it from consideration. It is elementary that the human mind does not function in compartments. When it receives impressions from different sources, it is the totality of the impressions which goes into the making of the decision and it is not possible to analyse and dissect the impressions and predicate which impressions went into the making of the decision and which did not. Nor is it an easy exercise to erase the impression created by particular circumstances so as to exclude the influence of such impression in the decision making process. Therefore, in a case where the material before the District Magistrate is of a character which would in all reasonable probability be likely to influence the decision of any reasonable human being, the Court would be most reluctant to accept the ipse dixit of the District Magistrate that he was not so influenced and a fortiori, if such material is not disclosed to the detenu, the order of detention would be vitiated, both on the ground that all the basic facts and materials which influenced the subjective satisfaction of the District Magistrate were not communicated to the detenu as also on the ground that the detenu was denied an opportunity of making an effective representation against the order of detention." (emphasis supplied)

43. The principle that the material that may influence the decision of a quasijudicial authority to award a penalty must be disclosed to a delinquent was affirmed by this Court in Union of India v. Mohd. Ramzan Khan . In that case, this Court laid down that a delinquent officer is entitled to receive the report of the enquiry officer which has been furnished to the disciplinary authority. This principle was affirmed by a Constitution Bench of this Court in Managing Director, ECIL, Hyderabad v. B. Karunakar . The rationale behind the right to receive the report of the enquiry officer was explained by this Court in the following terms: "26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a

finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it." (emphasis supplied)

44. For the purpose of determining if prejudice has been caused by a nondisclosure, this Court held that the report must be furnished to the aggrieved person and the employee must shoulder the burden of proving on facts that his case was prejudiced - either the outcome or the punishment - by the nondisclosure:

"30.[v]] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all

the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice.

31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present."

48. The following principles emerge from the above discussion: (i) A quasi-judicial authority has a duty to disclose the material that has been relied upon at the stage of adjudication; and (ii) An ipse dixit of the authority that it has not relied on certain material would not exempt it of its liability to disclose such material if it is relevant to and has a nexus to the action that is taken by the authority. In all reasonable probability, such material would have influenced the decision reached by the authority.

49. Thus, the actual test is whether the material that is required to be disclosed is relevant for purpose of adjudication. If it is, then the principles of natural justice require its due disclosure.

50. The investigation report forms the material considering which, the Board arrives at a satisfaction regarding whether there has been a violation of the regulations. If it is satisfied that there has been a violation of the regulations, after giving a reasonable opportunity to be heard, the Board is empowered to take action according to Regulations 11 and 12. It would not suffice for the first respondent to claim as it did before the High Court that it did not rely on the investigation report. The ipse dixit of the authority that it was not influenced by certain material would not suffice. If the material is relevant to and has a nexus to the stage at which satisfaction is reached by an authority, such material would be deemed to be important for the purpose of adjudication. The written submissions of the Board clearly state that the findings of the investigation report are important for the authority to decide whether there are any prima facie grounds to initiate enforcement proceedings under Regulation 10. The relevant extract of the submissions is reproduced below: "It is submitted that Regulation 9 of PFUTP Regulations require the Investigating Authority to submit the report after completion of the investigation to the appointing authority. However, the provision does not require furnishing of the report to the Noticee. Further, the investigation report is merely a culmination of documents which the investigating authority relies on/come across while conducting the investigation and is not a piece of evidence in itself. It is a report which is necessary for an authority, who orders an investigation, to decide as to

whether there are prima-facie grounds to initiate enforcement proceedings or not. Therefore, before the authority makes up his mind, he will either himself investigate or direct his subordinates to investigate in the matter. It is only after the authority receives the report of the investigation that he can decide as to whether action is called for or not. Therefore, the investigation report is in the nature of inter-departmental communications between officers investigating the matter and authority who can decide any enforcement action against the entity. The findings recorded in the investigation report against the Noticee are brought out in the SCN and the copies of all the documents that are relied upon by SEBI, while issuing the SCN are always shared with the concerned. The present case is no exception.” (emphasis supplied)

51. The above extracts indicate that the findings of the investigation report are relevant for the Board to arrive at the satisfaction on whether the Regulations have been violated. Even if it is assumed that the report is an inter-departmental communication, as held in Krishna Chandra Tandon (supra), there is a duty to disclose such report if it is relevant for the satisfaction of the enforcement authority for the determination of the alleged violation.

52. In Khudiram Das (supra), a four-Judge Bench of this Court laid down a twoprong test for the standard of 'relevancy'; firstly, the material must have nexus with the order and secondly, the material might have influenced the decision of the authority. A Constitution Bench of this Court in Karunakar (supra) held that the nondisclosure of the relevant information is not in itself sufficient to warrant the setting aside of the order of punishment. It was held that in order to set aside the order of punishment, the aggrieved person must be able prove that prejudice has been caused to him due to non-disclosure. To prove prejudice, he must prove that had the material been disclosed to him the outcome or the punishment would have been different. The test for the extent of disclosure and the corresponding remedy for non-disclosure is dependent on the objective that the disclosure seeks to achieve. Therefore, the impact of non-disclosure on the reliability of the verdict must also be determined vis-à-vis, the overall fairness of the proceeding. While determining the reliability of the verdict and punishment, the court must also look into the possible uses of the undisclosed information for purposes ancillary to the outcome, but that which might have impacted the verdict.

58. The appellant did not sufficiently discharge his burden by proving that the nondisclosure of the above information would affect his ability to defend himself. However, merely because a few portions of the enquiry report involve information on thirdparties or confidential information on the securities market, the respondent does not have a right to withhold the disclosure of the relevant portions of the report. The first respondent can only claim non-disclosure of those sections of the report which deal with third party personal information and strategic information on the functioning of the securities market.

59. Therefore, the Board should determine such parts of the investigation report under Regulation 9 which have a bearing on the action which is proposed to be taken against the person to whom the notice to show cause is issued and disclose the same. It can redact information that impinges on the privacy of third parties. It cannot exercise unfettered discretion in redacting information. On the other hand, such parts of the report which are necessary for the appellant to defend his case against the action proposed to be taken against him need to be disclosed. It is needless to say that the investigating authority is duty-bound to disclose such parts of the report to the noticee in good faith. If the investigating authority attempts to circumvent its duty by revealing minimal information, to the prejudice of the appellant, it will be in violation of the principles of natural justice. The court/appellate forum in an appropriate case will be empowered to call for the investigation report and determine if the duty to disclose has been effectively complied with.

60. The notice to show cause issued to the appellant is for violation of the provisions of the SEBI Act, SCRA and PFUTP Regulations. The show cause notice has specifically referred to what was revealed during the course of the investigation and has invoked the provisions of the PFUTP Regulations in the allegations against the appellant. Para 8(2) of the show cause notice is extracted below: "(II) It is alleged that Mr. T. Takano, during whose tenure the business transactions with FDSL started by virtue of his position as MD & CEO of Ricoh during FY 2012-13 to FY 2014-15, was actively involved in committing the fraud and had knowingly restricted the mandate given to PwC to six month so as to succeed in hiding his role in the commission of fraud of publishing untrue financial statement of Ricoh which resulted in misleading the investors about the financial performance of the company and thereby resulted in inducement of traders in the scrip. The said acts of the Noticee no. 2 are alleged to be violation of regulations 3(b), (c), (d), 4 (1) and 4(2)(e), (f), (k) and (r) of SEBI (PFUTP) Regulations, 2003 and clause 49 (V) read with 41(II)(a) of the erstwhile Listing Agreement."

62. The conclusions are summarised below: (i) The appellant has a right to disclosure of the material relevant to the proceedings initiated against him. A deviation from the general rule of disclosure of relevant information was made in *Natwar Singh (supra)* based on the stage of the proceedings. It is sufficient to disclose the materials relied on if it is for the purpose of issuing a show cause notice for deciding whether to initiate an inquiry. However, all information that is relevant to the proceedings must be disclosed in adjudication proceedings; (ii) The Board under Regulation 10 considers the investigation report submitted by the Investigating Authority under Regulation 9, and if it is satisfied with the allegations, it could issue punitive measures under Regulations 11 and 12. Therefore, the investigation report is not merely an internal document. In any event, the language of Regulation 10 makes it clear that the Board forms an opinion regarding the violation of Regulations after considering the investigation report prepared

under Regulation 9; (iii) The disclosure of material serves a three-fold purpose of decreasing the error in the verdict, protecting the fairness of the proceedings, and enhancing the transparency of the investigatory bodies and judicial institutions; (iv) A focus on the institutional impact of suppression of material prioritises the process as opposed to the outcome. The direction of the Constitution Bench of this Court in Karunakar (supra) that the non-disclosure of relevant information would render the order of punishment void only if the aggrieved person is able to prove that prejudice has been caused to him due to non-disclosure is founded both on the outcome and the process; (v) The right to disclosure is not absolute. The disclosure of information may affect other third-party interests and the stability and orderly functioning of the securities market. The respondent should prima facie establish that the disclosure of the report would affect third-party rights and the stability and orderly functioning of the securities market. The onus then shifts to the appellant to prove that the information is necessary to defend his case appropriately; and (vi) Where some portions of the enquiry report involve information on third-parties or confidential information on the securities market, the respondent cannot for that reason assert a privilege against disclosing any part of the report. The respondents can withhold disclosure of those sections of the report which deal with third-party personal information and strategic information bearing upon the stable and orderly functioning of the securities market.

63. The Board shall be duty-bound to provide copies of such parts of the report which concern the specific allegations which have been levelled against the appellant in the notice to show cause. However, this does not entitle the appellant to receive sensitive information regarding third parties and unrelated transactions that may form part of the investigation report.

64. During the course of the hearing, the Court has been apprised of the fact that though the hearing before the designated officer has been held, no orders have been passed in deference to the pendency of the present proceedings. Having regard to the conclusion which has been arrived at above, we direct that after a due disclosure is made to the appellant in terms as noted above, a reasonable opportunity shall be granted to the appellant of being heard with reference to the matters of disclosure in compliance with the principles of natural justice before a final decision is arrived at."

10. In the matter before the Supreme Court in T Takano (supra), the Division Bench of the Bombay High Court had dismissed a petition under Article 226 of the Constitution assailing a show cause notice issued by the authorities under the SEBI under the PFUTP-2003 where the principle issue raised was whether an investigation report under Regulation 9 of the PFUTP-2003 must be disclosed to the person to whom a notice of show cause is issued.

11. Regulation 9 of the PFUTP-2003 is in respect of the submission of a report of investigation done in exercise of the powers under Regulation 5 of the said Regulations. Regulation 5 of the PFUTP-2003 provides for an investigation, where the Board, the Chairman, the member or the Executive Director has reasonable ground to believe that— (a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market in violation of the regulations; (b) any intermediary or any person associated with the securities market has violated any of the provisions of the SEBI Act of 1992 or the Rules or the Regulations, framed thereunder and further to report thereon to the Board in the manner provided under Section 11C of the SEBI Act.

12. Primarily it appears that the provisions of Section 11C of the SEBI Act of 1992 and the provisions of Regulations 5 of the PFUTP-2003 are *perimateria*.

13. From paragraph 9 of the judgment of the Supreme Court in T Takano(supra) it transpires that the allegation raised by the petitioner therein was that they were not provided with the report of the investigation conducted by the SEBI under Regulations 9 of the PFUTP-2003. In paragraph 4 thereof, it was taken note of that *prima facie* the provision of Sections 12 A(a), 12A(b) and 12A(c) of the SEBI Act, read with Regulations 3(b), 3(c), 3(d), 4(1), 4(2)(e), 4(2)(k) and 4(2)(r) of the PFUTP-2003 were violated. Accordingly, certain directions were issued under Sections 11(1), 11(4) and 11B of the SEBI Act read with Regulation 11 of the PFUTP Regulations.

14. The respondent SEBI took a stand that the investigation report was an internal document which cannot be shared and further that the investigation report was not relied upon for the purpose of the show cause notice that was issued.

15. The Bombay High Court by its judgment dated 29.09.2020 had held that the investigation report under Regulation 9 of the PFUTP-2003 was solely for internal purpose and accordingly dismissed the writ petitions. Upon such dismissal, the appeal was carried before the Supreme Court.

16. On the issue as to whether there is a requirement of a disclosure of the investigation report, the Supreme Court in paragraphs 24 & 25 of its judgment was of the view that in shaping the jurisprudence surrounding the principles of access to justice and transparency as well as by balancing the conflicting claims of access to justice and the grounds of public interest such as privacy, confidentiality and market interest, the purpose of disclosure of information is not merely individualistic, that is to prevent error in the verdict, but is also towards fulfilling the larger institutional purpose of fair trial and transparency. The Supreme Court was also of the view that as the purpose of disclosure of information targets both outcome i.e., reliability and the process i.e., fair trial and transparency, it would be insufficient if only material relied on is disclosed. Such Rule of disclosure of only the material relied upon only holds the nexus to the outcome and not the process and, therefore, as a default Rule, all relevant materials must be disclosed.

The Supreme Court also provided that as the purpose of disclosure of information is not merely individualistic i.e. to prevent errors in the verdict but also for fulfilling the larger institutional purpose of fair trial and transparency, therefore, all relevant materials must be disclosed.

17. In paragraph 32, the Supreme Court referred to Rule 4(1) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (for short 'the FEMA Rules, 2000') which is *pari materia* to Rule 4(1) of the PR-1995.

In respect of Rule 4(1) of the FEMA Rules, 2000, the Supreme Court observed that the stage of the notice under Rule 4(1) is not for adjudication, but it is for the purpose of deciding whether an enquiry should be held. By referring to the interpretation of Rule 4(1) of the FEMA Rules, 2000 in *Natwar Singh (supra)*, wherein it was held that the adjudicating authority is required to form an opinion as to whether an enquiry is required to be held into the allegations of contravention and it is only thereafter the substantial enquiry into the allegations of contravention begins. Accordingly, in paragraph 35, it was held that the show cause notice under Rule 4(1) is not for the purpose for making adjudication into the alleged contravention but only for deciding whether an enquiry must be conducted. The stage when an enquiry is held is subsequent to the initial stage contemplated under Rule 4(1). Accordingly, by referring to the interpretation of Rule 4(1) of the FEMA Rules, 2000, wherein it was held that the right to fair hearing is a guaranteed right and if relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. And fair procedure and principles of natural justice are enabled into the rules and a noticee is always entitled to satisfy the adjudicating authority that those very documents upon which relevance has been placed do not make out even a *prima facie* case requiring any further enquiry. The Supreme Court in paragraph 36 in its judgment in *T. Takano (supra)* held that the Court distinguishes between the initial stage under Rule 4(1) which is only for the purpose of deciding whether an enquiry has to be held and the subsequent stage of adjudication is into the allegations of contravention. Accordingly, while interpreting the provision from Rule 4(1) of the PR-1995 Rules, a clear distinction is to be made between the two stages i.e. the first stage where the

notice concerned would be on the question as to whether an enquiry at all has to be made and if the procedure results in a conclusion that an enquiry is required, in the subsequent stage the adjudicating authorities would go into the veracity of the actual allegations of contravention that may have been raised.

18. In the conspectus of the aforementioned propositions laid down by the Supreme Court, Dr. Ashok Saraf, learned senior counsel for the petitioners assails the impugned show cause notices which are the subject matter of the present writ petitions by raising the following contentions:

(i). By referring to the provisions of Section 11C of the SEBI Act contends that the Board in order to embark upon an investigation under Section 11C would have to satisfy the condition precedent of having a reasonable ground to believe that the transactions in securities are being dealt in a manner detrimental to the investors or the securities market or that any intermediaries or any person associated with the securities market had violated any of the provisions of the SEBI Act or the Rules or Regulations or any directions issued by the Board.

(ii). By referring to Rule 4 of the PR-1995, it is the contention that the expression 'any person' contained therein would have to be understood to be a particular person to whom the notice under Section 4(1) had been issued and therefore, the requirement of the opinion to be formed by the Board under Rule 3 would have to be in respect of such particular person to whom the notice had been issued and therefore, there would be a requirement of the respondents in the SEBI to show it from the records that the opinion formed under Rule 3 are in existence in respect of the individual petitioner noticees.

(iii). The report of the investigation under Section 11(C) of the SEBI Act and the individual opinions formed by the Board in respect of the petitioner noticees are required to be provided to the petitioner noticees along with the notice under Rule 4(1) of the PR-1995.

(iv). The adjudicating officers appointed by the Board as provided under Section 15-I read with Rule 3 of the PR-1995 were not appointed by following the procedure of appointment and persons who are ineligible to be appointed as adjudicating officers have been appointed and that the adjudicating officers who were appointed are not the respective Division Chiefs.

(v). By referring to the impugned notices under Rule 4(1) of the PR-1995, Dr. Ashok Saraf, learned senior counsel for the petitioners point out that the notices required the noticees to show cause as to why an enquiry should not be held against them and also, as to why the penalties provided under Section 15HA of the SEBI Act should not be imposed upon them and further some of the notices also provided that the noticees may avail the benefit of a conciliation that are also available. Accordingly, it is the submission that the scheme of Rule 4 of PR-1995 splits the proceedings into two separate and distinct stages i.e. the first stage being the show cause notice as to why an enquiry should not be held and if the conclusion arrived at the first stage is that an enquiry is required to be held, the second stage would be for imposing the punishment. But in the notices impugned both the stages have been combined to make it a composite notice to show cause as to why the enquiry should not be held as well as, as regards the punishment that may be imposed. Further in some of the notices, the noticees were also required to avail the benefit of the conciliation process to accept a reduced punishment, which according to the learned senior counsel

could have been made only after the punishments have been imposed.

19. Ms. M Hazarika, learned senior counsel and Mr. A Choudhury, learned senior counsel for the respondent SEBI on the other hand raise counter contentions that the report of the investigation under section 11C of the SEBI Act would be an investigation report for the internal purpose of the authorities of the SEBI, and, therefore, there is no requirement under the law to provide a copy thereof to the petitioner noticees. It is contended that the investigation under section 11C being a wide based investigation to arrive at a satisfaction whether the provisions of the SEBI Act, Rules and Regulations have been violated in respect of the tradings in stocks and securities by using the SEBI platform, the entire report if provided to the individual petitioner noticees, would adversely affect the process initiated by the authorities under the SEBI and materials collected in respect of other entities would also be available in the public domain.

20. With regard to the contention of the petitioners that in order to initiate an investigation under section 11C, 'reasonable grounds to believe' must exist to initiate such investigation, it is the contention of Mr. A Choudhury, learned senior counsel that the order dated 20.08.2015 of the SEBI in WTM/RKA/ISD/106/2015 itself contains sufficient materials leading to the reasonable ground to believe to initiate the investigation under section 11C.

21. With regard to the contention that persons ineligible have also been appointed as adjudicating officers, meaning thereby that the persons so appointed are not the respective Division Chiefs, it is the submission of Ms. M Hazarika, learned senior counsel for the authorities in the SEBI that all such persons who were appointed as adjudicating officers are the respective Division

Chiefs of the Divisions from where the individual notices were issued and further the records would show that the required procedure for appointing the adjudicating officers have been duly followed.

22. With regard to the contention that the opinion to be formed under Rule 3 of the PR-1995 would have to be individual opinions against the respective noticees, it is the submission of Ms. M Hazarika, learned senior counsel for the authorities in the SEBI that materials implicating the individual noticees are available on record and the individual opinions do exist and are formed on the basis of such materials.

23. With regard to the contention that the impugned notices under Rule 4(1) are composite notices for the purpose of arriving at a conclusion as to whether an enquiry is to be held and as to what punishment is to be imposed, it is the submission of Ms. M Hazarika, learned senior counsel that the contents of the notices are expressive to enable the noticees to know as to what are the allegations against them and accordingly they can respond to the same and as such, no prejudice had been caused to either of the petitioner noticees. A further contention is raised that the writ petitions assailing a show cause notice itself is not maintainable *inasmuch as*, the law provides that it would be more appropriate for the noticees to respond to the notices and make whatever submission they intend to make against the allegations provided therein and therefore, seeking an interference with the notices in a petition under Article 226 of the Constitution of India would be not maintainable.

24. With regard to the contention that offering the petitioner noticees an opportunity to participate in a conciliation proceeding is an attempt to provide the opportunity to the noticees to accept a lesser punishment without going

through the rigours of participating in an proceeding under Rule 4 and therefore, such provisions incorporated in the show cause notices would not vitiate the procedure adopted.

25. In the premises of the contentions and counter contentions raised as indicated above, the following questions for determination would arise in the present writ petitions.

(i) Whether the 'grounds to believe' which is a condition precedent of initiating an investigation under Section 11C did exist in the facts and circumstance of the present case.

(ii) Whether the opinion to be formed under Rule 3 of the PR-1995 is an individual opinion in respect of the person specific against whom the notices under Rule 4(1) are to be issued and if yes, whether any such individual opinion had been formed.

(iii) Whether a notice under Rule 4 of the PR-1995 can be assailed in a proceeding under Article 226 of the Constitution of India.

(iv) Whether the adjudicating officers appointed for the purpose are the respective Division Chiefs.

(v) Whether the appointment of an officer not below the rank of a Division Chief to be an adjudicating officer was done in accordance with the requirement under Section 15-I of the SEBI Act, 1992.

(vi) Whether the individual opinions formed against the person specific with reference to Rule 3 of the PR-1995 are required to be provided to the noticees and in the present case, whether it had been provided.

(vii) Whether a notice under Rule 4(1) of the PR-1995 can be a composite notice requiring the noticee to respond as to whether an enquiry should

be held under Rule 4(1) and also requiring the noticee to respond under Rule 4(3) as to why any of the penalties contemplated under section 15A to Section 15HB should not be imposed.

Whether the 'grounds to believe' which is a condition precedent of initiating an investigation under section 11C did exist in the facts and circumstance of the present case:

26. Dr. Ashok Saraf learned senior counsel refers to the pronouncement of the Supreme Court rendered in the case of *Madhya Pradesh Industries Ltd. Vs. Income-Tax Officer* reported in (1965) 57 ITR 637, wherein in paragraph 7 it had been held that in the absence of reasons to believe, the Income Tax Officer has no jurisdiction to issue a notice under Section 34 of the Income Tax Act. Accordingly, the contention raised is that in order to embark upon an investigation under Section 11C of the SEBI Act, if the Board does not have reasonable grounds to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market or that any intermediaries or any person associated with the securities market had violated any of the provisions of the SEBI Act or the Rules or Regulations, or any directions made thereunder, the Board would have no jurisdiction to embark upon such investigation.

27. By referring to a pronouncement of the Supreme Court in *Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Nagpur* reported in (1970) 2 SCC 32, in paragraph 12 it is contended that the expression 'has reason to believe' appearing in Section 34(1)(a) of the Income Tax Act does not mean a purely subjective satisfaction of the Income Tax Officer but predicates the existence of

reasons on which such belief has to be founded and that it cannot be founded on a mere suspicion and must be based on evidence, although the question of adequacy of evidence would be immaterial at that stage. By referring to the said proposition, it is the contention of the learned senior counsel that for the Board to embark upon an investigation under Section 11C of the SEBI Act, there is a requirement of existence of reason to believe which again should not be purely a subjective satisfaction of the Board but upon existence of some material which may lead to the satisfaction of such reason to believe. Accordingly, the contention raised is that it will be for the respondent Board to satisfy from the records that materials did exist for the Board to have a reasonable ground to believe that the transactions in securities are being dealt in a manner detrimental to the investors or the securities market or any intermediary or any person associated with a securities market had violated any of the provisions of the Act or Rules or Regulations. Dr. Ashok Saraf, learned senior counsel by referring to the propositions laid down by the Supreme Court in paragraph 4 in the case of *Chhugamal Rajpal Vs. S.P. Chaliha & Ors.* reported in (1971) 1 SCC 453 and paragraph 6 in the case of *S.Ganga Saran and Sons Pvt. Ltd. Calcutta Vs. Income Tax Officer & Ors.* reported in (1981) 3 SCC 143, contends that the expression 'reason to believe' is stronger than the expression 'satisfied' and it must have a rational nexus between the believe and the materials available.

28. Per contra, both Mr. A Choudhury, learned senior counsel and Ms. M. Hazarika, learned senior counsel appearing for the respondent SEBI in different writ petitions, in response to the contention of Dr. Ashok Saraf learned senior counsel for the petitioners as regards the interpretation and requirements of Section 11C of the SEBI Act, 1992 as well as, as to whether any materials were available before the respondent SEBI to embark upon an investigation under

Section 11C have raised a counter contention that in the instant case, the authorities in the SEBI while enquiring certain regulation matters had noticed that large scale tradings were taking place, whose nature thereof would indicate that such tradings amounted to reversal trades. For the purpose, reference is made to an ex-parte ad-interim order dated 20.08.2005 bearing No. WTM/RKA/ISD/106/2015, which was passed by the authorities in the SEBI under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992 in the matter of illiquid stock options.

29. Paragraph 1 of the aforesaid ex-parte ad-interim order provides that as a part of the ongoing surveillance, the SEBI came across several instances/internal alerts wherein a set of entities were consistently making loss by their trading in option on individual stocks which are listed on the Bombay Stock Exchange. Trading of such entities appeared to the SEBI to be abnormal because they were consistently seen making significant loss by their trades, which were reversed with the same counterparts either on the same day or the next day. As per the analysis of the stock options segment of the Bombay Stock Exchange (BSE) for the period 01.04.2014 to 31.03.2015, it was observed that several entities were consistently making significant loss and others were consistently making significant profits by executing reversal trades in stock options on the BSE. Although the enquiries related to the ex-parte ad-interim order dated 20.08.2015 were in respect of certain other specific entities, but in paragraph 41 thereof, the authorities under the SEBI by considering the nature of the trades that were enquired into, arrived at a view that a detail investigation of the entire scheme employed in the case was necessary to find out the rational of such suspicious/artificial trades, including tracing the fund trail and the role of intermediaries in allowing such fictitious trades to enter the

system. The said aspect is available at paragraph 41 of the ad-interim order dated 20.08.2015, which is extracted as below:-

“41. While ascertaining the exact reasons for such abnormal behavior by each of the loss-making/profit-making entities remains the subject matter of detailed investigation, maintaining market integrity and protecting interest of investors is my main concern right now. In my view, a detailed investigation of the entire scheme employed in this case is necessary to find out the rationale of entities to indulge in such suspicious/artificial trades including tracing the fund trail and the role of intermediaries in allowing such fictitious trades to enter the system. The investigation shall also cover the examination of any other entity executing similar fictitious trades in the stock options segment.”

30. By referring to the aforesaid view formed in paragraph 41 of the ad-interim order dated 20.08.2015, it is the contention of Mr. A Choudhury, learned senior counsel for the respondents in the SEBI that in course of the enquiry involved in the said order of 20.08.2015, the authorities in the SEBI came across several such transactions involving reversal trades or trading in illiquid stocks. The materials that were available before the authorities in the SEBI pursuant to the said enquiry in connection with the ad-interim order dated 20.08.2015 is the basis of the SEBI authorities to arrive at a conclusion that the reasonable ground to believe exist in the instant case, so as to require the authorities in the SEBI to initiate an investigation under Section 11(C) of the SEBI Act, 1992.

31. We have considered the rival contentions raised on the issue as to whether the requirements of initiating an investigation under Section 11C of the SEBI Act, 1992 as well as the required conditions precedent thereof, did exist in the facts and circumstances of the present case.

32. It is the submission of Dr. Ashok Saraf, learned senior counsel for the petitioners by referring to the pronouncement of the Supreme Court in Madhya

Pradesh Industries Limited (supra), which is reported in (1965) 57 ITR 637, (referred as Madhya Pradesh Industries Limited-I) and Madhya Pradesh Industries Limited (supra), reported in (1970) 2 SCC 32, (referred as Madhya Pradesh Industries Limited-II) that the expression 'has a reasonable ground to believe' would have the same meaning as the expression 'has reason to believe' appearing in Section 34(1)(a) of the Income Tax Act, 1922 as amended. In Madhya Pradesh Industries Limited-I (supra), in paragraph-7, it had been held that in the absence of any reason to believe, the income tax authorities would have no jurisdiction to issue a notice under Section 34 of the Income Tax Act. Accordingly, it is the submission that in the instant case, there were no materials before the authorities of the SEBI to have a reasonable ground to believe that there was a requirement to initiate an investigation under Section 11C in respect of reversal trades having taken place in illiquid stocks. The relevant portions of paragraphs 7, 8, 9 and 10 of Madhya Pradesh Industries Limited-I (supra) are extracted as below:-

“7. This Court in Calcutta Discount Company Ltd. v. Income Tax Officer, Companies District, I [(1961) 2 SCR 241] observed that the Income Tax Officer has power to issue a notice under Section 34(1)(a) only if he has reason to believe (1) that income, profits or gains had been under-assessed and (2) that such under-assessment was due to non-disclosure of material facts by the assessee, and that where facts which invest the Income Tax Officer with jurisdiction to issue the notice do not exist, the assessee may apply to the High Court under Article 226 of the Constitution for appropriate relief. The Company has asserted that the facts which attract the jurisdiction of the Income Tax Officer to issue a notice under Section 34 did not exist, and the impugned notice was issued in colourable exercise of power.

..... The High Court must in each case consider, whether the act or omission complained of has resulted or is likely to result in grave injustice, and whether the party approaching it has another adequate remedy which is equally efficacious, whether he has approached the Court without acquiescence, and without undue delay, whether the problem posed raises complicated questions

be inappropriate for the High Court to determine, whether the aggrieved party has been guilty of misrepresentation or suppression of material facts, and whether notwithstanding the apparent breach it would be inequitable to grant relief.

8. *It is unfortunate that the learned Judges of the High Court have not indicated the considerations which persuaded them to reject the petition in limine. There can be no doubt that the averments made in the petition by the Company if proved may justify the issue of the writs claimed, for it is or the case of the Company that the facts which alone invest the Income Tax Officer with jurisdiction to issue the impugned notice did not exist. The Company has also submitted that the power under Section 34 was sought to be utilised as a mere cloak or pretence for making a "fishing enquiry or investigation with the object of reviewing the previous order". Whether the disclosure made by the Company was full and true in respect of all material facts necessary for the assessment cannot obviously be determined in the absence of an affidavit by the Income Tax Officer. Again the plea that the impugned notice was issued with a collateral object could not be rejected without an enquiry.*

12. *Jurisdiction of the Income Tax Officer obviously arises when he has reason to believe that by reason of omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment, income of the assessee has escaped assessment, or has been under-assessed, and when the party claiming relief challenges on oath the existence of the conditions which confer jurisdiction, and sets out facts which may, unless disproved, support his case, an order dismissing his petition in limine may not properly be made.*

10..... But where, as in the present case, the claim made is that the Income Tax Officer had no power to issue the notice under Section 34, and that the power is exercised not for any legitimate purpose for which it may be used, but for the purpose of making a fishing enquiry and to review a previous order passed in favour of the Company, a Rule upon the Income Tax; Officer to show cause why the order should not be set aside and an opportunity to the authority whose action was challenged either to accept or deny the facts alleged and to set out such other material facts as have a bearing on the question, was at least called for.

33. In *Madhya Pradesh Industries Limited/(ii)(supra)* in paragraph 12 it had been provided that the expression '*has reason to believe*' does not mean a

purely subjective satisfaction of the Income Tax Officer but predicates the existence of reasons on which such belief has to be founded.

34. Paragraph 12 of *Madhya Pradesh Industries Limited/(ii)(supra)* is extracted as below:

“12. Shah, J. (one of us) in his dissenting judgment has observed that the expression “has reason to believe” in Section 34(1)(a) of the Indian Income Tax Act does not mean a purely subjective satisfaction of the Income Tax Officer but predicates the existence of reasons on which such belief has to be founded. That belief, therefore, cannot be founded on mere suspicion and must be based on evidence and any question as to the adequacy of such evidence is wholly immaterial at that stage. He further observed that where the existence of reasonable belief that there had been underassessment due to non-disclosure by the assessee, which is a condition precedent to exercise of the power under Section 34(1)(a) is asserted by the assessing authority and the record prima facie supports its existence, any enquiry as to whether the authority could reasonably hold the belief that the underassessment was due to non-disclosure by the assessee of material facts necessary for the assessment must be barred.”

35. The first proposition as provided in *Madhya Pradesh Industries Limited/(i) (supra)* is that if the Income Tax Authorities has no reason to believe that certain income had escaped, the jurisdiction to issue a notice under Section 34 of the Income Tax Act, 1922 will be absent. The other proposition in *Madhya Pradesh Industries Limited/(ii)(supra)* provides the reason to believe is not purely a subjective satisfaction of the Income Tax Authority but predicates the existence of reason on which such belief is to be founded and that a mere suspicion cannot be the basis to have a reason to believe.

36. In the instant case, we are required to interpret whether the two expressions i.e. ‘*has reasonable ground to believe*’ as appearing in Section 11C of the *SEBI Act, 1992* and ‘*has reason to believe*’ as appearing in Section 34 (1) (a) of the *Income Tax Act, 1922* have the same meaning. The expression ‘*has*

reason to believe is based on the expressions '*reason*' and '*belief*'. As per the Black's Law Dictionary, the word '*belief*' means a state of mind that regards the existence of something as likely or relatively certain. While, the word '*reason*' as per the Oxford English Dictionary, amongst others, means a cause, explanation or justification for an action or event. Accordingly, the expression '*has reason to believe*' would have to be understood to be a state of mind regarding the existence of something as likely or relatively certain on the basis of certain cause, explanation or justification for arriving at such state of mind.

37. On the other hand, the expression '*has reasonable ground to believe*' would have to be understood to be the state of mind as regards the existence of something as likely or relatively certain and would have to be backed by some reasonable grounds. Reasonable ground is understood to mean the information that establishes sufficient articulable fact that gives a reasonable basis to believe. In other words, to be a reasonable ground, it would have to be based on certain information that establishes sufficient articulable fact to make it a basis to believe whereas existence of cause, explanation or justification would be sufficient in order to constitute a reason.

38. Accordingly, we have to understand that to have a reason to believe, the basis for the belief may be any cause, explanation or justification whereas for having a reasonable ground to believe the basis for the belief would have to be the information, in other words, comparable to knowledge.

39. '*Knowledge*' is defined in the Blacks' Law Dictionary to be an awareness or understanding of a fact or circumstance; a state of mind in which the person has no substantial doubt about the existence of a fact. '*Belief*' is regarding the existence of something which is likely or relatively certain whereas '*knowledge*'

is the absence of any substantial doubt in the mind of the person about its existence. In other words, in order to be knowledge, the element of unlikely or uncertainty of the existence of the fact is absent and there would remain no substantial doubt about its existence.

40. The Supreme Court in its pronouncement in *Collector of Customs, New Delhi v. Ahmadalieva Nodira reported in (2004) 3 SCC 549* had held that the expression '*reasonable grounds*' mean something more than *prima facie* grounds and it contemplates substantial probable causes for believing. Accordingly, we will have to understand that the test of certainty to arrive at a '*reasonable ground to believe*', of there being material available on record, would comparably be more than the test of certainty that would be required for arriving at '*has reasons to believe*'.

41. But, at the same time, although the element of certainty in respect of '*reasonable ground to believe*' would be more than in that of '*has reasons to believe*', but the same time, we are also required to look into the relevancy and purpose of the respective statutes wherein the two expressions may have been used. The expression '*has reason to believe*' is from Section 34(1)(a) of the Income Tax Act, 1922, whereas the expression '*has reasonable grounds to believe*' is to be understood from the point of view of Section 11C of the SEBI Act, 1992. The Income Tax Act, 1922 or as a matter of fact, the Income Tax Act, 1961 are statutory provisions to regulate the payment of income tax, where income tax may be paid either by individuals or Hindu undivided families or corporates, as the case may be. In the circumstance, any enquiries that are required to be made by the Income Tax Authorities under the Income Tax Act would be either against an individual or a Hindu undivided family or any

specified corporate entity. Therefore, the requirement of having reasons to believe for issuing a notice under Section 34 of the Income Tax Act, 1922 (as it was earlier), would have to be the formation of a believe with reasons for an enquiry against such specified individual, Hindu undivided family or corporate. The enquiries specific does not involve any other person or entity for that given particular enquiry. On the other hand, the SEBI Act, 1992 was enacted to provide for the establishment of a Board to protect the interest of investors, insecurities and to promote the development and regulate the securities market and for matters connected therewith or incidental thereto as held by the Supreme Court in the case of *Clariant International Ltd. Vs. Securities and Exchange Board of India* reported in (2004) 8 SCC 524. In other words, the SEBI Act, 1992 is for regulating and promoting the securities market as a whole. In the circumstance, any enquiry that may be required to be made under the SEBI Act, 1992, would be of a broader compass than that of an enquiry to be made under the Income Tax Act either of 1922 or 1961. Correspondingly, the requirement of having a reasonable ground to believe for initiating an enquiry under Section 11C of the SEBI Act, 1992 would also have to be on the basis of a broader spectrum as regards the activities that the SEBI is required to regulate, promote or develop.

42. As the enquiry may be in respect of a broader spectrum of the circumstances and activities, the element of higher certainty required for having a reasonable ground to believe under Section 11C would also have to be based on a broader spectrum of activities that are required to be regulated or promoted. If we proceed on the aforesaid premises, the materials produced by the respondents in the SEBI by referring to the interim order dated 20.08.2015 to form a view that a detailed investigation of the entire scheme as regards the

reversal trades and illiquid stocks options where the involvement of more number of persons in such reversal trades and illiquid stocks options cannot be ruled out, we are of the view that it cannot be said that there was no reasonable ground to believe that an enquiry is required to be conducted under Section 11C of the SEBI Act, 1992.

Whether the opinion to be formed under Rule 3 of the PR-1995 is an individual opinion in respect of the person specific against whom the notices under Rule 4(1) are to be issued and if yes, whether any such individual opinion had been formed:

43. By referring to Rule 4 of the PR-1995, the further contention of Dr. Ashok Saraf, learned senior counsel for the petitioners is that the expression 'any person contained therein' would have to be understood to be a particular person specific to whom the notice under Section 4(1) would be issued and therefore, the requirement of forming an opinion by the Board under Rule 3 would have to be in respect of such particular person specific to whom the notice may be issued. By referring to the said provision, it is the contention of Dr. Ashok Saraf that as a condition precedent to issue the notice under Rule 4(1) of the PR-1995, the Board would necessarily have to form an opinion against the particular person specific that the material available on record leads to the formation of such an opinion. Accordingly, it is the contention that in order to satisfy the requirement of forming an opinion against the petitioners, it would be for the respondents to show it from the records that such materials do exist for formation of such an opinion.

44. According to Dr. Ashok Saraf, learned senior counsel for the petitioners the requirement of Rule 4 of the PR-1995 is that the Board has to form the opinion

that there are grounds for adjudging under any of the provisions of Chapter VIA of the SEBI Act of 1992 and such opinion be formed against the individual person concerned against whom the Board is of the view that there are grounds for adjudging. The said contention is of its own relevance *inasmuch as* in respect of having a reasonable ground to believe to initiate an investigation under Section 11C of the SEBI Act of 1992, it had been held that the reasonable grounds to believe would be more broad based and may pertain to a ground to believe that the rules and procedures in conducting the trades under SEBI have been violated by someone rather than it being a reasonable ground to believe that it had been violated by a specific person concerned.

45. Ms. M Hazarika, learned senior counsel for the respondents in the SEBI on the other hand has raised a contention that in the facts and circumstances of the present case, there are materials on record to indicate that the individual noticees had indulged in certain trades, which according to the SEBI amounted to reversal trade in illiquid stock options.

46. With regard to the contention of Dr. Ashok Saraf, learned senior counsel for the petitioners as to whether the opinion of the Board to be formed as to whether there are grounds for adjudging under the provisions of Chapter VIA of the SEBI Act of 1992 that such opinion would have to be in respect of the involvements of the noticee concerned, we examine the provisions of Section 11C of the SEBI Act of 1992 and that of Rule 3 of the Procedure Rules 1995 as to under what circumstances, the two requirements i.e. reasonable ground to believe of Section 11C and the opinion of the Board that there are grounds for adjudging are circumstanced.

47. Section 11C of the SEBI Act of 1992 provides that where the Board has reasonable ground to believe that transactions in securities are being dealt in a manner detrimental to the investors or the securities market or any intermediary or any person associated with the securities market has violated any of the provisions or the Rules or a Regulation made there-under or the directions issued by the Board, it may at any time by order in writing, direct any person to be referred as the Investigating authority to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board.

48. Sub-clause A of Section 11C(1) refers to the transactions in securities that are being dealt in a manner detrimental to the investors or the securities market. The expression 'transaction in securities' may be of any such transactions in the securities which may be person specific. If any such transactions in securities are detected by the SEBI to have been dealt in a manner detrimental to the investors or the securities market, it would be for the Board to embark upon an investigation under Section 11C and such investigation may involve any further transactions that any securities that may have been undertaken against which the Board, the Board may have reasonable ground to believe to have been done in a manner detrimental to the investors or the securities market. The expression 'transactions in securities' appearing in Section 11C(1)(a) appears not to be person specific, but it being more broad based, which may involve any such transactions in securities wherein the Board has reasonable ground to believe to be detrimental to the investors or the securities market. Again with reference to the expression 'any intermediary or any person' appearing in Section 11C(1)(b), the provisions of Section 11C(1) provides that there may be an order in writing directing the investigating

authority to investigate the affairs of such intermediary or persons associated with the securities market where the expression 'persons' also gives an indication that the investigation may not be person specific, but more broad based to arrive at any such transactions in securities that may have taken place which are detrimental to the investors or the securities market.

49. Considering both the aspects above, the purport of an investigation under Section 11C of the SEBI Act of 1992 would be broad based rather than person specific investigation.

50. Section 11C(1) provides that the investigation to be conducted by the investigating authority, would ultimately result in a report thereon to the Board. Accordingly, it has to be understood that the report to be submitted by the investigating authorities to the Board would contain such materials which may indicate as to whether the transactions in all the securities was dealt in a manner detrimental to the investors or the securities market or whether any intermediary or any persons had violated any of the provisions of the SEBI Act, Rules or the Regulation made there-under.

51. While Sections 15A to Section 15HB provides for the various penalties that may be imposed for different circumstances leading to a violation of the SEBI Act as well as the Rules and Regulations made thereunder Section 15-I provides for the power to adjudicate. Section 15-I provides that for the purpose of adjudging under Sections 15A to 15HB, the Board may appoint any person not below the rank of a Division Chief to be an adjudicating officer for holding an enquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing the penalty.

52. On a reading of Section 15-I, makes it discernible that Section 15-I

provides for the holding of an enquiry by the adjudicating officer in the prescribed manner after giving any person concerned a reasonable opportunity and further for the purpose of imposing any penalty i.e. any of the penalties that may be provided under Sections 15A to Section 15HB. The expression 'any person concerned' appearing in Section 15-I for the purpose of holding an enquiry in the prescribed manner after providing a reasonable opportunity of being heard to such person, by itself shows that the proceedings under Section 15-I would be person specific rather than it being a more broad based investigation as made under Section 11C.

53. As a reading of the provision of Section 15-I makes it discernible that the investigation contemplated thereunder would have to be against the person concerned against whom the Board intends to hold an enquiry, it has to be understood that the expression 'whenever the Board is of the opinion that there are grounds of adjudging' as appearing in Rule 3 of the Procedure and Rules of 1995 would have to be understood that the expression 'opinion' referred therein would be a formation of an opinion by the Board against the specific person concerned.

54. Accordingly, we are in agreement with Dr. Ashok Saraf, learned senior counsel for the petitioners that the requirement of forming an opinion as provided in Rule 3 of the Procedure and Rules of 1995 would be an opinion against the person specific against whom an enquiry is being contemplated and such opinion would not be a broad based opinion.

55. Having arrived at such conclusion, we take note of the submissions of Ms. M Hazarika, learned senior counsel appearing for the respondents in the SEBI who had by producing the records have referred to certain materials which shows that the Board do have the materials before it to form an opinion against

the individual writ petitioners noticee of the present proceedings. We are not expressing any view on the adequacy or accuracy of such materials that are being produced inasmuch as, in exercise of the jurisdiction under Article 226 of the Constitution of India, we are not going into such aspect of the matter and we leave it to the individual writ petitioner noticees to take it up with the authorities concerned on the question of adequacy or accuracy of such materials against them. But at the same time, we are of the view that whatever materials are being relied or referred by the respondent authorities against the writ petitioners noticees, such materials would have to be materials pertaining to the specific person concerned and not broad based.

56. We have perused the records produced by the respondent SEBI in respect of the opinion required to be formed under Rule 3 of the PR-1995. The records produced contain materials which may be a basis to form an opinion, but the records do not indicate the formation of any such opinion by the respondent SEBI.

WHETHER A NOTICE UNDER RULE 4 OF THE PR-1995 CAN BE ASSAILED IN A PROCEEDING UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA :

57. Ms. M Hazarika, learned senior counsel for the respondents in the SEBI has raised a contention that in the instant writ petitions, the notices under Rule 4(1) of the PR-1995 are notices issued in the facts and circumstance of the case inviting the objections from the petitioner noticees and any grievances that they may have against such notices can be appropriately dealt with upon the petitioners noticees appearing before the authorities and making their respective submissions.

58. Dr. Ashok Saraf, learned senior counsel for the writ petitioners raises the counter contention that the impugned notices under Rule 4(1) of the PR-1995 are challenged primarily on the ground that the prescribed procedure under the Rules had not been followed and a bare perusal of the notices itself would make it apparent that such procedures had not been followed. According to the learned senior counsel, ordinarily a show-cause notice is not to be interfered in the proceeding under Article 226 of the Constitution of the India *inasmuch as* the noticee would have an adequate opportunity to reply in course of the proceeding pursuant to such notices. But, if the statutory provisions provides for a particular procedure to be followed while issuing the notices itself and the notices on a cursory glance, makes it apparent that such procedures have not been followed, a Court under Article 226 of the Constitution of India can always look into the aspect and decide the matter on the procedural proprieties as regards the notice.

59. In this respect, Dr. Ashok Saraf, learned senior counsel for the writ petitioners relies upon the pronouncement of the Supreme Court in paragraphs 9 and 11 of Siemens Ltd. v. State of Maharashtra, reported in (2006) 12 SCC 33 as extracted herein below:

“9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of U.P. v. Brahm Datt Sharma [(1987) 2 SCC 179 : (1987) 3 ATC 319 : AIR 1987 SC 943] , Special Director v. Mohd. Ghulam Ghouse [(2004) 3 SCC 440 : 2004 SCC (Cri) 826] and Union of India v. Kunisetty

Satyanarayana [(2006) 12 SCC 28 : (2006) 12 Scale 262] , but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. (See K.I. Shephard v. Union of India [(1987) 4 SCC 431 : 1987 SCC (L&S) 438 : AIR 1988 SC 686] .) It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.

11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter-affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable.”

60. Reliance has also been placed in the pronouncement of the Supreme Court in paragraph 31 of *Union of India Vs. VICCO Laboratories*, reported in (2007) 13 SCC 270 as extracted herein below:

31. Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of

case for proceeding against the person against whom the show-cause notices have been issued. Abstinence from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the authorities concerned is the normal rule. However, the said rule is not without exceptions. Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice. The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out.

61. A reading of the aforesaid propositions of law as regards maintainability of a writ petition under Article 226 of the Constitution of India against the notice of show-cause, makes it discernible that it is not an invariable rule that no writ petition under Article 226 would be maintainable against a show cause notice and it would always be for the noticee to raise the objections in the proceedings itself. Certain circumstances are provided by the Supreme Court, i.e., when a notice is issued with premeditation, where the application of mind and formation of opinion as regards the liability or otherwise of the noticee had already been made, where the notice is issued without jurisdiction or in an abuse of process of law, an interference in respect of a notice even in a writ petition under Article 226 would be permissible.

62. In the instant case, the issues raised against the impugned notices are

that the procedure prescribed under the statutory provisions for issuing such notices had not been followed and in the process certain formations of opinion in a premeditated manner had already been made and by not following the procedure prescribed under the statutory provisions an abuse of process of law had also taken place. In order to appreciate such issues raised, we are of the view that the same can be done in the present writ petitions and not require the petitioner noticees to subject themselves to the process to be initiated as per the impugned show cause notices, in respect of such issues regarding the procedure adopted that had been raised.

63. In order to appreciate the rival contentions, we look into one of the notices under Rule 4(1) of the PR-1995 in respect of the writ petitioner Ankita Didwania in WP(C)No.766/2022. In paragraph 1 of the notice dated 17.09.2021, it is stated that an adjudication proceeding had been initiated in respect of the writ petitioner Ms. Ankita Didwania bearing PAN No. BFYPB2268B for carrying out alleged non-genuine trades in illiquid stock options at the BSE and thereby violated the regulations 3(a), (b), (c), (d), 4(1) and 4(2)(a) of the SEBI (Prohibition of Fraudulent and Unfair Trading Practices related to Securities Market) Regulations, 2003 (in short, referred as PFUTP Regulations, 2003).

64. In paragraph 5, it is stated that pursuant to an investigation under Section 11C of the SEBI Act, 1992, it was noticed that 2,91,744 trades which comprises 81.41% of all trades executed in the stock options segment of BSE were non-genuine trades and the non-genuine trades resulted in the creation of artificial volume to the tune of 826.21 crore units or 54.68% of the total market volume. In paragraph 6, it is stated that the writ petitioner noticee was one of the various entities which indulged in execution of the non-genuine trades in the

stock options segment of BSE during the period of investigation. In paragraph 14 of the notice dated 17.09.2021, it is provided that the writ petitioner noticee is therefore, called upon to show cause as to why an inquiry should not be held against her in terms of Rule 4 of the Procedural Rules, 1995 read with Section 15-I of the SEBI Act, 1992 and penalty should not be imposed in terms of Rule 5 of the said Procedural Rules read with the provisions of Section 15HA of the SEBI Act, 1992.

65. It is the submission of Dr. Ashok Saraf, learned senior counsel for the writ petitioners that the scheme of the procedure prescribed under Rule 4 of the PR-1995 provides for two separate and distinct stages of the proceeding where at the first stage, the noticee is required to be noticed to show cause as to why an adjudication proceeding should not be initiated and the second stage pertains to the actual penalty proceeding that may be undertaken. By referring to paragraph 14 of the notice dated 17.09.2021, Dr. Ashok Saraf, learned senior counsel for the writ petitioners points out that in the impugned notice, the two separate and distinct stages provided under the scheme of the procedure of the Rule 4 of the PR-1995 had been amalgamated and joined into a single proceeding which would be impermissible under the scheme of the procedure. It is the submission of the learned senior counsel that by amalgamating and joining the two separate stages under the scheme of the procedure under Rule 4 of the PR-1995, there is an aberration of the prescribed procedure under the Rules. Accordingly, it is submitted that as there is an aberration of the procedure provided under Rule 4(1) of the PR-1995, the said aspect would touch upon the jurisdiction of the authority issuing the impugned notices which under the law proposition indicated above would enable the Court under Article 226 to look

into the matter.

66. Rule 4 of the PR-1995 under Rule 4(1) provides that in holding an enquiry for the purpose of adjudging under Section 15HA, amongst others, as to whether any person had committed a contravention, in the first instance, a notice is to be issued to such person requiring him to show cause within such period as may be specified in the notice, not being less than 14 (fourteen) days from the date of service thereof, as to why an enquiry should not be held.

67. Rule 4(3) provides that if after considering the cause, if any, shown by such person, the Adjudicating Officer is of the opinion that an enquiry should be held, he shall issue a notice fixing a date for the appearance of the person concerned either personally or through his lawyer or other authorized representative.

68. The very expression '*in the first instance*' of Rule 4(1) of the Procedural Rules, 1995 gives an indication that the scheme of procedure provides for two different stages as submitted by Dr. Ashok Saraf, learned senior counsel for the writ petitioners. If it is so, the said question raised by the petitioner requires an examination and if it is so, requiring the noticee to raise a complete and comprehensive objection to the notice before the Adjudicating Officer wherein such question of procedural aberration may also be raised, may require the noticee to set forth many other such circumstances to give a wholesome reply rather than finding it as a whole scheme of the procedure requires the notices to be in two separate stages.

69. Considering the aforesaid aspect, we are of the view that the question on

the procedural aberration of Rule 4(1) raised in these writ petitions can also be adjudicated in a proceeding under Article 226 of the Constitution of India rather than requiring the noticee to give a wholesome and composite reply to all such allegations that may be made in the notice and thereafter take a decision as to whether the procedural requirements were duly followed. From such point of view, we reject the objections raised by the respondents SEBI as regards the maintainability of the writ petition on the ground that the issues raised could also have been answered by the writ petitioner noticees in the proceeding before the adjudicating officer itself.

WHETHER THE ADJUDICATING OFFICERS APPOINTED FOR THE PURPOSE ARE THE RESPECTIVE DIVISION CHIEFS:

70. Another contention raised by Dr. Ashok Saraf, learned senior counsel is that as required under Section 15-I of the SEBI Act 1992, it is for the Board to appoint any officer not below the rank of a Division Chief to be an adjudicating officer. But in the instant case, the notices impugned have been issued by authorities other than a person in the rank of a Division Chief and nor such Division Chiefs have been appointed by the Board to be the adjudicating officers.

71. Dr. Ashok Saraf, learned senior counsel for the petitioners by referring to the provisions of Section 15-I of the SEBI Act 1992 raises a contention that the adjudicating officers to be appointed for the purpose of adjudging under Section 15HA, amongst others, would have to be an officer not below the rank of a Division Chief and as a corollary if any officer other than a Division Chief is appointed as the adjudicating officer, the process initiated by such adjudicating

officer would be without jurisdiction. To substantiate the contention, a reference is made to the provisions of *Securities and Exchange Board of India (Delegation of Statutory and Financial Powers) Order, 2019* (for short, the Delegation Order 2019). As per the definition of Division Chief under Clause 2(1)(i), a Division Chief means an officer of the Board in the Grades D to F. Clause 2(1)(f) provides that a Chief General Manager means an Officer of the Board in the Grade F. Clause 2(1)(k) provides that General Manager means an officer of the Board in the Grade E and Clause 2(1)(h) Deputy General Manager means an officer of the Board in the Grade D.

72. On a conjoint reading of Clause 2(1) with Clauses 2(1)(f) to 2(1)(k) and Clause 2(1)(h) we have to understand that a Division Chief may be a Chief General Manager or a General Manager or a Deputy General Manager depending upon as to an officer of which rank is the Division Chief of a particular Division. In a given Division if the Division Chief is the Chief General Manager for that particular Division, the Division Chief would have to be the Chief General Manager and if for another given Division, it is the Deputy General Manager, it has to be understood that the Deputy General Manager would be the Division Chief of that particular Division and accordingly. Clauses 2(1)(f), 2(1)(i), 2(1)(k) and 2(1)(h) are extracted hereunder:

“2(1)(f) Chief General Manager means an officer of the Board in the Grade F;

2(1)(i) Division Chief means an officer of the Board in the Grades D to F;

2(1)(k) General Manager means an officer of the Board in the Grade E;

2(1)(h) Deputy General Manager means an officer of the Board in the Grade D.”

73. In order to appreciate the contentions raised by Dr. Ashok Saraf, learned senior counsel, which would depend on the factual situation as to whether the

authority issuing the notices under Rule 4(1) of the PR- 1995 in a given case was the Division Chief of that given Division would be a question of fact to be examined from the records.

74. Dr. Ashok Saraf, learned senior counsel refers to a particular document downloaded from the website of the SEBI which provides for the organisation structure within the Board. By referring to the said document providing for the organisation structure in the SEBI, Dr. Ashok Saraf, learned senior counsel points out that the adjudicating authority who had issued the notices under Rule 4(1) of the PR-1995 in WP(C)No.766/2022, where Ms. Ankita Didwania is the writ petitioner. The said notice was issued by the Corporation Finance Department. By an order dated 06.07.2021 under the signature of M/s. Bhavana RaviKumar, General Manager, SEBI in paragraph 3 thereof, it is provided that the competent authority in exercise of the power under Section 19 of the SEBI Act, read with Section 15-I (1) thereof and Rule 3 of the PR- 1995 appointed certain Division Chiefs as adjudicating officers as per Order dated 02.07.2021 to enquire and adjudicate under Section 15HA of the SEBI Act. Accordingly, Sri Rajesh Anand Gujjar had been appointed as the adjudicating officer in respect of the writ petitioner Ankita Didwania bearing Case ID No.20018267. Sri Rajesh Anand Gujjar is stated by the respondents SEBI to be the Deputy General Manager in the Division of Issues and Listing-1. Accordingly it is given to be understood that the notice under Rule 4(1) of the PR-1995 in respect of the writ petitioner Ms. Ankita Didwania had been issued by the Issues and Listing-1 Division, where Sri Rajesh Anand Gujjar being the Deputy General Manager is the Division Chief.

75. As per the organisation structure of SEBI referred by Dr. Ashok Saraf, learned Senior counsel for the writ petitioners Issues and Listing-1 Division is a

Division and the Division Head is Sri Rajesh Anand Gujjar.

76. A reading of the materials produced and the statements made by the petitioners and the authorities in the SEBI, in respect of the writ petitioner Ankita Didwania, it can be noticed that the notices under Rule 4(1) of the PR-1995 had been issued by the Division Chief. Instead of venturing into examining the factual aspect as to whether in respect of the other writ petitions, the authorities issuing notices under Rule 4(1) of the PR-1995 are Division Chief or not, in the light of the analysis made hereinabove, the Executive Director of the SEBI is required to look into the individual notices and arrive at his own satisfaction as to whether the respective authorities who have issued the notices do satisfy the requirement of being the Division Chiefs. If the Executive Director upon examining the records arrive at any conclusion that the authorities who have issued the notice would be not a Division Chief of the Division which had issued the notices, appropriate steps be taken to ensure that only the person who would be the Division Chief of the Division issuing the notices be appointed as the adjudicating officer. In such event, the notices that may have been issued, if any, by an authority otherwise than that of a Division Chief be recalled and necessary corrective measures be taken.

WHETHER THE APPOINTMENTS OF AN OFFICER NOT BELOW THE RANK OF A DIVISION CHIEF TO BE AN ADJUDICATING OFFICER WAS DONE IN ACCORDANCE WITH THE REQUIREMENT UNDER SECTION 15-I OF THE SEBI ACT, 1992

77. Dr. Ashok Saraf, learned Senior counsel for the petitioner by referring to the provisions of Section 15-I of the SEBI Act, 1992 contends that for the

purpose of adjudging under the Sections referred therein, amongst others, Section 15HA, the Board may appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an enquiry in the prescribed manner. Accordingly, reference is made to Section 2A of the SEBI Act, 1992, wherein it is provided that the 'Board' means the Securities and Exchange Board of India established under Section 3. Section 3 of the SEBI Act, 1992 provides that the Central Government may by notification appoint and establish for the purpose of the Act, a Board by the name of Securities and Exchange Board of India where Section 3(2) provides that the Board shall be a body corporate by the name of Securities and Exchange Board of India having perpetual succession and a common seal. Further reference is made under Section 4(1) of the SEBI Act, 1992 which provides that the Board shall consist of a Chairman, two members from amongst the officials of the Ministry of the Central Government dealing with the finance and administration of Companies Act, one member amongst the officials of the Reserve Bank of India, five other members of whom at least three shall be whole time members to be appointed by the Central Government.

78. By referring to the provisions of Section 4 of the SEBI Act, 1992, it is the contention of Dr. Ashok Saraf, learned Senior counsel for the petitioner that the Board being a defined concept under the SEBI Act, 1992, the appointment of the adjudicating officer under Section 15-I can be made only by the said defined concept alone and not by any other authority.

79. Ms. M. Hazarika, learned Senior counsel for the respondents in the SEBI *per contra* refers to Section 19 of the SEBI Act, 1992, which provides for delegation of powers and functions under the Act. By referring to the delegation of powers at Entry 20(A), it is pointed out that for the purpose of appointing an

adjudicating officer under Section 15-I, the delegated authority would be the Executive Director In-charge of EFD (in short referred to as 'ED-EFD'). By referring to the delegation of the powers, further reference is made to the records containing the note sheet which provides for the appointment of adjudicating officers for the different adjudicating proceedings. By referring to the said note sheet, it is pointed out that the various adjudicating officers appointed for the adjudicating proceedings were submitted for consideration by an officer who signed as GM (SM) on 03.04.2018. The said note sheet was thereafter signed by the CGM (AP) on 03.04.2018 by providing the endorsement 'as proposed, AOs may be appointed by ED(Law)'. Subsequent thereto, there is an endorsement 'approved the name of the adjudicating officers as per the list 1 to 9 given above' by the ED(Law), which is also dated 03.04.2018 and thereafter, the file goes back to the CGM, VSS and other authorities.

80. Dr. Ashok Saraf, learned Senior counsel for the petitioner has raised an issue that even if we go by the note sheet produced from the records, the ED-EFD had only approved the names of the adjudicating officers and it cannot be said to be an appointment made by the ED-EFD. To substantiate the contention raised, it is the submission of Dr. Ashok Saraf, learned Senior counsel for the petitioner that there is substantial difference between the appointment of a person and the approval given to such appointment of that person. The expression appointment is defined in Black's Law Dictionary to mean '*the designation of a person, such as non-elected public official, for a job or duty*'. According to Oxford English Dictionary, one of the meanings of the word 'appointment' is '*an act of assigning a job or position to someone*'. On the other hand, the word 'approval' which flows from the word 'approve' as per the Black's Law Dictionary means '*to give formal sanction; to confirm authoritatively*'. Again

as per the Oxford English Dictionary 'approval', amongst others, means '*an official statement or indication that something is accepted or regarded favourably*,' whereas the word 'approve' means '*officially agree or accept as satisfactory*'.

81. Going by the aforesaid meanings of the words 'appointment' and 'approval', we have to understand that 'appointment' means the designation of a person for a job or duty or to assign a person for a job or position to someone whereas 'approval' means to officially agree or accept as satisfactory of any appointment or any act or assigning a job or position to someone by an authority other than the authority assigning it. Going by the aforesaid difference in the concepts of 'appointment' and 'approval', we examine the note sheet produced by the respondents in the SEBI, wherein the endorsements indicated above are found, as well as the order communicating the appointment of adjudicating officer dated 06.07.2021 under the signature of Ms. Bhavana Ravikumar, GM, SEBI. A reading of the note sheet goes to show that the General Manager (SM) had put up a note providing for the names of the officials who can be appointed as adjudicating officers in respect of various adjudications to be made and to such note, the CGM(AB) gives the endorsement that the adjudicating officers as proposed by the GM(SM) may be appointed by the ED(Law) and thereafter, the ED(Law)/ED-EFD had given the endorsement, approved the name of the adjudicating officers as per the list provided. If we read the sequence of events from the note sheet, the GM(SM) had provided a list of officers who can be appointed as adjudicating officers for the various adjudications and the CGM(AB) had endorsed that whatever list of officers that were presented may be appointed by the ED(Law), meaning thereby that up the stage of being considered by the CGM(AB), the appointment had not taken

place and it is to be made by the ED(Law)/ED-EFD. But the ED(Law)/ED-EFD has used the expression 'approved the name of the adjudicating officers as per the list', although a more appropriate wording could have been 'appoint the adjudicating officers as per the list'.

82. As no appointment had taken place upto the stage of the consideration by the CGM(AP), who again provided that the appointment may be made by the ED (law)/ED-EFD, the word approved appearing in the endorsement of the ED (law)/ED-EFD would have to be accepted to be not a very happily worded endorsement, but the meaning thereof would be that the ED (law)/ED-EFD had made the appointments.

83. Clause 3 of the order communicating appointment of Adjudicating Officer dated 06.07.2021 under the signature of Ms. Bhavana Ravikumar, General Manager, SEBI is extracted as below:

“3. The Competent Authority has, therefore, in exercise of the powers conferred upon her under Section 19 of the SEBI Act read with Section 15 I(1) of the SEBI Act and Rules 3 of securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 ("hereinafter referred as the 'SEBI Rules') read with section 19 of the SEBI Act appointed certain Division Chiefs as Adjudicating Officers vide Order dated July 02, 2021 to enquire into and adjudge under Sections 15HA SEBI Act the alleged violations by the entities.”

84. A reading of the Clause 3 of the said order makes it discernable that the competent authority in exercise of the powers under Section 19 of the SEBI Act read with Section 15-I(1) and Rule 3 of the Procedural Rules, 1995 had appointed certain Division Chiefs as the adjudicating officers. In other words, when the order dated 06.07.2021 was issued by Ms. Bhavana Ravikumar, General Manager, SEBI, the competent authority had already appointed the Division Chiefs as adjudicating officers.

85. Dr. Ashok Saraf, learned senior counsel submits that in the process there ought to have been in place an actual order appointing the Division Chiefs as adjudicating officers which in the instant case is found absent.

86. We are in agreement with Dr. Ashok Saraf, learned senior counsel of the petitioners to that extent that the authorities in the SEBI while undertaking the process of appointing the adjudicating officers had not meticulously followed the procedure as suggested by the petitioners, but going by the steps adopted as per the note-sheet as well as the order dated 06.07.2021, we are of the view that there is a substantial compliance of the requirement of the Board through its delegated authority in appointing the Division Chiefs as adjudicating officers in view of the conclusion which has been arrived hereinbefore.

87. In order to avoid such issues, it is the suggestion by Dr. Ashok Saraf, the learned senior counsel for the writ petitioners, that the ED (law)/ED-EFD may be more careful in exercising his powers.

WHETHER THE INDIVIDUAL OPINIONS FORMED AGAINST THE PERSON SPECIFIC WITH REFERENCE TO RULE 3 OF THE PR-1995 ARE REQUIRED TO BE PROVIDED TO THE NOTICEES AND IN THE PRESENT CASE, WHETHER IT HAD BEEN PROVIDED.

88. Rule 3 of the PR-1995 provides that whenever the Board is of the opinion that there are grounds for adjudging under any of the provisions of Chapter VI-A of the SEBI Act of 1992, it may appoint any of its officers not below the rank of Division Chiefs to be an adjudicating officer. The opinion to be formed under

Rule 3 therefore would have to precede the appointment of adjudicating officers.

89. The Supreme Court in paragraph 24 and 25 of T Takano (supra) had provided that in shaping the jurisprudence surrounding the principles of access to justice and transparency as well as balancing the conflicting claims of access of justice and the grounds of public interest such as privacy, confidentiality and market interest, the purpose of disclosure of information is not merely individualistic, that is to prevent error in the verdict, but is also towards fulfilling the larger institutional purpose of fair trial and transparency, and, therefore, there is a requirement of a disclosure of the investigation report.

90. The opinion to be formed under Rule 3 of the PR-1995 against the person specific is in the nature of a disclosure of an investigation report. Therefore, from the point of view of fulfilling the larger institutional purpose of fair trial and transparency, as enunciated by the Supreme Court in paragraphs 24 and 25 of T Takano (supra), we are of the view that there would be a requirement for the respondents in the SEBI to provide the noticees the opinion formed against the individual noticee under Rule 3 of PR-1995 along with any such notice that may be issued under Rule 4(1) of the PR-1995.

WHETHER A NOTICE UNDER RULE 4(1) OF THE PROCEDURAL RULES OF 1995 CAN BE A COMPOSITE NOTICE REQUIRING THE NOTICEE TO RESPOND AS TO WHETHER AN ENQUIRY SHOULD BE HELD UNDER RULE 4(1) AND ALSO REQUIRING THE NOTICEE TO RESPOND UNDER RULE 4(3) AS TO WHY ANY OF THE PENALTIES CONTEMPLATED UNDER SECTION 11-A TO SECTION 11HB SHOULD NOT BE IMPOSED:

91. It is the contention of Dr. Ashok Saraf, learned senior counsel for the petitioner that the notices impugned in these writ petitions comprises of two parts as to why an enquiry should not be conducted by the adjudicating officers against the noticees and secondly as to why the penalties prescribed under section 15HA should not be inflicted upon them. According to the learned senior counsel, Rule 4 having provided for two separate proceedings i.e. one to show cause the noticee and give a hearing as to why an enquiry should not be held and the second being an actual enquiry into the allegations of contravention that may have been raised and the Supreme Court in T. Takano (supra) having clearly distinguished and provided for it, the combined show cause notices for the purpose of showing cause as to why the enquiry should not be held and as to why the penalty under section 15HA should not be inflicted would not be maintainable in law.

92. Dr. Ashok Saraf learned senior counsel for the petitioners has taken the Court to the notice dated 17.09.2021 issued by the adjudicating officer under Rule 4 of the Procedure Rules of 1995 read with Section 15-I of the SEBI Act of 1992. By referring to the said notice of 17.09.2021, it is pointed out by the learned senior counsel that it is a notice under Rule 4 of the PR-1995, meaning thereby, that the notice covers the requirements of the provisions of the entire Rule 4 and not specific to any of the sub-rules under Rule 4. The notice dated 17.09.2021 being made conjointly to be read with Section 15-I of the SEBI Act of 1992, it is pointed out that the notice covers the entire procedural requirements of arriving at a penalty under any of the Sections from 15A to 15HB.

93. By referring to paragraph 5 and 6 of the notice dated 17.09.2021, Dr. Ashok

Saraf learned senior counsel contends that pursuant to the investigation under Section 11C of the SEBI Act 1992, the adjudicating officer arrived at a conclusion as regards the prevalence of non-genuine trades in the stock options segment of the BSE totaling 2,91,744 trades which comprised a substantial 81.41% of all trades. By further referring to paragraph 6 of the said notice, it is contended that the adjudicating officer had arrived at his conclusion that the writ petitioner noticee Ankita Didwania was involved in such non-genuine trades in the stock options segment of BSE. In paragraph 7 of the notice, it is provided that during the investigation period four trades of 99,000 units were executed in respect of contract viz., DIVI15APR1920.00CE and the petitioner noticee had executed two trades for 29,000 units in the said contract on 30.03.2015. While dealing with the said contract on 30.03.2015, the petitioner noticee at 15:14:45 hrs., had entered one buy trade with a counter party namely Open Futures and Derivatives Pvt. Ltd., for 14,500 units @Rs.4/- per unit and thereafter at 15:14:51 hrs., had entered one sell trade with the same counter party for 14,500 units @Rs.28/- per unit. Paragraph 8 of the notice provides for the details of the non-genuine trades at Annexure-B to the notice.

94. Paragraphs 5, 6, 7 and 8 of the notice dated 17.09.2021 are extracted as below:

5. Pursuant to investigation, it is observed that during the investigation period, total 2,91,744 trades comprising substantial 81.41% of all the trades executed in Stock Options Segment of BSE were non genuine trades. The aforesaid non genuine trades resulted into creation of artificial volume to the tune of 826.21 crore units or 54.68% of the total market resulted into creation of artificial volume in Stock Options segment of BSE during the investigation period.

6. It is noted that Noticee was one of the various entities which were indulged in

execution of non-genuine trade(s) in Stock Options Segment of BSE during the investigation period. Following points mention the dealings of Noticee in Stock Options segment of BSE during the investigation period and allegations against Noticee for execution of non-genuine trade(s).

7. Non- genuine trade(s) and artificial volume are illustrated through the dealings of the Noticee in the contract viz, "DIVI15APR1920.00CE" during the investigation period, mentioned as follows:

(a) During the investigation period, total 4 trades for 99,000 units were executed in the said contract. Noticee had executed 2 trades for 29,000 units in the said contract on 30/03/2015.

(a) While dealing in the said contract on 30/03/2015, Noticee at 15:14:45 hrs entered into 1 buy trade with counterparty viz, OPEN FUTURES AND DERIVATIVES PRIVATE LIMITED for 14,500 units at rate of Rs. 4/- per unit. Thereafter, the Noticee at 14:14:51 hrs entered into 1 sell trade with the same counter party for 14,500 units at rate of Rs. 28/- per unit.

(b) From the above, it is noted that while dealing in the said contract during the investigation period, Noticee executed total 2 reversal trades (1 buy trade + 1 sell trade) with same counterpart viz, OPEN FUTURES AND DERIVATIVES PRIVATE LIMITED on the same day and with significant price differential in buy and sell rate.

(c) Thus, Noticee, through its dealing in the contract viz, "DIVI15APR1920.00CE" during the investigation period, executed 01(One) trade reversal through 2 non genuine trades which is 50% of the total trades from the market in the said contract during the investigation period, and thereby, Noticee generated artificial volume of 29,000 units which is 29.29% of the volume traded in the said contract from the market during the investigation period.

8. Details of both the trades, which are non- genuine, of Noticee in Stock Options segment of BSE during the investigation period is given in "Annexure B", and the detailed summary of all the dealings in the contract "DIVI15APR1920.00CE" IN WHICH Noticee allegedly executed non genuine trades during the investigation period is given in "Annexure C".

95. Thereupon, Dr. Ashok Saraf, learned senior counsel for the petitioners refers to paragraph 14 of the notice dated 17.09.2021 wherein the petitioner noticee Ankita Didwania was called upon to show cause as to why an enquiry should not be held under Rule 4 of the Procedure Rules of 1995 read with Section 15-I of the SEBI Act of 1992 and further why penalty should not be imposed in terms of Rule 5 of the Procedure Rules of 1995 read with Section 15HA of the SEBI Act of 1992. By referring to the paragraph 14 of the notice dated 17.09.2021, the learned senior counsel submits that the purport of the notice dated 17.09.2021 is two-fold. Firstly it is a notice upon the noticee to show cause as to why an enquiry should not be held against her and secondly, as to why the penalties prescribed under Section 15HA of the SEBI Act of 1992 should not be imposed under Rule 5 of the Procedure Rules of 1995.

96. Dr. Ashok Saraf, learned senior counsel for the petitioners makes a submission that the scheme of Rule 4 of the PR-1995 provides for a proceeding under Rule 4(1) of the PR-1995, in the first instance, to issue a notice requiring the person concerned to show-cause as to why an enquiry should not be held against him/her and thereafter if under Rule 4(3) an opinion is formed that an enquiry should be held, a further notice fixing a date for appearance of that person either personally or through a lawyer or representative be issued whereafter the person concerned would be explained the offence alleged to have been committed by indicating the provisions of the Act, Rules, Regulations etc., of which the contravention had taken place. It is further submitted that under Rule 4(5) the person concerned is required to be given an opportunity to produce such documents or evidence as he may consider relevant to the enquiry. According to the learned senior counsel after following the procedure

from Rule 4(3) onwards, any order of penalty may be passed under Rule 5 thereof.

97. By referring to the scheme of Rule 4, it is the submission of Dr. Ashok Saraf, learned senior counsel that the composite notice as discernible from paragraph 14 of the notice dated 17.09.2021 requiring the petitioner noticee to show cause as to why an enquiry should not be held against her and also as to why the penalties under Section 15HA of the SEBI Act of 1992 in terms of Rule 5 of the PR-1995 should not be imposed, would be not maintainable. It is the submission of the learned senior counsel for the petitioners that the scheme of Rule 4 of PR-1995 provides for two separate and distinct stages of the proceeding, one being a show-cause as to why an enquiry should not be held and only after arriving at an opinion that an enquiry is required to be held, the other notice as regards the penalty to be imposed can be made. The composite notice as discernible from paragraph 14 of the notice dated 17.09.2021 by which the two stages of the proceeding was amalgamated into one would not be maintainable as the second stage of issuing the notice for penalty requires the satisfaction of the condition precedent of there being an opinion formed that the enquiry is required to be held.

98. Ms. M Hazarika, learned senior counsel for the respondent SEBI per contra contends that the notice dated 17.09.2021 is only a show cause notice and the writ petitioners can respond to the notices and when such responses are submitted, the authorities in the SEBI would give a consideration to it. Accordingly, it is the contention that no interference is required against the notice under Rule 4 of PR-1995.

99. According to Ms. M Hazarika, learned senior counsel, the provisions of Rule 4 of PR-1995 itself are composite in nature and therefore, a composite notice in respect of all the aspect of Rule 4 would be permissible under the law.

100. Having heard the contentions and the counter contentions raised by the petitioner and the respondent SEBI on the question as to whether a composite notice with regard to all the aspects of Rule 4 of PR-1995 would be maintainable, we examined the provisions of the Rule 4 of PR-1995 itself.

101. Rule 4 of PR-1995 is extracted as below:-

4. Holding of inquiry- (1) In holding an inquiry for the purpose of adjudging under Sections 15-A, 15-B, 15-C, 15-D, 15-E, [15-EA, 15-EB,] A5-F, 15-G [,15-HA and 15-HB] whether any person has committed contraventions as specified in any of Sections 15-A, 15-B, 15-C, 15-D, 15-E, [15-EA, 15-EB,] A5-F, 15-G [,15-HA and 15-HB] the [the Board or adjudicating officer] shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than fourteen days from the date of service thereof) why an inquiry should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him.

(3) If, after considering the cause, if any, shown by such person, the [the Board or the adjudicating officer] is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or other authorized representative.

(4) On the date fixed, the [the Board or the adjudicating officer] shall explain to the person proceeded against or his lawyer or authorized representative, the offence, alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place.

(5) The [the Board or the adjudicating officer] shall then aive an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary the hearing may be adjourned to a future date and in taking such evidence the [the Board or the adjudicating officer] shall not be bound to observe the provisions of the Evidence Act, 1872 (11 of 1872):

Provided that the notice referred to in sub-rule (3), and the personal hearing referred to in sub-rules (3), (4) and (5) may, at the request of the person concerned, be waived.

[(5-A) The Board may appoint a presenting officer in an inquiry under this rule.]

(6) While holding an inquiry under this inquiry the [the Board or the adjudicating officer] shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any

document which, in opinion of the [the Board or the adjudicating officer], may be useful for or relevant to, the subject-matter of the inquiry.

(7) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the [the Board or the adjudicating officer], the [the Board or the adjudicating officer] may proceed with the inquiry in the absence of such person after recording the reasons for doing so.

102. Rule 4 (1) of PR-1995 provides that in holding an enquiry for the purpose of adjudging under Sections 15A to 15HB of the SEBI Act, 1992 as to whether any person had contravened any of the provisions thereof, the adjudicating officer at the first instance to issue a notice to such person requiring him/her to show cause as to why an enquiry should not be held against him/her. The expression 'first instance' in Rule 4(1) of PR-1995 gives the indication that a notice under Rule 4(1) requiring the person to show cause as to why an enquiry should not be held against him/her, should precede all such notices that may be issued as per the subsequent sub Rules of Rule 4.

103. The expression 'first instance', as per the Merriam Webster dictionary means '*before other events happen or as the first thing in a series of actions.*' The meaning of the expression 'first instance' would have to be understood to be that whatever process is required to be undertaken before embarking upon the subsequent processes, would have to be first completed and thereafter alone the subsequent processes can be initiated. When Rule 4(1) of PR-1995 provides that at the first instance a notice is to be issued as to why an enquiry should not be held, such notice would have to remain confined on the issue as to why the enquiry should not be held and cannot embark upon any other subsequent processes that may be provided by the subsequent provisions after the opinion to hold the enquiry is arrived at.

104. Rule 4(3) of PR-1995 inter-alia provides that if after considering the cause shown pursuant to the notice under Sub-Rule 1, the adjudicating officer is of the opinion that an enquiry should be held, he may issue a notice fixing a date for appearance of that person either personally or through a lawyer or representative. Further Rule 4(4) provides that on the date so fixed under Rule 4(3), the adjudicating officer shall explain to the person concerned or his lawyer or representative the offence alleged to have been committed by him by indicating the provisions of the Act, Rules or Regulations in respect of which the contravention is alleged to have taken place. It is to be noticed that the further process of issuing a notice for fixing the date of appearance of the person and upon his appearance to explain him the offence that he has been alleged to have been committed by referring to the provisions of the Act, Rules or Regulations can take place only upon the opinion being formed that there is a requirement to hold an enquiry pursuant to the process under Rule 4(1) of PR-1995. In other words, only upon a completion of the process of the notice issued under Rule 4(1) by forming an opinion that an enquiry is required to be held, the further processes under Rule 4(3) and 4(4) can be initiated.

105. In *Natwar Singh Vs. Directorate of Enforcement*, reported in (2010) 13 SCC 255, the Supreme Court examined the provisions of Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, (in short FEMA Rules 2000) which is extracted as below:-

20. Rule 4 of the said Rules which prescribes the procedure for holding of inquiry which is material for our present purpose is as under:

“4. Holding of inquiry.- (1) For the purpose of adjudicating under Section 13 of the Act whether any person has committed any contravention as specified in that section of the Act, the adjudicating authority shall, issue a notice to such person requiring him to

show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why an inquiry should not be held against him.

(2) Every notice under sub-rule (1) to any person shall indicate the nature of contravention alleged to have been committed by him.

(3) After considering the cause, if any, shown by such person, the adjudicating authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorized by him.

(4) On the date fixed, the adjudicating authority shall explain to the person proceeded against or his legal practitioner or the chartered accountant, as the case may be, the contravention, alleged to have been committed by such person indicating the provisions of the Act or of rules, regulations, notifications, direction or orders or any condition subject to which an authorization is issued by the Reserve Bank of India in respect of which contravention is alleged to have taken place.

(5) The adjudicating authority shall, then, given an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary, the hearing may be adjourned to future date and in taking such evidence the adjudicating authority shall not be bound to observe the provisions of the Indian Evidence Act, 1872 (1 of 1872).

(6) While holding an inquiry under this rule the adjudicating authority shall have the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which is in the opinion of the adjudicating authority may be useful for or relevant to the subject-matter of the inquiry.

(7) If any person fails or neglects or refuses to appear as required by sub-rule (3) before the adjudicating authority, the adjudicating authority may proceed with the adjudicating proceedings in the absence of such person after recording the reasons for doing so.

(8) If, upon consideration of the evidence produced before the adjudicating authority, the adjudicating authority is satisfied that the person has committed the

contravention, he may, by order in writing, impose such penalty as he thinks fit, in accordance with provisions of Section 13 of the Act.

(9) Every order made under sub-rule 8 of Rule 4 shall specify the provisions of the Act or of the rules, regulations, notifications, direction or orders or any condition subject to which an authorization is issued by the Reserve Bank of India in respect of which contravention has taken place and shall contain brief reasons for such decisions.

(10) Every order made under sub-rule (8) shall be dated and signed by the adjudicating authority.

(11) A copy of the order made under sub-rule (8) of Rule 4 shall be supplied free of charge to the person against whom the order is made and all other copies of proceedings shall be supplied to him on payment of copying fee @2 per page.

(12) The copying fee referred to in sub-rule (11) shall be paid in cash or in the form of demand draft in form of the adjudicating authority.

(emphasis supplied)

106. Rule 4 (1) of the FEMA Rules 2000 provides that for the purpose of adjudicating under section 13 of the Foreign Exchange Regulation Act, 1973, the adjudicating authority shall issue notice to such person requiring him to show cause within such period as to why an enquiry should not be held against him. Rule 4(3) of the FEMA Rules, 2000 provides that after considering the cause if any shown by such person, the adjudicating authority is of the opinion that an enquiry should be held, a notice fixing a date for appearance of that person, either personally or through lawyer or authorized chartered accountant, be issued.

107. While interpreting of the provisions of Rules 4(1) and 4(3) of the FEMA Rules 2000, the Supreme Court in Natwar Singh (supra) arrived at its conclusion in paragraph 23 of its judgment that the Rules do not provide and empower the adjudicating officer to straight away make an enquiry into the allegations of

contravention in respect of any person, against whom a complaint had been received. The Supreme Court was of the view that for the purpose of adjudication whether any person has committed any contravention, the adjudicating officer shall issue notice requiring him to show cause as to why an enquiry should not be held and the notice to be issued is not for the purposes of making any adjudication into the alleged contravention, but only for the purpose of deciding whether an enquiry should be held. After taking the cause shown by such person the adjudicating officer is required to form an opinion as to whether any enquiry is required to be held and it is only then the real and substantial enquiry into the allegations of contravention begins.

Paragraph 23 of the Natwar Singh (supra) is extracted below:-

23. The Rules do not provide and empower the adjudicating authority to straightway make any inquiry into allegations of contravention against any person against whom a complaint has been received by it. Rule 4 of the Rules mandates that for the purpose of adjudication whether any person has committed any contravention, the adjudicating authority shall issue a notice to such person requiring him to show cause as to why an inquiry should not be held against him. It is clear from a bare reading of the rule that show-cause notice to be so issued is not for the purpose of making any adjudication into alleged contravention but only for the purpose of deciding whether an inquiry should be held against him or not. Every such notice is required to indicate the nature of contravention alleged to have been committed by the person concerned. That after taking the cause, if any, shown by such person, the adjudicating authority is required to form an opinion as to whether any inquiry is required to be held into the allegations of contravention. It is only then the real and substantial inquiry into allegations of contravention begins.

108. While examining the provisions of Rule 4(1) of the PR-1995, the Supreme Court in T. Takano (supra), had in paragraph 34 referred to the proposition laid down in paragraph 23 of Natwar Singh (supra). In paragraph 35, the conclusion arrived was that the notice under Rule 4(1) of PR-1995 is not for the purpose of making an adjudication into the alleged contravention, but only for deciding whether an enquiry must be conducted. It was also held that the stage when an

enquiry is held is subsequent to the initial stage contemplated by Rule 4(1). In paragraph 36 of T. Takano (supra), it had been held that the Court distinguishes between the initial stage under Rule 4(1) which is only for the purpose of deciding whether an enquiry has to be held and the subsequent stage of adjudication into the allegations of contravention.

109. Paragraphs 34, 35 and 36 of T. Takano (supra) are extracted below:-

34. Now in this backdrop, Justice B. Sudarshan Reddy speaking for the two-judge Bench of this Court interpreted Rule 4 as follows: "23. The Rules do not provide and empower the Adjudicating Authority to straightaway make any inquiry into allegations of contravention against any person against whom a complaint has been received by it. Rule 4 of the Rules mandates that for the purpose of adjudication whether any person has committed any contravention, the Adjudicating Authority shall issue a notice to such person requiring him to show cause as to why an inquiry should not be held against him. It is clear from a bare reading of the rule that show cause notice to be so issued is not for the purposes of making any adjudication into alleged contravention but only for the purpose of deciding whether an inquiry should be held against him or not. Every such notice is required to indicate the nature of contravention alleged to have been committed by the person concerned. That after taking the cause, if any, shown by such person, the Adjudicating Authority is required to form an opinion as to whether an inquiry is required to be held into the allegations of contravention. It is only then the real and substantial inquiry into allegations of contravention begins."

35. The above extract clearly indicates that the show cause notice under Rule 4(1) is not for the purpose of making an adjudication into the alleged contravention but only for deciding whether an enquiry must be conducted. The stage when an enquiry is held is subsequent to the initial stage contemplated by Rule 4(1). During the course of the adjudication, the fundamental principle is that material which is used against a person must be brought to notice. As this Court observed: "30. The right to fair hearing is a guaranteed right. Every person before an authority exercising the adjudicatory powers has a right to know the evidence to be used against him. This principle is firmly established and recognised by this Court in Dhakeswari Cotton Mills Ltd. v. CIT [AIR 1955 SC 65 : (1955) 1 SCR 941]. However, disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. However, there are various exceptions to this general rule where disclosure of evidential material might inflict

serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future (see R. v. Secy. of State for Home Deptt., ex p H [[1995] Q.B. 43 : [1994] 3 WLR 1110 : (1995) 1 All ER 479 (CA)]). 31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute.” (emphasis supplied)

36. The decision of this Court distinguishes between the initial stage under Rule 4 (1) which is only for the purpose of deciding whether an enquiry has to be held and the subsequent stage of adjudication into the allegations of contravention. This Court further held: “34. As noticed, a reasonable opportunity of being heard is to be provided by the adjudicating authority in the manner prescribed for the purpose of imposing any penalty as provided for in the Act and not at the stage where the adjudicating authority is required merely to decide as to whether an inquiry at all be held into the matter. Imposing of penalty after the adjudication is fraught with grave and serious consequences and therefore, the requirement of providing a reasonable opportunity of being heard before imposition of any such penalty is to be met. In contradistinction, the opinion formed by the adjudicating authority whether an inquiry should be held into the allegations made in the complaint are not fraught with such grave consequences and therefore the minimum requirement of a showcause notice and consideration of cause shown would meet the ends of justice. A proper hearing always include, no doubt, a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.”

109. By following the aforesaid propositions of law laid down by the Supreme Court in Natwar Singh (supra) and T. Takano (supra), we have to arrive at a conclusion that a notice under Rule 4(1) of the PR-1995 would be a notice only for the purpose as to whether an enquiry should be held and such notice cannot embark into an actual adjudication being made which ultimately may lead to

any of the penalties under sections 15A to 15HB. As clearly provided under Rule 4(3) of PR-1995, upon the causes being shown to the notice as to whether an enquiry is to be held, the adjudicating authority is required to form an opinion that in the case at hand, an enquiry is required to be held. Only upon forming such opinion that an enquiry is required to be held, the subsequent process of fixing a date of appearance for explaining the person concerned as to the alleged offence that had been committed by indicating the provisions of the Acts, Rules or Regulations that were contravened, can be carried forward.

110. When we examine the impugned notice dated 17.09.2021 in respect of the writ petitioner noticee Ankita Didwania at paragraph 14, as per the aforesaid proposition of the law, it is noticed that the noticee is called upon to show cause not only as to why an enquiry should not be held against her under Rule 4, but also why penalty should not be imposed under the provisions of Section 15HA of the SEBI Act, 1992 in terms of Rule 5 of the PR-1995. In other words, the notice dated 19.09.2021 in respect of petitioner noticee Ankita Didwania is a composite notice comprising of a notice as to why an enquiry should not be held and also why the adjudication proceeding be not carried forward and brought to its end by referring to the penalty.

111. Rule 4(3) of the PR-1995 provides that the subsequent process of adjudication by fixing a date of appearance of the person concerned leading to a penalty in terms of Rule 5 is to be preceded by the condition precedent of forming an opinion that an enquiry is required to be held. If we go by paragraph 14 of the impugned notice dated 17.09.2021 in respect of petitioner noticee Ankita Didwania, it has to be understood that the notice is also for the

adjudication proceeding which may result in a penalty and that it was made without the satisfaction of the condition precedent of forming an opinion by the adjudicating officer that an enquiry is required to be held.

112. Accordingly, we are to arrive at a conclusion that the impugned notice dated 17.09.2021 in respect of petitioner noticee Ankita Didwania is a notice defective in form, although we may not have had arrived at any conclusion nor expressed any view on the substance of the notice dated 17.09.2021.

113. A contention has been raised by Ms. M Hazarika, learned senior counsel for the respondent SEBI that even if the notice dated 17.09.2021 is a notice defective in form, but no prejudice would be caused to the petitioners and therefore, an interference of the notice may not be made.

114. Whether or not, a prejudice has been caused would be a matter of individual perception, but by the impugned notices, the noticees are required to show cause firstly, as to why an enquiry should not be held and secondly, as to why the penalty should not be imposed. By the composite notices, the noticees are put at a disadvantage that their show cause also would have to be composite and while providing for any reply to the adjudication stage as to why penalty should not be imposed, the reply thereof can also be used for the first stage of giving a reply as to whether the enquiry is to be held or not. Had the appropriate procedure of separating the two stages would have been followed by issuing the notice under Rule 4(1) of PR-1995 by confining it on the issue as to whether an enquiry should be held or not, the noticees would have had the opportunity not to give any reply with regard to the further issue on the penalty which would be a part of the subsequent stage of the proceeding. Therefore, it cannot be wholly agreed upon that no prejudice of any kind was caused to the

petitioner noticees because of the composite notice of requiring to show cause both against as to why an enquiry should not be held and also on the adjudication proceedings which may result in the penalty to be imposed.

115. By following the propositions laid down by the Supreme Court in Natwar Singh (supra) and T. Takano (supra), as well as taking note of the procedural requirements of Rule 4 of the PR-1995, we are of the view that the impugned notice dated 17.09.2021 in respect of the petitioner noticee Ankita Didwania in WP(C) No. 766 of 2022 and other similar notices in respect of the petitioner noticees of the other writ petitions would not be sustainable in the present form and accordingly, they are all set aside.

116. We also take note that some of the impugned notices provide for an opportunity to the noticees to avail certain conciliation process in respect of the penalties to be imposed. If any such petitioner noticees without intending to raise objection to any of the notices intends to avail any offer of conciliation in respect of the quantum of penalty, liberty would remain to any such petitioner noticees to avail the same.

117. However, as the interference is on a technical aspect on the procedure adopted in the matter, with regard to the manner in which the notices were issued, without any view being expressed on the legality and validity of the notices as regards the subject matter involved, as well as on the materials available on record, the respondents in the SEBI may proceed against the petitioner noticees from the stage of issuing the notices under Rule 4(1) of PR-1995, if so advised subject to it being otherwise sustainable in law.

118. We have taken note of a submission being made by Dr. Ashok Saraf,

learned senior counsel for the petitioners that under Rule 3 of the PR-1995, the Board may appoint any of its officers not below the rank of Division Chief to be the adjudicating officer for holding an enquiry whenever the Board is of the opinion that there are grounds for adjudging under Chapter VI-A of the SEBI Act, 1992. The learned senior counsel submits that even prior to appointment of an adjudicating officer by the Board, there is a requirement of an opinion to be formed that there are grounds for adjudging under Chapter VI-A of the SEBI Act 1992. The learned senior counsel further submits that the opinion to be formed would have to be person specific against whom the adjudication process is sought to be initiated.

119. Ms. M Hazarika, learned senior counsel for the respondents in the SEBI on the other hand submits that the records itself would show that such individual opinion had been formed by the Board through its appropriate authority who had been delegated in exercise of the powers under Rule 19 of the SEBI Act, 1992.

120. As we have interfered with the notices issued by the adjudicating officers of the respondent SEBI on the technical ground of it not conforming to the requirements of the Rule 4 of PR-1995, we further provide that the delegated authority of the Board who is required to form the opinion before appointing the adjudicating officer to look into the records on the opinion being formed against the persons specific against whom the adjudication process is sought to be initiated and ensure that the required opinion referred under Rule 3 of PR-1995 is duly formed.

121. As provided by the Supreme Court in paragraphs 24 and 25 in T Takano (supra), the opinion to be formed under Rule 3 of the PR-1995, which would

have to be person specific to the individual noticees, be also served on the noticees along with the *de-novo* notice that may be issued under Rule 4(1) of the PR-1995.

122. The writ petitions are answered and decided accordingly.

JUDGE

Comparing Assistant