BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 06.02.2020

Date of Decision: 05.11.2020

Misc. Application No. 604 of 2019
And
Misc. Application No. 158 of 2017
And
Misc. Application No. 215 of 2017
And
Misc. Application No. 217 of 2017
And
Appeal No. 120 of 2017

1. Reliance Industries Limited
   3rd Floor, Maker Chambers IV,
   222, Nariman Point,
   Mumbai – 400 021.

2. Gujarat Petcoke and Petro Product Supply Pvt. Ltd.
   White House, Opp. 9 Patel Colony,
   Bedi Road, Jamnagar – 361 008.

3. Teesta Retail Private Limited
   (Aarthik Commercials Pvt. Limited,
   one of the Named Entity, ultimately merged into
   Teesta Retail Private Limited)
   4th Floor, Court House,
   Lokmanya Tilak Marg,
   Dhobi Talao, Mumbai – 400 002.

4. Reliance Petro Marketing Limited
   (LPG Infrastructure India Pvt. Ltd.
   one of the Named Entity, merged into this entity)
   5th Floor, Court House,
   Lokmanya Tilak Marg,
   Dhobi Talao, Mumbai – 400 002.

5. Relpol Plastic Products Pvt. Limited
   C-1, MIDC Industrial Area,
   Shivani Village,
   Akola – 444 104.

6. Fine Tech Corporation Pvt. Limited
   3rd Floor, Court House,
   Lokmanya Tilak Marg,
   Dhobi Talao, Mumbai – 400 002.

7. Reliance Ports and Terminals Limited
   (Pipeline Infrastructure India Pvt. Limited
   one of the Named Entity merged into
   Reliance Ports and Terminals Limited)
   Admin Building, MTF Area, Village Sikka,
   Taluka & District Jamnagar – 361 140.

8. Motech Software Pvt. Limited
   (represented by erstwhile Director
   K. Varadarajan since the name of this entity
   has been struck off u/s 560 of the
   Companies Act, 1956)
   104-B, Sukhmani CHS Ltd.
   Yashodham, Goregaon (East),
   Mumbai – 400 063.

9. Darshan Services Pvt. Limited
   (earlier known as Darshan Securities Pvt. Ltd.)
   84-A, 8th Floor, Mittal Court,
   224, Nariman Point,
   Mumbai – 400 021.

10. Relogistics (India) Pvt. Limited
(including on behalf of Relogistis (Rajasthan)
Pvt. Ltd., one of the Named Entities,
which merged into this entity)
3rd Floor, Court House,
Lokmanya Tilak Marg,
Dhobi Talao, Mumbai – 400 002.

11. Vinamara Universal Traders Pvt. Limited
Jai Centre, 1st Floor,
34, P.D'Mello Road,
Opp. Red Gate, Mumbai – 400 009.

12. Dharti Investment and Holdings Pvt. Limited
Jai Centre, 1st Floor,
34, P.D'Mello Road,
Opp. Red Gate, Mumbai – 400 009. …Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. … Respondent

Mr. Harish Salve, Senior Advocate with Mr. Janak Dwarkadas, Senior Advocate, Mr. Raghav Shankar, Mr. Rohan Rajadhyaksha, Mr. Ashwath Rav, Mr. Kashish Batia, Mr. Vivek Shetty, Mr. Amey Nabar, Mr. Geetanjali Sharma, Ms. Arundhati Kelkar, Mr. Armaan Patkar, Ms. Cheryl Fernandes and Mr. Vedant Jalan, Advocates i/b AZB Partners for Appellants.

Mr. Darius Khambata, Senior Advocate with Mr. Gaurav Joshi, Senior Advocate, Mr. Aditya Mehta, Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates i/b K. Ashar & Co. for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. The appellants have preferred the present appeal against the order dt 24.03.2017 passed by the Whole Time Member (WTM) exercising the powers under section 11 & 11B of the Securities And Exchange Board Of India Act 1992 (SEBI Act), Section 12A of Securities Contract (Regulation) Act 1956 (SCR Act) read with Regulation 11 of Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations 2003 (PFUTP Regulations). The WTM in its order issued the following directions, namely,

(i) The appellants are prohibited from dealing in equity derivatives in F&O segment of Stock Exchanges, directly or indirectly, for a period of one year from the date of the order.

(ii) Appellant no. 1 shall disgorge an amount of Rs 447.27 Crs alongwith interest @12% p.a. w.e.f. 29.11.2017 onwards till the date of payment.

2. The period of restraint has already run its course and thus the present appeal is confined to the question as to whether the imposition of disgorgement in the facts of the present case was justified or not.

3. The facts leading to the filing of the appeal is, that appellant no. 1, Reliance Industries Ltd (RIL) resolved in its Board meeting on 29.03.2007 to generate funds for completion of various projects to the extent of Rs 87,000 Cr. Reliance Petroleum Ltd. (RPL) was a listed subsidiary of RIL and was holding approx 75% of shares in RPL. Appellants No. 2 to 13 are agents of RIL under an agreement, who took an aggregate net short positions of 9.92 Cr shares in Nov, 2007 in RPL Futures on the Stock Exchange as a hedge against the proposed sale by RIL in the cash segment.

4. In May 2006, RPL made a public issue of its shares @ Rs 60/- per share. In Sept 2007, the price was Rs 150/- per share. On 31.10.2007 the share price increased to 247.90 per share. According to the analyst reports of Goldman Sachs and Kotak Institutional Securities in Sept/Oct 2007, the shares were shown to be overpriced and, according to them, the value should have

been around Rs 150/- per share. In this backdrop, it was decided to sell 5% of its shareholdings in RPL which roughly worked out to 22.5 Cr shares. The decision to sell the shares was based on the premise that the shares of RPL were overvalued.

5. Offloading 5% of the shares in RPL by its promoter RIL would cause a flutter in the stock market and would not be in the interest of the investors. Selling approx 22.5 Cr shares would make the price of the share of RPL to fall significantly. Keeping this in mind, the appellant no. 1 was required to sell the shares in an orderly manner that would protect the integrity of the market and consequently appointed 12 agents, namely appellants 2 to 13 under a written agreement to take aggregate net short position of 9.92 Cr shares in Nov 2007 RPL Futures between 1.11.2007 and 6.11.2007 as a hedge against the proposed sale in the cash segment. The settlement period for the Nov 2007 RPL Futures was from 1.11.2007 to 29.11.2007.

6. On 1.11.2007 the share price of RPL touched a high of Rs 294/-. It is at this point, a decision was taken to sell the shares of RPL. The agents of appellant no. 1 took short positions between 1.11.2007 and 6.11.2007. From 6.11.2007 to 29.11.2007, RIL sold

20.29 Cr shares out of proposed 22.5 Cr shares in the cash segment of NSE and BSE out of which 2.25 Cr shares were sold in the last ten minutes, i.e. between 3.21.40 p.m. to 3.30.00 pm on 29.11.2007. The impugned order contains a factual error, namely, that 1.95 Cr shares were sold in the last 10 minutes. The correct figure is 2.25 Cr shares.

7. The sale of 20.29 Cr shares in the cash segment was done over a period of 11 trading days. 13.83 Cr shares were sold on the NSE platform and 6.46 Cr shares were sold on the BSE platform.

8. The short positions taken by the two agents, namely appellants no. 12 and 13 were squared off before 29.11.2007. However, the short positions taken by the remaining 10 agents were closed on 29.11.2007 at the settlement price, i.e. the last half an hour weighted average price in the cash segment on 29.11.2007. It may be noted here, that physical delivery of shares is not allowed in the futures segment under the SEBI laws and Regulations and Stock Exchanges bye laws. Positions taken in the futures segment has to be cash settled after squaring off or closing out on the last day of the settlement.

9. The appellant nos. 2 to 13 squared off 1.95 Cr shares short positions by purchases in the Nov 2007 RPL Futures between 7.11.2007 to 28.11.2007. They had an aggregate outstanding open interest short position of 7.97 Cr shares on 29.11.2007. These short positions were closed out by NSE on 29.11.2007 at the settlement price, i.e. last half an hour weighted average price in the cash segment (closing price) in accordance with the NSE bye laws.

10. In this way, RIL realized Rs 4500 Cr from the sale of the shares in the cash segment and Rs 513 Cr from the futures segment through the 12 agents, thus realized an aggregate amount of Rs 5013 Cr.

11. On 16.07.2008, SEBI sought certain information from RIL with regard to the above transactions. In this regard, various communications were made between SEBI and RIL between July 2008 to Jan 2009 through which RIL disclosed the agency agreement with appellants no. 2 to 13.

12. Based on the information gathered by SEBI, a Show Cause Notice dt 29.04.2009 was issued against RIL only alleging violations of the SEBI Act and PFUTP Regulations 2003. A

corrigendum notice dt 8.10.2009 was issued to show cause why appropriate directions should not be issued under Regulation 11 of SEBI (Prohibition Of Insider Trading) Regulations 1992. RIL filed their appropriate response. It transpires that based on the reply filed by RIL, SEBI conducted a reinvestigation in the transactions done by RIL and its agents, pursuant to which a Second Show Cause Notice dt 16.12.2010 was issued to all the appellants in supersession to the first Show Cause Notice and corrigendum notice.

13. The Show Cause Notice alleged that;

(i) The appellants have violated the provisions of the SEBI Act, 1992, Securities Contracts (Regulation) Act, 1956, SEBI (Prevention of Fraudulent and Unfair Trade Practices) Regulations,2003 and Rules, Regulations and Bye-laws of the National Stock Exchange of India Limited pertaining to F&O trading in particular, Section 11 of the SEBI Act, 1992, Section 11B of the SEBI Act, 1992, Section 12A of the SEBI Act, 1992, Section 12A of the Securities Contracts (Regulation) Act, 1956, Sections 18A of the Securities Contracts

(Regulation) Act, 1956, Regulation 3(a), (b), (c), (d) and Regulation 4(1), 4(2)(d), (e) of SEBI (Prevention of Fraudulent and Unfair Trade Practices) Regulations, 2003, SEBI circular no. SMDRP/DC/CIR-10/01 dated November 2, 2001, NSE Circular no. NSE/CMPT/2982 dated November 7, 2001, Regulation 3.2 of National Stock Exchange (Futures & Options segment) Trading Regulations and Byelaw 4 of Chapter VII of National Securities Clearing Corporation Limited (Futures & Options Segment) Bye Laws read with Byelaw 12 of Chapter I of National Securities Clearing Corporation Limited (Futures & Options Segment) Bye Laws.

(ii) Appellants no. 1-13, in pursuance of the individual agreements between appellant no. 1 and appellants no. 2-13, by taking positions in the F&O segment of the scrip of RPL in excess of the limits specified vide SEBI circular no. SMDRP/DC/CIR-10/01 dated November 2, 2001 and NSE circular no. NSE/CMPT/2982 dated Nov 7, 2001, have violated

SEBI circular no. SMDRP/DC/CIR-10/01 dated Nov 2, 2001, NSE circular no. NSE/CMPT/2982 dated Nov 7, 2001, Regulation 3.2 of National Stock Exchange (Futures & Options segment) Trading Regulations, Byelaw 4 of chapter VII of National Securities Clearing Corporation Limited (Futures & Options Segment) Bye laws read with Byelaw 12 of Chapter I of National Securities Clearing Corporation Limited (Futures & Options Segment) Bye laws, thus have rendered the futures contracts entered into by all of them in violation of section 18A of the Securities Contracts (Regulation) Act, 1956 and hence, illegal and invalid and is in violation of Section 12A of the SEBI Act, 1992 read with Regulation 3(a),(b),(c) and (d) and Regulation 4(1) and 4(2)(d) and (e) of the SEBI (Prevention of Fraudulent and Unfair Trade Practices) Regulations, 2003.

(iii) Further, appellant no. 1, which held a large short position in November futures in the derivatives segment of the RPL scrip through appellant no. 2-

13, by placing huge sell orders during the last ten minutes of trading on November 29,2007, depressed the share price of the RPL scrip, and consequently manipulated the settlement price of Nov RPL futures, which is in violation of Section 12A of the SEBI Act, 1992 read with Regulation 3(a),(b),(c) and (d) and Regulation 4(1) and 4(2)(d) and (e) of the SEBI (Prevention of Fraudulent and Unfair Trade Practices) Regulations, 2003.

(iv) In view of the aforesaid violations, the appellants were called upon to show cause why all or any of the actions, including disgorgement of the undue and illegal profits made, and such other measures as deemed fit, in terms of SEBI Act, 1992, Securities Contracts (Regulation) Act, 1956 and SEBI (PFUTP relating to Securities market) Regulations, 2003 should not be initiated.

14. The allegations in the Show Cause Notice are summarized as under:-

(a) RIL took massive short positions through the 12 named entities in November 2007 RPL Futures, in

breach of the position limits prescribed in circulars issued by SEBI, NSE and National Securities Clearing Corporation Limited (NSCCL) with the knowledge of the impending sales in the cash market. This was a well-planned, fraudulent, manipulative trading scheme and unfair trade practice violating PFUTP Regulations.

(b) RIL's trades in the F&O segments are illegal and invalid under Section 18A of the Securities Contracts (Regulations) Act, 1956 (SCRA), which provides conditions for contracts in derivative to be legal and valid.

(c) RIL depressed the settlement price of futures by dumping large number of shares in the last 10 minutes of trading in the cash segment on November 29, 2007 and thereby earned an unjust profit of Rs 513.12 Cr.

(d) The futures transactions carried out by the 12 Named Entities are benami transactions and thus illegal and void.

15. After considering the written replies, oral submissions and written submissions, and, after considering the material evidence on record, the Whole Time Member (WTM) passed the impugned order against which the present appeal has been filed.

16. The WTM in the impugned order, framed the following issues which arose for consideration, namely:

(A) Whether the dealings of the appellants in the F&O Market amounts to the commission of a 'fraudulent and manipulative trade' in securities in terms of the SEBI (PFUTP) Regulations?

(B) Whether appellant No. 1, by selling 1.95 Cr of RPL shares in the cash segment in the last ten minutes of the trading session on 29 Nov 2007 can be said to have acted fraudulently or manipulated the securities market, as per the SEBI (PFUTP) Regulations?

(C) (i) Whether in terms of the scheme of provisions of SCRA, in particular, Sections 18A and the circulars issued thereunder, SEBI is empowered to take enforcement action for PFUTP against the appellants?

(ii) Whether the Agency agreements executed by appellant No. 1 appointing appellants Nos 2-13 to act as its agents to trade in the F&O segment involve a violation of the provisions of Benami Transactions (Prohibitions) Act, 1988?

(iii) Whether the requirements of "fraud" as laid down by the Courts and Tribunals are being satisfied in the instant set of facts, to establish the violation of SEBI (PFUTP) Regulations?

(iv) Whether the "re-investigation" carried out by SEBI without any new ground or fresh material as contended by the appellants invalidates the Show Cause Notice?

(v) Whether SEBI in exercise of its powers under section 11(4) and 11B is empowered to pass the directions, as proposed in the Show Cause Notice, in the given facts and circumstances?

17. The WTM held:

(i) Appellant no. 1 by employing 12 agents to take separate position limits of Open Interest on its behalf by executing separate agreements with each

one of them and cornering 93.63% of the November Futures of RPL, has acted in a fraudulent manner while dealing in RPL scrip.

(ii) The appellant no. 1, by manipulating the F&O segment through 12 of its agents (appellants no. 2-13) and allowing them to hold the contracts till the last day of expiry and thereafter by closing out the derivative contracts on the 29th of Nov, 2007 had engaged in a pre-planned fraudulent practice and the same cannot be held to a mere breach of position limits by the clients attracting penalty under the exchange circulars.

(iii) On the basis of the analysis of the trading strategy/pattern adopted by appellant no.1 in the cash market during the month of Nov 2007 and specifically on the 29th of Nov 2007, being the expiry day of the November Futures of RPL, it was found that there had been a manipulation of the last half an hour settlement price.

(iv) The actions of appellant No. 1 and appellant No. 2-13, as stated above constitute a violation of the

provisions of section 12A of SEBI Act, 1992 read with regulations 3, 4(1) and 4(2)(e) of the SEBI (PFUTP) Regulations, 2003 and that appellants Nos. 2 to 13 have also violated provisions of the SEBI circular No. SMDRP/DC/CIR-10/01 dt Nov 2, 2001 and NSE circular no. NSE/CMPT/2982 dt Nov 7, 2001.

18. Based on the above findings, the WTM issued certain direction which has been stated earlier in the proceeding paragraphs.

19. The findings of the WTM is based on the following:

(a) RIL's act of employing 12 Named Entities to take separate short positions (aggregating to 9.92 Cr on Nov. 6, 2007 in Nov. 2007 RPL Futures), breaching the client-wise position limit per client/customer, knowing that its planned sale of 22.5 Cr shares of RPL shares in Nov. 2007 will depress the RPL share price in the cash segment, is not a hedging strategy, but is a pre-planned fraudulent scheme for cornering positions and manipulation of Nov. 2007 RPL Futures to make unlawful gains. This

cannot be construed as mere breach of position limits by the clients attracting penalty under the exchange circulars.

(b) The sale of 1.95 Cr RPL shares in the cash segment by RIL during the last 10 minutes of trading on Nov. 29, 2007 have been done for depressing the last half an hour weighted average price (which is the settlement price for Nov. 2007 RPL Futures) to make gains on the 7.97 Cr outstanding short positions in Nov. 2007 RPL Futures is manipulative in nature as contemplated under PFUTP Regulations.

(c) RIL made unlawful gains by this fraudulent and manipulative strategy/pattern of Rs 513 Cr. The actions of RIL and the 12 Named Entities constitute a violation of the provisions of Section 12A of the SEBI Act read with Regulations 3, 4(1) and 4(2)(e) of PFUTP Regulations. The 12 Named Entities have also violated provisions of 2001 SEBI Circular and 2001 NSE Circular.

20. We have heard Mr. Harish Salve, Senior Advocate with Mr. Janak Dwarkadas, Senior Advocate, Mr. Raghav Shankar, Mr. Rohan Rajadhyaksha, Mr. Ashwath Rav, Mr. Kashish Batia, Mr. Vivek Shetty, Mr. Amey Nabar, Mr. Geetanjali Sharma, Ms. Arundhati Kelkar, Mr. Armaan Patkar, Ms. Cheryl Fernandes and Mr. Vedant Jalan, Advocates i/b AZB Partners for Appellants; and Mr. Darius Khambata, Senior Advocate with Mr. Gaurav Joshi, Senior Advocate, Mr. Aditya Mehta, Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates i/b K. Ashar & Co. for the Respondent at length. We have also heard Mr. Arun Kumar Agarwal and Mr. Shailesh Mehta who have appeared in person as interveners. Before we proceed to deal with the matter on merits, it would be appropriate to decide the applications of the two interveners.

21. An Intervention Application has been filed by Mr Arun Kumar Agarwal praying that he should be impleaded as a respondent in the appeal and that copies of the memo of appeal and other papers should be supplied to him. The Intervener has also prayed that this Tribunal should ultimately direct SEBI to reexamine the matter in the light of the assertions made in the Intervention Application.

22. The Intervener Arun Kumar Agarwal contends that he is a pro bono lawyer taking up causes of economic injustice to the people of the country as enshrined in the Constitution. He has taken up the challenge in the Enron project, in the iron ore scam, in the 2G scam and other ponzi schemes. The Intervener further contends that he is involved with SEBI and appellant No.1 in five High Courts where the matters are pending. It was contended that Intervener had applied for a copy of the investigation report, but SEBI has refused to supply. It was contended that there are glaring omissions in the investigation report which has led underreporting of the unlawful gains made by appellant No.1. According to the Intervener the unlawful gains should have been Rs.3500 crores instead of Rs.513 crore as computed in the impugned order. It was contended that SEBI has made a shoddy investigation against the appellants and have deliberately not been charged with insider trading. In fact, SEBI and appellant No.1 are in collusion and are keen that the investigation report should not come out in the public domain. It was urged that if the investigation report is placed, the Tribunal would find that there are glaring omissions in the investigation report. It was urged that since SEBI has conducted

a shoddy investigation and has not investigated the price manipulation between the period September to October, 2007 when the price of the shares of RPL increased from Rs.66 to Rs.295. It was contended that the shortcoming in the investigation can be redressed by the Tribunal inasmuch as the Tribunal has coextensive powers as that of SEBI. It was further contended that SEBI has abysmal track record of conducting investigation. In the instant case, criminal investigation has not been recommended by SEBI. The Intervener, who has appeared in person, thus contended that in view of the decision of the Supreme Court in **Clariant International Limited & anr. Vs. SEBI, (2004) 8 SCC 524** the error of fact can be corrected. Since the price manipulation was not investigated by SEBI, this Tribunal having coextensive power should direct SEBI to re-investigate the matter especially relating to price manipulation and the unlawful gains made by appellant No.1. It was also contended that appellant Nos. 2 to 13 were the agents of appellant No.1 and they had inside information which fact should also be investigated. Since the same was not done, this Tribunal should remit the matter to SEBI to conduct reinvestigation in the matter.

23. Another Intervener Shailesh Mehta has filed an Intervention Application praying that he should also be provided copies of the papers and proceedings of the Tribunal and that appeal filed by the appellants should be dismissed on the ground that fraud has been played by the appellants upon the Tribunal. The intervener has also prayed that appropriate direction should be issued to initiate criminal proceedings against the appellants for concealing material facts and further this Tribunal should direct SEBI to conduct further investigation and also annul all the trades which took place from 1/6/2007 to 31/12/2007 and that SEBI should refund the money lost by the investors during the period in question in the scrip of RPL It was asserted that intervener is a minority shareholder in appellant No.1 company holding 38 shares. The intervener contended that wrongdoers are in control of the company and appeal filed by them is, therefore, not maintainable and should be dismissed as such. It was contended that a fraud has been played against the minority shareholder and, therefore, this Tribunal should protect the minority shareholders and that the applicant should be allowed to intervene in the appeal.

24. The Intervener contended that one of the appellants, namely appellant No.8 – Motech Software Pvt. Ltd. could not have filed an appeal as his name was struck off by the Registrar of Companies, Mumbai from the record of the ROC. Since it is no longer an existing company, no appeal could have been filed by a non-existing company. It was asserted that even SEBI could not have passed an order against the non-existing company. On this, it was contended that this crucial fact was neither brought to the knowledge of SEBI nor to this Tribunal and, therefore, for concealment of this material fact, the appeal should be dismissed and criminal prosecution should be launched against the appellants.

25. It was categorically made clear to the two interveners that they cannot be impleaded as parties to the appeal but they would be heard as Interveners. Accordingly, the two Interveners were heard at length. The said Interveners have filed their written submissions. Insofar as Arun Kumar Agarwal, the submissions made by him and in his written submissions is the same as stated in his Intervention Application which has been stated hereinabove. However, Shailesh Mehta in his written submission has stated the following facts:-

(i) In addition to the concealment of the name of the appellant No.8 being struck off from the register of the Registrar of Companies, the said Intervener contended that a public issue of RPL was made in the year 2006. Money was generated which was not utilized for the project and the said money was diverted which in fact has not been investigated. Further, on account of issuance of the public issue and generation of money, there was no need for appellant no.1 to sell shares for the purpose of augmenting income for said projects. It was contended that combined appeal filed by appellant no.1 and other entities was not maintainable as one of the appellants had become a dead company. It was contended that appellant No.1 and SEBI are in collusion and that SEBI deliberately did not investigate the matter relating to insider trading for more than a year and it is only when the Parliament raised a question that SEBI investigated the matter which was conducted in a shoddy manner. It was contended that investigation of price manipulation should have been conducted against the

appellant No.1 and appellant Nos. 2 to 13 who were using pump and dump mechanism by artificially raising price of the shares of RPL. It was contended that the rise of price of shares of the RPL from Rs.66 to Rs.295 should have been investigated which would have clearly indicated that the price manipulation was for a vested purpose. It was further contended that unless some big politician makes a complaint to SEBI only then an investigation is made, otherwise SEBI does not act or investigate on the complaints made by ordinary investors. It was further stated that investigation made by SEBI is only to please the political masters. The Intervener further submitted that he has no personal interest in SEBI and is doing pro bono to put forward the cause of the investors who have lost moneys on account of insider trading done by appellant No.1. The Intervener contended that the rule of law must prevail and that the Tribunal should intervene in the matter relating to price manipulation done by appellant No.1 which should be thoroughly investigated under supervision of the Tribunal.

26. On the other hand, the appellants have vehemently opposed the Intervention Applications contending that the present appeal is a continuation of the proceedings passed by SEBI. The Interveners were not a party in the proceedings before SEBI and thus, cannot be made a party in the appeal filed by the appellants. It was contended that the Interveners are not necessary parties and their applications should be summarily rejected. It was further contended that the appeal cannot be treated as a "public interest litigation" which the Interveners are trying to project. It was urged that the allegations made in the Intervention Applications are beyond the scope of the appeal. It was contended that baseless allegations are being made against the appellants as well as against SEBI which should not be allowed by this Tribunal and that the Tribunal must protect the corporate industry and its reputation from such Interveners making such slanders / wild allegations without any basis and without any evidence. It was contended that the Interveners are acting as a super regulators over and above SEBI projecting that SEBI is incompetent and, therefore, the matter should be reinvestigated under the aegis of this Tribunal. It was contended that the Interveners are misusing the process of the court and are

only playing to the gallery. Their Intervention Applications are patently misconceived and should be rejected.

27. At the outset, the contention made by one of the Interveners that he is a minority shareholder and is adversely affected by the investigation and by the fraud committed by the wrongdoers who are in majority of and in control of the appellant No.1 and that the appeal would adversely affect the interest of the minority shareholders, in our opinion, is without any merit. We find that adverse orders have already been passed against appellant No.1 and the validity of that order has to be tested on the basis of grounds set out in the appeal filed by the appellants. It is for the company to address the merits of the case and not by the shareholders. Further, the appeal has been filed by the appellants against the order of SEBI. It is for SEBI to defend its orders by raising all relevant contentions as it deems fit. Therefore, the applicants who were not parties before SEBI have no *locus standi* to contend that they should be impleaded as a party / respondent. Since they are not necessary parties, their plea that they should be impleaded as a respondent cannot be accepted and is rejected.

28. However, as an Intervener we have allowed the said Interveners to address the Tribunal in the interest of justice. **In Saraswati Industrial Syndicate Ltd. vs. Commissioner of Income Tax Haryana, Rohtak (1999) 3 SCC 141,** the Supreme Court held that an Intervener is only entitled to address the arguments in support of one or the other side, meaning thereby that the Intervener could either support the impugned order or oppose the impugned order. Further, the Intervener cannot raise fresh grounds or ask the Tribunal to investigate such matters which is not the subject matter of dispute or by which it would enlarge the scope of the appeal which was not part of the show-cause notice.

29. In this regard, one has to distinguish between a public interest litigation and a statutory appeal arising against the order passed by the Adjudicatory Authority under an Act. In the instant case, we find that the two Interveners have raised questions which are beyond the scope of the appeal. Their contention that the matter should be reinvestigated as SEBI has done a shoddy job and that there should be a probe with regard to the price manipulation in the shares of the scrip of RPL which rose from Rs.65 to Rs.295 or the fact that the minority

shareholders are being oppressed because of the mismanagement by the majority shareholders of appellant No.1 company, are questions which are beyond the pale jurisdiction of this Tribunal. Such issues raised by the two Interveners in their Intervention Applications and which have also been stated in their written submissions are outside the scope of the appeal and cannot be entertained.

30. Reliance has been made by the Interveners to a decision of the Supreme Court in **Clariant International Limited vs. SEBI, (2004) 8 SCC 524** wherein the Supreme Court held that the powers of the Tribunal are not fettered and that the Tribunal exercises all the jurisdiction as that of the Board (SEBI). The Supreme Court held:

> "74. The jurisdiction of the Appellate Authority under the Act is not in any way fettered by the statute and, thus, it exercises all the jurisdiction as that of the Board. It can exercise its discretionary jurisdiction in the same manner as the Board."
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> 75. The SEBI Act confers a wide jurisdiction upon the Board. Its duties and functions thereunder, run counter to the doctrine of separation of powers. Integration of power by vesting legislative, executive and judicial powers in the same body, in future, may raise several public law concerns as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers.

> 76. Our Constitution although does not incorporate the doctrine of separation of powers in its full rigour but it does make horizontal division of powers between the Legislature, Executive and Judiciary.[See Rai Sahib Ram Jawaya Kapur and Others Vs The State of Punjab, AIR 1955 SC 549].
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> 77. The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof. The only check upon exercise of such wide ranging power is that it must comply with the Constitution and the Act. In that view of the matter, where an expert Tribunal has been constituted, the scrutiny at its end must by held to be of wide import. The Tribunal, another expert body, must, thus, be allowed to exercise its own jurisdiction conferred on it by the statute without any limitation."

31. The Interveners, in the light of the observations made by the Supreme Court in the aforesaid decision, contended that the jurisdiction of this Tribunal is coextensive with that of SEBI and, therefore, the power of investigation by SEBI could also be done by the Tribunal and since SEBI failed to investigate the matter properly, this Tribunal should intervene and direct SEBI to make a fresh investigation under its supervision.

32. The submission of the Interveners are patently misconceived and is a misreading of the aforesaid observations made by the Supreme Court in paragraphs 74 to 77 in the

Clariant's judgment. Under Section 15T of the Act, an appeal can be filed against an order made by Board or by the Adjudicating Officer. Under Section 15T(4) the appellate tribunal may ultimately pass orders confirming, modifying or setting aside the order appealed against. The Supreme Court in Clariant's judgment (supra) has clearly stated that the Tribunal exercises all the jurisdiction as that of the Board. This, observation of the Supreme Court was further clarified by the Supreme Court itself in **National Securities Depository Ltd. v. SEBI (2017) 5 Supreme Court Cases 517** to the effect that the appeal being a continuation of the proceedings before the Board, the proceedings can only be quasi judicial in nature, namely that the appeal is only against the quasi judicial order of the Adjudicatory Authority. Other administrative orders/circulars are not under the purview of an appeal before the Tribunal.

33. In the light of the aforesaid, direction to reinvestigate the matter because something has been left out in the investigation does not come within the jurisdiction of the Tribunal. The Tribunal is also confined to consider the scope of the appeal within the four corners of the allegations set out in the show-cause notice pursuant to which the allegations culminated in a

finding in the impugned order. The appeal being a continuation of the adjudicatory proceedings is only confined to the validity and legality of the impugned order which has to be tested on the basis of the grounds set out in the memo of appeal. Thus, in our opinion, the scrutiny which the Tribunal is required to make is limited only to the veracity of the finding given in the impugned order as challenged by the appellants in the grounds set out in the memo of appeal. The reliefs sought by the Interveners as set out in their Intervention Applications and in their written submissions are beyond the scope of the memo of appeal. They are neither supporting the appellants nor supporting the SEBI and, as held in **Saraswati Industrial Syndicate Ltd.** (supra), the Interveners can only address arguments in support of the appellant or of the respondent and cannot enlarge the scope of the appeal. Thus, upon consideration, we are of the opinion that the Intervention Applications made by the Interveners are patently misconceived and are rejected. The submissions made and the reliefs sought cannot be granted and are rejected.

34. Sri Harish Salve, the learned Senior Counsel for the appellants stated that all the trades in the cash segment and in the Nov 2007 RPL Futures were conducted in an orderly manner

which was genuine and legal. Considering that a large quantity of RPL shares were to be sold the appellants ensured that the integrity of the market and the interest of the investors and minority shareholders were protected and ensured that there was no knee jerk reaction in the market on account of selling large quantities of RPL shares. It was urged that the price of RPL shares were rising. In Sept 2007 the price was Rs 150 per share which peaked to Rs 271.70 per share on 31.10.2007. It was urged that the reports of Goldman Sach, Kotak and Morgan Stanley issued during the period of Sept 2007 to Oct 2007 reported that the price of RPL was overvalued, and accordingly, it was decided to sell 5% of RPL shares in order to maximize the return to RIL shareholders.

35. Shri Salve contended that accordingly the 12 agents of RIL took short positions in the derivative market in Nov 2007 RPL futures as a hedge considering the fact that there was an underlying exposure of RPL shares to be sold in the cash segment which would expose the risk of loss due to price movement, especially when large quantities of RPL shares were to be sold in the cash segment.

36. It was contended that the test of whether a future transaction is for hedging or for speculation hinges on whether there already existed a related commercial position which is exposed to the risk of loss due to price movement. It was urged that on 01.11.2007, RIL had an underlying exposure to sell 5% of RPL shares which worked out to 22.5 Cr shares which fact is not disputed by the company. Further, selling large quantities on the Stock Exchange would definitely dip the price and thus there was an existing risk of loss due to price fluctuations. The learned senior counsel thus contended that the circumstances existed for the appellants 2 to 12 to take a hedge by taking short position in Nov 2007 RPL Future on the sales side by placing half the quantity as a hedge and leaving the balance as unhedged. Sri Salve contended that this strategy made sense because the sale price for half of the quantity got locked in. It was contended that if the RPL share price went upwards, the unhedged price quantity would realize such higher price in the cash segment. On the other hand, if the RPL shares went down below the price fixed under hedging, the hedged quantity would realize a higher price. It was thus urged that the hedging done was to safeguard

the interest of the shareholders as well as of the investors and the hedging done was perfectly valid and genuine.

37. The learned senior counsel further submitted that where the liquidity of the shares is volatile and selling a large quantity of the shares would cause a disturbance and would fluctuate the price considerably, RIL decided to use this segment (namely Futures) since the trading and liquidity in this segment was higher. In this regard, the learned senior counsel placed relevance on Annex 2 and 3 of Vol III of the Compilation of Documents to drive home the point that trading in the Futures segment was more than in the cash segment during the last week of Oct 2007 and also in Nov 2007. This was therefore another reason to take short position in the Nov 2007 RPL Futures during 1st to 6th of Nov 2007 so that the impact was minimized when shares were sold in the cash segment. It was submitted that the 12 agents took net short positions of 9.92 Cr shares of RPL in an orderly manner over a period of 4 trading days which constituted a miniscule 8% of the total trades in the Nov 2007 RPL Futures. The learned senior counsel further submitted that the price of RPL had touched a high of Rs 294 on 01.11.2007 and there was nothing to stop RIL from offloading its

shares from 1st Nov onwards. It was contended that if that was done RIL would have realized more money. However, the appellants created the hedge positions first between 1st to 6th Nov 2007 and thereafter sold shares in the cash segment from 6th to 29th of Nov 2007 even though during this period the prices had fallen from the peak price of Rs 294/- per share.

38. The learned senior counsel pointed out that between 6 Nov to 29 Nov 2007, RIL sold 20.29 Cr RPL shares in the cash segment of NSE and BSE out of which 2.25 Cr shares were sold in the last half hour at market price. It was contended that the sale of 20.29 Cr shares in the cash segment was not sold in a single day but over a period of 11 trading days in Nov 2007 even though nothing stopped RIL from selling all the shares in a single day. It was urged that selling all the shares on a single day would have resulted in the price of the share to fall drastically which in turn would have fetched a higher return in the future segment. However, according to the learned senior counsel, the same was not done and the shares were sold over 11 trading days in an orderly manner and to ensure that such sales did not disturb the market integrity. The learned senior counsel urged that the 12 agents squared off 1.95 Cr RPL shares in the Futures

segment by making purchases between 7 Nov to 28 Nov 2007. The balance 7.97 Cr shares were closed out on 29.11.2007 at the settlement price. Sri Salve contended that physical delivery of the shares were not allowed in the futures segment otherwise RIL would have delivered 9.92 Cr shares at the hedged price and would have made more gains than it did. Since, physical delivery were prohibited at that stage, the short positions taken in the futures segment had to be cash settled after squaring off or closing out on the last day of settlement.

39. The learned senior counsel thus contended that the trades made by appellants in the futures segment as well as in the cash segment were bonafide trades and were not speculative, or fraudulent or manipulative as held by the WTM. The learned senior counsel submitted that a bonafide hedge was made in the futures segment and that the WTM committed an error in holding that the trades done in the futures segment was not a valid hedge. It was contended that the finding given by the WTM on this aspect was wholly untenable and unsustainable.

40. In so far as the cash segment was concerned, it was urged by Shri Salve, that there is no law, or requirement under the

SEBI laws to disclose an entity's intention to sell the shares in the open market. No such disclosure is required. In fact, on the other hand, if an entity disclosed its intention to sell the shares, it would be looked with suspicion.

41. The learned senior counsel further submitted, but not vehemently, contending that the first Show Cause Notice was only against RIL and there was no allegation of fraud and only alleged manipulative activities by RIL to earn Rs 513 Cr. However, based on the replies given by RIL, a second Show Cause Notice was issued on the same facts not only against RIL but also against the 12 agents of RIL alleging massive short positions taken by the 12 agents. It was urged that the Show Cause Notice was on account of bias and prejudice on the part of SEBI against the appellants motivated solely on account of complaints made against them for vested reasons.

42. Shri Salve contended that the issues which arise for consideration can be narrowed down as under.

(i) Whether the explanation given by RIL on taking hedging positions was satisfactory?

(ii) Whether the appointment of the 12 agents by RIL by which RIL took positions in excess of the client wise position limits constituted fraudulent or manipulative trade practice or was it only violative of the circulars?

(iii) Whether the action of RIL in indulging in selling RPL shares in the last 30 minutes of the closing day of 29.11.2007 was done deliberately to depress the market price of the scrip in order to gain on the short positions held by the 12 agents in Nov 2007 RPL Futures?

43. It was urged that the finding of the WTM that the sale of 2.25 Cr shares in the last ten minutes of the trading was done deliberately to depress the price in order to make gains on the 7.97 Cr shares outstanding positions in the Nov 2007 RPL Futures which was fraudulent and manipulative under the PFUTP Regulation was based on surmises and conjectures. The learned counsel contended that the aforesaid finding was based on the following reasons:-

a) No sale was made by RIL after 24.11.2007 till the last 10 min of 29.11.2007.

b) 12 out of 19 times, the sale orders were placed below Last Traded Price (LTP).

c) 12 agents had taken short position in the Nov 2007 RPL Futures and therefore the entire effort of RIL was to bring the price down by selling shares in the last 10 min.

d) The aforesaid circumstances put together indicate fraudulent practice adopted by RIL to depress the price in the cash segment.

44. The learned senior counsel submitted that there was no fraudulent or manipulative tactics adopted by RIL. RIL had 4.46 Cr shares yet to be sold in the cash segment. The market price on 29.11.2007 rose from Rs 193.80 per share to Rs 224.90 per share. RIL had last sold the shares on 23rd Nov 2007 at Rs 210 per share. Since then the price had gone down below Rs 210 per share to a low of Rs 193.80 per share. Thus when the price rose to Rs 224.90 per share during the last 10 minutes of trading, RIL exited the market at this stage and tried to sell off the remaining shares but could only sell 2.25 Cr shares out of 4.46 Cr shares. Selling shares in the last 10 min was not a crime and, in any case cannot be termed fraudulent or manipulative.

45. Shri Salve future contended that there is no embargo upon an investor to sell his shares below the Last Traded Price. In the cash segment trading is done on screen based trading system of the Stock Exchanges where a seller or a buyer has the benefit of not only viewing the Last Traded Price but also the quantity as well as the price at which buy or sell orders have been placed on the screen. It was submitted that if there were not sufficient number of buy orders at the Last Traded Price (LTP), it would be open to the investor to sell his chunk of shares below the LTP. It was contended that selling shares below the LTP could be viewed with suspicion but under no circumstances such sales made below LTP could be termed as fraudulent or manipulative. It was contended that the sales made by RIL were genuine sales followed by delivery of shares in the cash segment. Such sales can never be termed as fraudulent or manipulative. The price for sale of shares was placed below LTP on account of insufficient demand. The finding of the WTM that the market had sufficient depth to absorb all RIL sales orders was not based on any documentary evidence. Such bald finding is based on surmises and conjectures. Selling shares below the LTP cannot be termed as manipulative.

46. It was urged that the WTM committed a manifest error in treating the sales made by RIL in the last ten minutes as manipulative and a malpractice on the ground that 12 out of 19 times, the sale orders were placed below the LTP. It was urged that between 3:21:40 p.m. and 3:28:55 p.m. RIL placed 19 sell orders out of which 12 orders were placed below LTP. These sale orders below LTP were not fully sold. The learned senior counsel thus suggested that the price quoted by RIL though it was lower than LTP was still too high as there was not enough demand to absorb the sell orders placed by RIL. It was urged that 2.25 Cr shares were sold in an orderly manner though 19 trades and the sale price offered every time were reasonable. To elucidate this, the learned senior counsel submitted that;

a) At 3:21:40 p.m., RIL placed 20 lac sell order of shares at Rs 222/- per share against the LTP of 224.70. Despite this low price, 3.5 lacs shares out of 20 lac shares were not sold. This showed that demand did not exist at Rs 222/- per share nor at LTP of 224.70. the demand existed at prices lower than Rs 222/- per share

b) At 3:22:55 p.m., RIL placed an order of 10 lac shares at Rs 220/- per share against LTP of Rs 219.70/-. The sell order was more than the LTP. Only 1.5 lac shares were sold. This showed that demand was only at lower prices.

c) At 3:23:53 p.m., LTP was Rs 219.50/-, RIL places sell order for 8.33 lakh shares at Rs 219, i.e. 50 paisa less than LTP. In spite of offering a lower price than LTP, 5.71 lac shares remained unsold showing demand only at lesser price.

d) At 3:24:33 p.m., LTP was Rs 218.55/-, RIL placed order of 10 lac shares above LTP at Rs 220/- per share. No shares were sold thereby indicating that there was no demand.

e) At 3:24:26 p.m., LTP was Rs 218.90/-, RIL placed order for 30 lac shares at Rs 218/- per share, i.e. 90 paisa less than LTP. Only 8 lac shares were sold and 22 lac shares remained unsold. This showed that there were not many buyers at LTP.

47. It was thus urged from the above that what RIL did was only to match the prices at which demand existed. The sale price

offered were reasonable and given the circumstances, even though at some stage, sell orders were below LTP, the same was not manipulative nor a malpractice. It was thus contended that matching the demand in terms of price and quantity was not a manipulation. It was urged that merely because RIL had placed sell orders below the LTP it cannot automatically lead to a conclusion that RIL was manipulating the price of the scrip nor did it lead to an artificial depression of the share price.

48. Shri Dwarkads as well as Shri Salve contended that the appointment of 12 agents which took positions in the Futures segment was valid and in accordance with the circulars. The finding of the WTM that the positions taken by the 12 agents on behalf of RIL constitute a fraudulent or manipulative trade practice was patently erroneous. It was contended that none of the 12 agents exceeded the prescribed position limit. The finding of the WTM that taking position limit by the 12 agents was a well orchestrated scheme to defeat the position limits as per the circular was wholly erroneous. The finding of the WTM that it was done deliberately to take advantages of the sharp decline in price of the shares in the cash segment which was expected to be triggered by the proposed sale in the cash segment and was

therefore fraudulent is based on surmises and conjectures. It was urged that there has been no fraudulent trades done by the appellant nor violated Section 12 A (1) to (3) of SEBI Act and/or Regulation 3 and 4 of PFUTP Regulation.

49. It was further contended that the finding of the WTM that the 12 agents were required to disclose the principal agency relationship with RIL was patently erroneous in as much as there was no requirement either under the Act or the Regulations to disclose such fact. The finding that RIL could not authorize the 12 agents when the principal (RIL) itself lacked the authority to do such act was erroneous in as much as the circulars did not prohibit RIL to do such acts, viz. appointing 12 agents.

50. The learned senior counsel submitted that the position limit in derivative contracts prescribed by the Stock Exchanges and by SEBI as per the circulars of 2001 were very clearly applicable to a customer/client individually. The circulars did not prohibit customer/client wise position limits to be aggregated for a common beneficiary, namely RIL, since each of the 12 agents were different clients/customer as per the circulars.

It was contended that the position limit circulars have consciously omitted "individually or together with its group" or "in concert with each other".

51. It was further contended that SEBI circular dt 28.07.1999 relates to "Index based futures and options" in which no client wise position limits were fixed for index based derivatives. However, a self disclosure scheme was mandated for disclosing the positions of persons acting in concert if it exceeds 15% of the Open Interest. It was thus contended that even under the 1999 SEBI circular, there was no prohibition for persons to act in concert. Acting in concert was not a violation. Only a disclosure was required where the intention was to rope in persons acting in concert. This was, however done away in the subsequent position limit circulars which specifically provided client/customer wise position limits. It was also contended that the circulars did not envisage aggregation of position limits as is clear from the model client broker agreement prescribed for derivatives segment. The learned senior counsel stressed that after 2007, the Stock Exchanges amended the model client broker agreement which included a clause, namely, that a client/customer acting alone or in concert with others, directly or

indirectly hold and control in excess of the permitted limits and shall not exercise a long or short position in excess of the prescribed limits. The learned senior counsel, thus urged that the model agreement applicable in 2007 clearly showed that neither the bye laws nor the client member agreement provided for aggregation of limits of a group of persons acting in concert.

52. Shri Salve vehemently contended that the finding of the WTM to the effect that the positions taken by RIL were not genuine hedge and were taken only to take advantage of the large dip in the share price of RPL once 22.5 Cr shares of RPL were sold in the cash market is patently misconceived and is based on surmises and conjectures. The finding of the WTM that short positions taken by the 12 agents were only to reap huge profit by cornering future position limits beyond the permissible limit is not based on any sound reasoning. The finding that RIL was required to have a hedging policy is patently erroneous in as much as there was no rule/regulation/circular which mandated any company to formulate a hedging policy. The accounting standards came much later and reliance on such accounting standards which did not exist on the date when the transactions took place indicates total non application of mind

by the WTM. It was urged that the WTM committed a manifest error in holding that non compliance of hedging accounting norms takes away the character of a hedge and renders the trades not only speculative but also fraudulent. It was further urged that the WTM committed an error in holding that the RPL Futures should be closed simultaneously with the sale of the shares in the cash segment when there was no such requirement. On the other hand, the learned senior counsel relied upon Table in Vol 3 to show that from 15.11.07 onwards, the hedge positions were in excess of the cash market sales, namely, the open positions remained 'naked' until the closing on 29.11.07. The learned senior counsel urged that the finding that RIL cornered huge position in Nov 2007 RPL Futures which was more than the permissible limit available to an individual client and thus made unlawful gains was based on wrong interpretation of the circulars.

53. The learned senior counsel urged that the transactions undertaken by RIL in Nov 2007 RPL Futures was a hedging strategy to hedge the proposed sale of 22.50 Cr RPL shares in the cash segment was bonafide and was not an afterthought as held by the WTM.

54. Shri Salve contended that SEBI Rules and Regulation does not prohibit a potential seller in the cash segment from taking positions in F&O segment and thus, further submitted that the WTM fell in error in holding that the Nov 2007 RPL Futures were speculative transactions with the sole view to make unlawful gains by the expected drop in the price of RPL shares in the cash market. It was urged that absence of a hedging policy cannot lead to the transaction being manipulative or fraudulent. The learned senior counsel contended that a transaction in the F&O segment is a hedge if there is an underlying exposure/risk which in the instant case was existing, namely the sale of 22.5 Cr shares in the cash segment. Thus the hedge was neither speculative nor ceased to become a hedge. It was contended that there is no rule/regulation/circular stipulating that throughout the period of hedge, the open positions should be equal to the underlying risk. In fact the F&O segment rules clearly allow either closure of position by purchases in the F&O segment or allow open position to be closed out on the last day which in the instant case was done bonafidely. It was thus contended that the short position taken by the 12 agents was a genuine, valid and a bonafide hedge.

55. Shri Salve contended that the finding on fraud is misplaced. Before a person can be found guilty of fraud, the element of inducement must exist which in the instant case was non existing. The learned senior counsel submitted that there is no evidence on record to hold that the appellants are guilty of "inducement". In the instant case all the trades in the Nov 2007 RPL Futures were undertaken at market prices which only formed 8% of the total trades. Further, the entire trade was made on screen based trading where the identity of the buyer and seller was not known to each other. Thus the question of inducing any person does not arise.

56. The learned senior counsel further urged that even though the appellants did not exceed the position limits, but assuming without admitting that the appellants exceeded the position limits in violation of the circulars, at best, it would only invite an imposition of penalty under SCR Act but under no circumstances it would be construed to violate PFUTP Regulation or SEBI Act. The learned senior counsel submitted that the exercise of powers under section 11B was not only excessive and unwarranted but also illegal.

57. The learned senior counsel submitted that the impugned order was based on no evidence and was liable to be set aside. It was submitted that the explanation to Sec 11B of SEBI Act is absolutely clear, namely, that the power to issue direction could only arise when there is a contravention of the SEBI Act or the Regulations framed thereunder. In the instant case, the appellant have not violated any provision of the SEBI Act or any Regulation framed thereunder. Violation of a circular is not violation of the SEBI Act or the Regulation framed thereunder and at best is a violation of SCR Act inviting a penalty, if any. It was thus urged that the order of disgorgement under section 11B of SEBI Act was wholly illegal.

58. Shri Darius Khambatta, the learned senior counsel for SEBI submitted that the findings arrived at by the WTM was based on evidence and sound reasoning which requires no interference. The learned senior counsel submitted that neither under SEBI Act or under Regulation one party can corner 61.5% of Open Interest on 6.11.07 and 93% of the trades on 29.11.07 in a scrip of the Company. Such cornering of the shares is a fraud on the system. It was contended that by employing and splitting the trades across 12 agents, RIL had cornered 93% of open interest

position on 29.11.2007 in the RPL Futures and thus limited other players from trading in the RPL Futures and therefore it was a fraud on the stock market system.

59. Shri Khambatta submitted that appointing 12 agents by RIL in order to take up short positions in RPL Futures was in clear violation of the circulars. It was submitted that the agreements entered by RIL with the 12 agents were identical. All profit or losses was to be borne by RIL. The agreement further provided that any transaction executed by the agent was required to be approved by RIL. The strategy adopted by RIL was that through the 12 agents, the trades could be executed at higher levels without disturbing the client wise position limits provided by the circular dt 7.11.2001 and 2.11.2001.

60. It was submitted that as the SEBI and NSE circulars dt 2.11.2001 and 7.11.2001 imposed client wise position limits in respect of single stock futures. These circulars were in fact issued as part of "risk containment measures" and "to deter and detect concentration of positions and market manipulation". As per these circulars, the gross open position of a customer/client should not exceed the higher of 1% of the free float market

capitalization (in terms of number of shares) or 5% of the open interest in the derivative. Shri Khambatta submitted that as per these circulars, the maximum permissible client wise position limit on 6.11.2007 was 101 lakh shares as per Table (iv)-a of the Show Cause Notice and on 29.11.2007, the maximum permissible client wise position limit was 90 lac shares as is clear from Table (iv)-b of the Show Cause Notice. It was submitted that if RIL was to enter the F&O segment and take short position, the max position limit could not exceed 101 lac shares on 6.11.2007 or 90 lac shares on 29.11.2007. But by appointing 12 agents, RIL clandestinely accumulated position limits far in excess of the permissible limit available to a single client/customer. The accumulation of 992.2 lac shares by the 12 agents on behalf of RIL on 6.11.07 was in gross violation of the position limits available to single client/customer and thus was manipulative and fraudulent.

61. Shri Khambatta submitted that in law, the acts of the agent have the same consequences as though the acts had been done by the principal himself. Therefore, the futures contracts executed by RIL through its agents have the same legal effect as though they were executed by RIL itself. The fundamental

principle of agency law enunciated in Section 226 of the Contract Act, 1872 which provides that "Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person." The learned senior counsel contended that the principle that what is prohibited directly cannot be done indirectly by engaging another. In this regard, reliance was made on a decision of a Division Bench of the Calcutta High Court **in Sukumari Gupta vs Dhirendra Nath Boy Chowdhury, 1941 SCC OnLine Cal 244 ,** wherein the Court has aptly described an agent as a "a mere conduit pipe-a mere connecting link-in bringing about a contractual relation between the principal and third parties". Reliance was also made on a decision of the Supreme Court in **Firm of Pratapchand Nopaji vs Firm of Kotrike Venkatta Shetty (1975) 2 SCC 208**, the Supreme Court has held that "what cannot be done directly cannot be done indirectly by engaging another…"and **in Jagir Singh vs Rambir Singh AIR1979 SC 381,** the Hon'ble Supreme Court has held that "what may not be done directly cannot be

allowed to be done indirectly, that would be an evasion of the statute."

62. It was thus submitted that where several clients or customers act on behalf of one common beneficiary, separate position limits would not apply to each of them. It was urged that since RIL could not have crossed the position limits in its individual capacity, if would not employ agents to indirectly overcome the position limits. The learned senior counsel strenuously urged that the concept of "acting in concert" was illusory and not applicable in the instant case as it was a case of principal and agents. Once the principal-agency relationship is accepted, the limits prescribed in the position limit circulars will apply to RIL for acts done by its agents. It was contended that the acts of all the 12 agents are the acts of RIL itself. The principle of "persons acting in concert" was therefore irrelevant.

63. Shri Khambatta contended that the appellant's contention that the circulars merely triggered a disclosure requirement is incorrect in as much as the language of the circular made it absolutely clear that there was an explicit prohibition for breaching the position limits. According to Shri Khambatta, the

sentence in the circular, namely "The gross open position across all derivative contracts on a particular underlying of a customer/ client should not exceed the higher....." clearly indicates a prohibition from exceeding the position limits. The words "should not" is the same as "shall not" and therefore clearly mandatory and prohibitive as held by the Supreme Court in **Mannalal Khetan vs Kedar Nath Khetan (1972) 2 SCC 426**.

64. Shri Khambatta, the learned senior counsel for SEBI further submitted that the action of the 12 agents cornering massive short positions in RPL Futures was a fraudulent act. It was urged that an impression was given in the stock market that large open positions were held by 12 entities instead of just RIL. The amassing of open position by RIL was a manipulation of the market by circumventing the circulars with brazenness and thus misled the market. Therefore, RIL had breached the PFUTP Regulation by manipulating the market. Such manipulation was a fraudulent act violating Section 12A of SEBI Act read with Regulation 3, 4(1) and 4(2)(e) of the PFUTP Regulation. The learned senior counsel contended that once manipulation was established, the investors were automatically induced and therefore the contention of the appellants that there must be a

specific finding on inducement in order to establish fraud is patently erroneous. In this regard, the learned senior counsel relied upon a decision of the Supreme Court in **Sebi vs Rakhi Trading Pvt Ltd., (2018) 13 SCC 753**. It was thus contended that once the factum of manipulation was established, no further proof was required that the investors were induced and consequently fraud is deemed to be established. The learned senior counsel thus urged that violation of the circulars was also a violation of the SEBI Act and its Regulations and the contention of the appellant that circulars are not Rules or Regulations under the SEBI Act is misconceived. The learned senior counsel urged that once fraud is established, it becomes immaterial whether or not position limits have been breached. The learned senior counsel submitted that the decision of the Tribunal in **Price Waterhouse & Co. vs SEBI (2019) SCC Online SAT 165** was distinguishable and not applicable in the instant case.

65. Shri Khambatta further submitted that the action of RIL in dumping of 2.25 Cr shares in the last ten minutes of trading on 29.11.2007 was with the sole purpose to manipulate the settlement price of the RPL Futures contracts. Such manipulation

amounted to a fraudulent act. The learned senior counsel contended that on 29.11.2007, RPL scrip opened at Rs 193.80 and at 3:00 p.m. rose to Rs 208.20 and thereafter rose to Rs 224.35 at 3:20 p.m. The learned senior counsel contended that the graph of RPL share price during the last half hour showed that the price was rising steadily. It was submitted that the continuous price rise was not suiting RIL in as much as a rise in price of the RPL shares in the cash segment would mean reduction in RIL's realization on the open position in the RPL Futures. The learned senior counsel, thus, submitted that in order to avert this situation, RIL started dumping RPL shares in the cash segment during the last 10 minutes of the trading. This dumping was with a view to reverse the rising trend in RPL's share price.

66. It was further contended that between 3:21:40 and 3:28:55 p.m. RIL placed 17 sell orders for 2.43 Cr shares in which 12 out of 17 orders were placed at prices lower than Last Traded Price (LTP). As a result of placing sell orders below LTP, RIL managed to reduce the price Rs 224.35 price per share to the last half hour weighted average price to Rs 215.25 per share resulting RIL to make higher profits on RPL Futures. The learned counsel submitted that dumping of huge quantity of shares in the last 10

min, in the absence of any rational explanation was clearly manipulative and a fraud on the market, as it clearly influenced the settlement price in the F&O segment. In the absence of any plausible explanation, the WTM was justified in holding that the dumping of large quantity of shares in the last 10 minutes was to influence the settlement price in order to gain huge profits in the F&O segment. The said act was purely with a malafide intention. The learned senior counsel submitted that the contention of RIL that they were selling the shares in order to take advantage of the higher price in the last 10 minutes of the trading was totally erroneous. In fact the selling of the shares was only with the intention to manipulate the market in order to bring the price down. The learned senior counsel further stated that the action of RIL in not selling any shares from 23rd to 29th Nov, 2007 also speaks volumes by itself as on those days RIL could have got a better price. The learned senior counsel placed reliance of decision of this Tribunal in **Sandeep Paul vs SEBI** in which it was held that factors such as volume of trading, percentage of market share trade, timings of trades in the last half hour would establish that the person had engaged in market manipulation. It was thus urged that selling 2.25 Cr shares in the last 10 min

which led to determine the settlement price was sufficient to establish market manipulation and thus a fraudulent act.

67. Shri Khambatta, the learned senior counsel lastly contended that the defence of hedging adopted by RIL was nothing but an afterthought to cover up the motive of making speculative gains. Placing 9.92 Cr shares in the Futures Segment was not a legitimate hedge in as much as RIL intention was to corner futures positions and take advantage of the price dip in the cash segment induced by RIIL itself. It was urged that the appellants' contention that the transactions executed in the F&O segment were hedge transactions since it expected that RPL price would fall when shares were sold in the cash segment was nothing but an afterthought. The learned senior counsel contended that the short position taken by the 12 agents of RIL was not a hedge transaction.

68. The learned senior counsel placed reliance on a decision of the FB of the Gujarat High Court in **Pankaj Oil Mills vs Comm. of Income Tax, AIR 1978 Guj. 226** which distinguished hedging from speculative transactions as "the genuine transactions entered into for purposes of insuring against adverse price

fluctuations" and further held "in order to be genuine and valid hedging contracts of sales, the total of such transactions should not exceed the total stocks of the raw materials or the merchandise on hand which would include existing stocks as well as the stocks acquired under the firm contracts of purchases."

69. The learned senior counsel also placed reliance on a decision of the Supreme Court of Canada **in Ontario (Minister of Finance) vs Placer Dome Canada Ltd, 2006 SCC Online Can SC 20**, which has explained the difference between hedging and speculation in the following terms:

> "29…… This distinction between speculation and hedging is an important one. A transaction is a hedge where the party to it genuinely has assets or liabilities exposed to market fluctuations, while speculation is "the degree to which a hedger engages in derivatives transactions with a notional value in excess of its actual risk exposure".

70. The learned senior counsel contended that there must be a correlation in the quantities of shares exposed to market fluctuations and the quantity of the hedge transaction undertaken in the futures market. If the quantities in the futures market exceed the quantity of shares actually exposed to market fluctuations then the transaction would not be a genuine hedge.

Reliance was made of another decision of The Supreme Court of Montana in **Whorley vs Patton-Kjose Co., Inc. 90 Mont. 461** in which it was held that:

> "Country elevator hedging involves a purchase of grain and a sale of a future as simultaneously as possible, as insurance against the fluctuation of the market between the time of purchase and the arrival of the grain in Minneapolis for sale, and, on arrival, an equally simultaneous executing of the reverse of these transactions. It is a hedge only in so far as the transactions are simultaneous and the amount of grain sold for future delivery offsets the grain purchased. If the operator, having sold his actual grain, fails to buy back his hedge in the future market, he is backing his individual judgment against the fluctuations of market prices and is speculating and no longer hedging."

71. On the aforesaid basis, Shri Khambatta submitted that the unwinding of a hedge transaction has to be almost simultaneous with the sale of the shares in the cash segment. Further, the quantity of the hedge transaction unwound must be substantially the same as the quantity of shares sold in the cash segment. If the hedge transaction is not unwound simultaneously and to the same extent as the sale in the cash segment, then the transaction would cease to be hedge transaction.

72. The learned senior counsel, thus submitted that:

(i) Hedging is risk mitigating strategy for purposes of insuring against adverse price fluctuations;

(ii) A person engaging in hedging transactions must genuinely have assets or liabilities that are exposed to market fluctuations;

(iii) While on the one hand a hedge protects a trader from risk, it also prevents him from making windfall gains;

(iv) The total quantity of hedging transactions must not exceed the actual underlying exposed to market fluctuations;

(v) Hedge transactions would normally be unwound almost simultaneously with the sale of the underlying in the cash market;

(vi) If, after a trader has actually sold the underlying in the cash market and he does not square-up an equal quantity of his hedge in the futures market, the transaction would no longer be a hedge and would amount to speculating.

73. The learned senior counsel contended that the transactions undertaken by the 12 agents in the F&O segment can never be treated as a hedge transaction for the following reasons; namely:

a) On 6 Nov2007, RIL achieved a net short position of 9.92 Cr shares in RPL shares in the Nov. Futures market. This 'net' position was achieved by selling 11:45 Cr shares between 1st to 6th Nov 2007 and purchasing 1.53 Cr shares again between 1st to 6th Nov 2007. When sale and purchase is made, it shows that it was not a genuine hedge. Further, purchasing 1.53 Cr shares in the futures without any counterbalancing sale of shares in the cash segment shows that the transaction in the Futures segment was not a genuine hedge.

b) Between 13th Nov 2007 to 15th Nov 2007, RIL sold total of 5.97 Cr RPL shares in the cash segment against which it unwound its short position only to the extent of 0.01 Cr shares i.e. on 15th Nov 2007 [Vol. I/pg 148/Table- see Columns (7) and (4)]. As a result, RIL's volume in the F&O segment had exceeded the quantity of RPL shares left to sell by

0.41 Cr RPL shares. In fact, from 15th Nov 2007 onwards, RIL's position in the F&O segment continued to be in excess of the quantity of RPL shares it had left to sell.

c) Further, 0.02 Cr shares were sold on 19th and 27th Nov in the Futures segment which is inconsistent with hedging.

d) RIL did not unwind its positions even when RPL share prices in the Futures segment fell to a low of Rs 185.50 on 28.11.2007.

e) On 29.11.2007 RIL had 2.2 Cr RPL shares for sale but did not execute any fresh futures transactions. In fact RIL sold 2.25 Cr shares in the cash segment and cash settled the entire outstanding positions of 7.97 Cr shares in the Futures segment and did not enter into a fresh Futures contract of the balance 2.21 Cr shares.

f) RIL had no hedging policy and the transaction in question was a "one off transaction" which was not part of the ordinary and regular business of RIL.

g) Reliance on RBI guidelines is misplaced in as much as "naked" hedge is only permitted by RBI for foreign exchange hedges and that too against a genuine exposure.

h) The hedge position from 15.11.2007 onwards which exceeded the proposed sale makes it apparently clear that it was not a genuine hedge and was only intended to make speculative gains.

74. The learned senior counsel further contended that the powers of the Tribunal are co-extensive with those of SEBI and that the Tribunal can exercise its discretionary jurisdiction in the same manner as exercised by SEBI. In this regard, the learned senior counsel placed reliance on a decision of a Supreme Court **in Clariant International Ltd. and another vs SEBI (2004) 8 SCC 524.** It was thus urged that SEBI rightly exercises the powers under section 11B of the SEBI Act in directing disgorgement of the amount on account of violation of the PFUTP Regulation and Sec 12A of SEBI Act.

75. Shri Salve, the learned senior counsel, in rejoinder submitted that the decision of the Supreme Court in Clariant's

case (Supra) was distinguishable and not relevant to the issue in hand. The decision in Clariant's case was in the context of a direction issued by SEBI with regard to payment of interest to shareholders of a target Co. as compensation on account of failure to make a public announcement under the Takeover Code. The learned senior counsel placed reliance on a decision of this Tribunal **in Sterlite Industries (India) Ltd. vs SEBI (2001) SCC Online SAT 28 and LKP Securities Ltd V/s SEBI (2002) SCC Online SAT 31** wherein it was held that a statutory order cannot be supplemented by fresh reasons and that one cannot go beyond the impugned order.

76. Shri Salve contended vehemently that the position limits circulars have been issued under SCR Act and the Rules made thereunder. The learned senior counsel submitted that assuming without admitting that the position limits were breached it cannot attract Regulation 3(b) of PFUTP Regulation. The learned senior counsel submitted that the ingredient of 'fraud' was missing in Regulation 3(b). The learned senior counsel further contended that the essential element of "inducement" in fraud is required to be established which in the instant case was lacking. It was thus urged that mere manipulation is not sufficient for

issuing a direction for disgorgement and that reliance on the decision in Sandeep Paul's case (supra) was totally misplaced. The learned senior counsel further submitted that the decision of the Supreme Court in **SEBI vs Rakhi Trading P Ltd. 2018 (13) SCC 753** had no application to the present facts and circumstances of the case. The learned senior counsel placed reliance on the decision of this Tribunal in Price Waterhouse and Co. wherein it was held that inducement was necessary as an element to constitute fraud under the Regulation.

77. Shri Salve contended that the contention of SEBI that the aggregate positions taken up by the 12 agents did not allow the market players from entering the market and that such concentration of position limits by appellants was a manipulative and a fraud on the market was totally misplaced and misconceived in as much as SEBI seems to be confused between "market wide limits" and "open limits". It was contended that on 06.11.2007, RIL had a position of 9.92 Cr, thereby had an aggregate position of 61.15% of open interest in Nov Futures Contract of RPL and 48.64% of open interest across all derivatives contracts in RPL. Thus other market players had 51.36% of balance market wide limits when other players could

have taken. Similarly, on 29.11.2007, RIL had 40.13% of the open interest across all derivatives contract in RPL are thus other market players had approx 60% of market wide limits. It was thus contended that the contention of SEBI that other players could not enter the market was patently erroneous.

78. Shri Salve contended vehemently that there was no violation of the circulars with regard to the position limits. It was contended that the 1999 SEBI circular on "Index Futures" clearly prescribed the disclosure requirement for persons acting in concert. It was thus contended, that in the absence of such limits, there was no bar on "persons acting in concert" and therefore taking position limits by the 12 agents was not in violation of position limits circulars. Thus the concept of persons acting in concert was relevant and applicable and the contention of SEBI that the concept of "persons acting in concert" was irrelevant since the principal - agent relationship was established is misplaced.

79. The learned senior counsel reiterated that there is no provision in law which required RIL to disclose the existence of the 12 agents. The learned senior counsel submitted that neither

there was any misrepresentation to the market nor any fraud was played since the 12 agents did not corner the market. The contention of SEBI that people trading with another person are entitled to know how many positions have been taken by the other person is misplaced. The learned senior counsel submitted that there is no law which requires a trader to disclose in advance the number of shares he intends to buy or sell. Further there is no requirement that a trader must know whether a person has exceeded his limit or not or whether the positions were taken individually or in concert. On the contrary, in terms of NSE (F&O segment) Trading Regulations, a trading member is prohibited from disclosing the name and beneficial identity of the client.

80. The learned senior counsel also pointed out that now the NSE Model Client Broker Agreement has been amended which includes an undertaking by the client that he is not acting in concert with any other person. This requirement indicates that Circular relied upon at the given point of time did not have the requirement of disclosing persons "acting in concert".

81. Shri Salve again reiterated that the Nov 2007 RPL Futures trades were hedging transaction and there was no obligation for RIL to make an announcement that they were entering into a hedge transaction. The essential prerequisite of a valid hedge was existing which was sufficient to hold that the transaction were a valid hedge and thus the finding that these transactions were manipulative and fraudulent was wholly erroneous. The learned senior counsel reiterated that Regulation 3 (b) of PFUTP Regulation was not applicable in the instant case in as much as SEBI failed to establish "inducement" on the part of the appellants. The learned senior counsel distinguished the cases cited by SEBI and submitted that the said decisions had no relevance to the facts and circumstances in the appeal in question.

82. We have heard the learned counsel for the parties at length. Before proceeding it would be appropriate to define a few technical terms which are used in the impugned order as well as in this order. These technical terms are defined in the Regulations known as National Stock Exchange (Futures & Options) Trading Regulations 2000.

Reg. 1.3.19 defines derivative contracts as:
A contract which derives its value from the prices, or index of prices, of underlying securities, the trading of which shall be carried out in such manner as provided in the regulations.
Explanation: For the purpose of this definition, derivative includes a security from a debt instrument, share, loan whether secured or unsecured, risk instrument or contract for differences or any other form of security.

Reg.1.3.26 defines Futures Contract:
Futures Contract means a legally binding agreement to buy or sell the underlying security in the future.

Reg. 1.3.37 defines Open Interest:
Open Interest means the total number of Derivatives Contract of an underlying security that have not yet been offset and closed by an opposite Derivatives transaction nor fulfilled by delivery of the cash or underlying security or option exercise. For calculation of Open Interest only one side of the Derivative Contract is counted.

Reg. 1.3.51 defines Settlement Date:
Settlement Date means the date on which the settlement of outstanding obligations in a permitted Derivatives contract are required to be settled as provided in these Regulations.

Reg. 1.3.52 defines Settlement Price:
Settlement Price, in respect of Exercise Settlement, is the closing price of the underlined on the day of the exercise or such other price as may be decided by the Relevant Authority from time to time.

Reg. 1.3.53 defines Short Position:
Short Position in a derivatives contract means outstanding Sell obligations in respect of a permitted derivatives at any point of time.

Reg. 1.3.61 defines Underlined Securities:
Underlined Securities means a security in reference to which a derivatives contract is permitted to be traded on

the Futures & Options segment of the exchange from time to time.

83. In order to deal with the issues raised, it is essential to first deal with the transactions executed in the F&O segment, namely whether such transactions were in the nature of hedging transactions. Before we dwell into the nature of the transactions, it is essential to understand the meaning of the word "hedge" or "hedging transactions".

84. Black's Law Dictionary (11th Edition) defines Hedging Contract as "A contract of purchase or sale that amounts to insurance against changing prices by which a dealer contracts to buy or sell for future delivery the same amount of a commodity as he or she is buying or selling in the present market."The circular of NCDEX on Hedge Policy defines hedge as "a hedge is a trade designed to reduce risk." Further "a hedge is a futures transaction or position that normally represents a substitute for transactions to be made or positions to be taken at a later time in a physical market." A hedge transaction is therefore taking a position either sale or purchase to reduce or extinguish a risk in an existing underlying exposure.

85. In **Pankaj Oil Mills V/s CIT, AIR 1978 Guj. 226**, a Full Bench of the Gujarat High Court held that a hedge contract is so called because it enables the persons dealing with the actual commodity to hedge themselves, i.e., to insure themselves against adverse price fluctuations. The Full Bench further held that in order to be genuine and valid hedging contracts of sales, the total of such transactions should not exceed the total stocks of the merchandise.

86. On the other hand, "speculation" or "speculative transactions" have not been defined under the SEBI Act and its Regulations." Speculation" as per Law Lexicon by P. Ramanatha Aiyer, means "more or less risky investment of money for the sake of, and in expectation of usually large profits." Section 45(5) of the Income Tax Act 1961 defines "speculative transactions" as under :

> "Speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips.

87. "Speculative transaction" means that unless the transaction was settled by actual delivery or transfer of the commodity, it would be a speculative transaction as held by the

Supreme Court in **Jute Investment Co. vs I.T. Comm. W.B., AIR 1980 SC 483.** Thus, transactions conducted in the F&O segment are speculative transactions since the transactions are not settled by actual delivery of shares.

88. Difference between hedging and speculation has been explained in **Ontario Minister of Finance V/s Placer Dome Canada Ltd. 2006 SCC Online Can SC 20** as under:

> "This distinction between speculation and hedging is an important one. A transaction is a hedge where the party to it genuinely has assets or liabilities exposed to market fluctuations, while speculation is "the degree to which a hedger engages in derivatives transactions with a notional value in excess of its actual risk exposure".

89. L.C. Gupta Committee Report states:

> "The test of whether a futures transaction is for hedging or for speculation hinges on whether there already exists a related commercial position which is exposed to risk of loss due to price movement."

The report further went on to state;

> "The Committee strongly favors the introduction of financial derivatives in order to provide the facility for hedging in the most cost efficient way against market risk. This is an important economic purpose. At the same time, it recognizes that in order to make hedging possible, the market should also have speculators who are prepared to be counter parties to hedgers. A derivative market wholly or mostly consisting of speculators is unlikely to be a sound economic institution. A soundly based derivatives market

requires the presence of both hedgers and speculators" and went further to hold "Hedging will not be possible if there are no speculators".

90. From the aforesaid, the key elements of a hedge transaction and speculative transaction can be culled out as under:

a) Hedging is a risk mitigating strategy for the purpose of insuring against adverse price fluctuations.

b) A person engaged in hedging transactions must have assets or liabilities that are exposed to market fluctuations

c) If the transaction is not settled by actual delivery of the commodity, it would be a speculative transaction.

91. Thus, from the aforesaid, it is clear that one of the purposes for establishment of the F&O segment was hedging as it was the most cost efficient way to insure against market risk. Since at the relevant moment of time, physical delivery of the goods was not permitted in the F&O segment, the transactions done in the F&O segment was also a speculative transaction. The test whether a transaction in the F&O segment is hedging or is for speculation hinges on a crucial fact, namely, whether there already existed a related commercial position which is exposed to a risk of loss due to price movement.

92. In the instant case, the admitted facts, which are not disputed by SEBI is, that a decision was taken by appellant no. 1 in its Boards meeting at 29.03.2007 to generate funds for completion of various projects. The shares price of RPL was rising. It rose from Rs 60 to Rs 150/- and was Rs 249.90 on 31.10.2007. In this backdrop, which is again not disputed, is that a decision was taken to sell 5% of the shareholding in RPL which roughly worked out to 22.5 Cr shares. The decision to offload the shares was based on the analysis report of Goldman Sachs and Kotak Institutional Securities of Sept/Oct 2007, which valued the shares at Rs 150/- per share. Thus selling the shares in RPL was justified by RIL.

93. It is a well known fact that selling 22.5 Cr shares in the market would cause fluctuation in the price of the scrip which would not in the interest of the investors. Selling such large quantities of shares would make the price of the scrip to fall significantly. Large quantity of shares cannot be sold on a single day. The selling of the shares has to be sold over several trading days. The dipping of the price would cause loss to the seller, namely RIL. Thus selling large quantities of shares by RIL was exposed to the risk of loss due to the price movement. Thus a

hedging transaction was undertaken since there was an underlying exposure on which there was an existing risk. We also find that circumstances existed for the appellant no. 2 to 12 to take a hedge by taking short positions in Nov. 2007 RPL Futures on the sale side by placing half the quantity as a hedge and leaving the balance as unhedged. Thus, in our opinion, creation of short positions of 9.92 Cr RPL shares over a period of four trading days was clearly a hedge transaction. We are further of the opinion that by taking short position during 1st to 6th Nov 2007, the impact got minimized when shares were sold in the cash segment. Looking from another angle, if the short positions taken was not a hedge, there was nothing to stop the appellants from off loading its shares from 6th Nov onwards. The short positions were taken on the sales side at Rs 265.67 per share. Table 1 & 2 of Vol 3 indicates that the weighted average price on 07.11.2007 was Rs 219.21 in the cash segment and Rs 215.78 in the Futures segment. If the short positions were squared off on 07.11.2007, the appellants would have made far more than by holding it out till the end. Table 1 & 2 further indicates that the prices kept on dipping and it would have been easier for the appellants to square off the short positions and

make large profits. If speculation was the intention then definitely the appellants would have squared off the short positions between the 6th to 29th of Nov. But this was not the case. The appellants had taken a hedge position against the existing related commercial position which was exposed to the risk of loss due to price movement.

94. Whether a transaction in the F&O segment is a hedge or not is determined at the time the position is taken and not by interpreting in hindsight some of the actions in the course of sale in the cash segment and the closing out of positions.

95. The finding of the WTM that the Nov 2007 RPL Futures was not a hedge because the Open Interest positions were not closed simultaneously with the cash segment or that from 15 Nov 2007 onwards, the Open Interest's exceeded the quantity remaining to be sold in the cash segment, or that between 1st to 6th Nov, the 12 agents took short position of 11.45 Cr and closed out 1.53 Cr positions leading to a net short position of 9.92 Cr is erroneous. A hedge not properly closed out at best can be termed as an imperfect hedge. We are of the opinion that if there was an imperfect hedge it does not mean that there was no valid

hedge nor can it lead to a presumption that the hedge was an afterthought or that the trades were speculative or fraudulent.

96. Further, short positions are required to be closed out by purchases. As per SEBI's policy existing at that time, physical delivery was not allowed. Had physical delivery been allowed, the appellants would have delivered the shares at Rs 265.67 per share. Quantity equal to the sale made in the cash segment is required to be made available in the Nov 2007. RPL Futures per purchase depends on the market trend and sometimes a close out may not happen on the same day and the sale may take place the next day. Thus a perfect hedge of a simultaneous closing of equal quantity may not happen. In any case, this by itself does not make the transactions in the F&O segment as an invalid hedge. The fact that on some days the hedge position exceeded the balance quantities to be sold and that 7.97 Cr shares were allowed to expire does not make the initial transaction in the F&O segment as an invalid hedge. It is impossible to analyze and find out whether it was done with intent or there was an element of speculation. Assuming it to be purely speculation, in our view, transactions done in the F&O segment with the intention of speculation is not prohibited nor

can such speculation be termed as manipulation or fraudulent. We are saying this, since physical deliveries in F&O segment was not permitted and therefore, trading done in F&O segment always had an element of speculation. We reiterate that what starts as a hedge continues as a hedge irrespective of imperfections. A perfect hedge is only possible when it is settled by delivery. Thus any deviation from a perfect hedge cannot be termed as an invalid hedge nor can it be termed as speculative and therefore, fraudulent. If at the beginning it was a valid hedge, the same does not become an invalid hedge merely because Open Interest positions was not closed simultaneously with the cash segment or that the Open Interest exceeded the quantity remaining to be sold in the cash segment. At best a valid hedge could become an imperfect hedge at a later point of time but it cannot be called an invalid hedge.

97. Similarly, the purchase of 1.53 Cr shares between 1st Nov 2007 to 6th Nov 2007 are not speculative transactions since it was to ensure compliance of the individual position limits of the 12 agents which was 0.91 Cr. We find that the purchase of 0.62 Cr on 06.11.2007 was against the sale of 7 Cr shares made in the cash segment on that day. Thus, in our view, there was no

unwinding of the futures position before the exposures were reduced.

98. The WTM in para 4.A.18 of the impugned order has explained the concept of hedging as under:

> "Hedging is a strategy resorted by market entities to mitigate the price risk associated with sale or purchase transactions to be undertaken in the cash segment at a predetermined point of time in future by entering into a derivative transactions which enables to look into a price for a future date."

99. The word "predetermined" assumes importance when a valid hedge is made, it is predetermined and the same does not become invalid merely because at some point of time in future, there is some variation. When a hedge is made the price is locked which cannot be varied and remains locked till the predetermined point of time fructifies.

100. The finding that sine appellant no. 1 did not have a consistent accounting policy throughout the life of the hedge, the transactions were not a valid hedge is patently erroneous and is also misconceived. At the time when the appellants made the transactions in Nov 2007, there was no hedging policy or accounting policy framed by SEBI. Such policies came into existence later. Thus, in our opinion, the appellants cannot be

ousted from a valid hedge merely because of not having a hedging policy or accounting policy when none was required. The WTM in para 4:A20 found that "hedge accounting norms is not a legal requirement" and went on to hold that "non compliance would take away the character of a hedge and render it to be classified as trading or speculative position". In our view once the WTM holds that a hedging policy was not a legal requirement, it was not necessary for the WTM to proceed any further. Such findings given by the WTM dwells into the realm of conjectures and surmises without any legal basis.

101. The fact that there was no hedging policy, nor there was no board resolution for hedging or that there were no accounting standards followed, are all irrelevant. These policies came only in existence in 2016 and thus reliance on these policies shows complete non application of mind.

102. It must be understood that had physical deliveries been allowed, RIL would have delivered the 9.92 Cr short positions. It is worth mentioning that the stock exchange rules, progressively from July 2018 made it mandatory for physical deliveries of specified scrips in the F&O segment and significantly from

October 2019 onwards any outstanding short positions in any scrip has to be mandatorily settled by physical delivery. There is no closing out of outstanding positions which was the case in 2007. It cannot be denied that RIL would have simply made physical delivery of 9.92 Cr shares on November 29, 2007 and earned Rs 265.67 per share had physical deliveries been allowed in 2007.

103. There is another aspect. What has been achieved by RIL through the transactions undertaken in the November 2007 RPL Futures? It is simple. RIL realized Rs 221 per share on the sale of 20.29 Cr shares in the cash segment. The hedges in the Nov 2007 RPL Futures helped RIL to realise an additional Rs 26 per share on the 20.29 Cr shares, taking up the average realization to Rs 247. Nothing more. This realization of Rs 247 per share must be looked at from the following perspective:-

(i) When RIL entered the F&O segment, the high price was Rs 295.40.
(ii) When RIL entered the cash segment, the high price was Rs 279.10.
(iii) The average price in the F&O position of 9.92 Cr shares was Rs 265.67, much above the average realization of Rs 247.

104. The purchase of 1.53 Cr shares during the period Nov 1, 2007 to Nov 6, 2007 in the Nov 2007 RPL Futures are not

speculative transactions as has been suggested by the respondent. The purchases on Nov 2, 2007 and Nov 5, 2007 aggregating to 0.91 Cr had to be done by one or more of the 12 agents to ensure compliance with the individual position limits. This is evident from the table at Paragraph 4.A.26 of the Impugned Order. The purchase of 0.62 Cr on Nov 6, 2007 is against the sale of 7 Cr shares made in the cash segment on that day. It is thus clear that there was no unwinding of the futures position before the exposures were reduced.

105. Reliance was made by the Respondent in the case of **M/s. Pankaj Oil Mills vs. Commissioner of Income-Tax, Gujarat, AIR 1978 Guj 226** to contend that open interest positions should be closed simultaneously with the sales in the cash segment. This contention is totally misplaced for the reasons that hedge transactions are taken for the purpose of insuring against the adverse price fluctuations. If it is a genuine and valid hedge, the total contract of sale should not exceed the total stock of raw materials or merchandise in hand. In the instant case, when hedge position of 9.92 crore shares were taken the underlying was the proposed 21.5 crore shares. Thus, the total sale transaction did not exceed the total stock of raw materials in

hand which complies with the requirement of a hedge contract. Further, there will always be imperfections in the F&O market and we also find that there is no provision which provides that a close out should be simultaneous.

106. The case of **Ontario (Minister of Finance) vs Placer Dome Canada Limited (supra),** does not support the case of the Respondent namely, that the period of hedge underlying should be equal to the proposed sales. The said decision only states that where a party has assets or liability exposed to market fluctuations, such transaction would be a hedge.

107. Similarly, in the case of **Whorley v. Patton – Kjose Company, Inc. [90 Mont. 461] [1931]** it was held that simultaneous closing of positions with the underlying would become speculative. In this regard, we have already pointed out that imperfection in a hedge transaction will always exist when created or squared up in derivative market. Further, L. C. Gupta's report clearly indicates that the derivative market was created for speculation and, therefore, if hedge is combined with speculation, the same is not illegal.

108. Thus, we hold that a transaction in the F&O segment is a hedge if there is an underlying exposure/ risk. In this case it cannot be denied that there was an underlying exposure/ risk, namely, the potential sale of 22.5 Cr shares in the cash segment. This is an identified and existing risk. A hedge even assuming it is imperfect, does not and cannot cease to be a hedge nor becomes speculative. There is no need for a simultaneous closure of the open positions along with the reduction in the exposure. An underlying risk has to be present at the time of taking the positions. There is nothing wrong nor there are any rules which prescribes that there has to be a simultaneous closure of the open position in the F&O segment. As long as the underlying exposure/ risk continues, the hedge can continue. Neither the extent of the hedge transaction nor the extent of the outstanding hedge oppositions need have any co-terminus co-relation with the underlying exposure/ risk. There is no rule which stipulates that throughout the period of the hedge, the open position should be equal to the underlying risk. In fact, the F&O segment rules clearly allow either closure of position by purchases in the F&O segment (in this case) or allow the open position to be closed out by the exchanges on the last day and this was done.

109. Before we deal with the issues on whether the agreements issued between appellant no. 1 with appellant no. 2 to 13 are benami contracts, and whether such arrangements were part of a scheme/article intended to manipulate and/or defraud the market or whether the execution of trades through the agreements was with the object of avoiding detection of the breach of the client wise position limits, it would be appropriate to place certain facts, and circulars issued by the respondent.

110. The trades in derivatives, namely, transactions in F&O segment was allowed when SEBI accepted the recommendation of L.C. Gupta Commission. The trades in derivatives were first allowed in the stock exchange indices, namely Index Futures. SEBI circular dt 28.07.1999 prescribed the risk containment measures. The relevant measures for the purpose of this appeal is:-

a) Customer level position limits
b) Market level position limits

For facility the relevant portion of the aforesaid circular is extracted hereunder:-

"Position Limits:

i. Customer Level: Instead of prescribing position limits at the client level, a self-disclosure requirement similar to that in the take-over regulations is prescribed:

a. Any person or persons acting in concert who together own 15% or more of the open interest shall be required to report this fact to the exchange and failure to do so shall attract a penalty as laid down by the exchange/ clearing corporation/ SEBI.

b. This requirement may not be monitored by the exchange on a real time basis, but if during any investigation or otherwise, any violation is proved, penalties can be levied.

c. This would not mean a ban on large open positions but only a disclosure requirement.

ii. Market Level:

a. No limits are prescribed at this stage on the total market wide open interest (as a percentage of the underlying market capitalization).

b. This will be reviewed at the end of six months of index futures trading to determine whether position limits are required at this level to guard against situations where a very large open interest leads to attempts to manipulate the underlying market."

The aforesaid circular indicates that no customer level position limits nor any market level position limits were prescribed. The circular only required that a disclosure should be made for any person or persons acting in concert who together own 15% or more of the Open Interest. The circular further provided that failure to disclose the aforesaid fact would attract a penalty. Thus, this circular of July 1999, did not place a ban on large Open Interest positions but only required it to make a disclosure.

111. In respect of Single Stock Futures, SEBI issued a circular dt 02.11.2001, the relevant portion is extracted hereunder:-

> **"Position Limits:**
> On the introduction of index futures contracts, index options contracts and stock options contracts the trading ember level and the market wide position limits were prescribed. However, with the introduction of Single Stock Futures contracts, a customer level position limit is also prescribed to deter and detect concentration of positions and market manipulation. The market wide position in the case of stock specific derivative contract (both stock options and Single Stock Future) shall be applicable on the cumulative open positions in derivative contracts on that stock at an Exchange. The volumes in the derivative markets are growing steadily and therefore, position limits shall be reviewed by the Advisory Committee on Derivatives from time to time and also the Advisory Committee shall be empowered to weed out any operational issue in implementation of the position limits.
>
> **Client/ Customer level position limits:**
> The gross open position across all derivative contracts on a particular underlying of a customer/ client should not exceed the **higher of** :-
> 1% of the free float market capitalization (in terms of number of shares).
> **Or**
> 5% of the open interest in the derivative contracts on a particular underlying stock (in terms of number of contracts)."

The aforesaid circular stipulated that gross Open positions across all derivative contracts on a particular customer/client should not exceed the higher of 1% of the free float market capitalization (in terms of number of shares) or 5% of the Open Interest in the derivative contracts on particular underlying

stock. The said circular was adopted by NSE by its circular dt 07.11.2001. NSE Futures & Options segment circular dt 26.8.2004 only prescribed the monetary penalty for breach of position limits, namely:

> "At the end of each day during which the ban on fresh positions is in force for any scrip, when any member or client has increased his existing positions or has created a new position in that scrip the client / TMs shall be subject to a penalty of 1% of the value of increased position subject to a minimum of Rs 5000/- and maximum of Rs 1,00,000/-."

112. Thus, for Index Futures, the circular dt 28.7.99 only required that a disclosure should be made for any person or persons acting in concert who together own 15% or more of the Open Interest. For Single Stock Futures, as per circular dt 2.11.2001, there was no such requirement that a disclosure was required to be made for any person or persons acting in concert. The only requirement was that a particular client/customer should not exceed the higher of 1% of the free float market capitalization (in terms of number of shares) or 5% of the Open Interest in the derivative contracts on a particular underlying stock.

113. In the light of the aforesaid, as per circular of 2001, for the Nov 2007 Futures, the client wise position limit of RPL shares

comes to 1.09 Cr shares as on 6.11.07 and 90 lac shares as on 29.11.2007. We find from the record that appellant no. 2 to 13, held short position which was nearly equal to the maximum that was allowed to them. Breach of this limit invites penalty as per NSE circular of 2004 under the SCR Act. Appellant no. 1 admits that the 12 named entities (appellant 2 to 13) were its agents. The appellant no. 1, however contends that the position limits are applicable to a client/customer and every agent was an independent client/customer of the broker since the concept of acting in concert was wanting and no disclosure was required, each and every agent of appellant no. 1 was validly as well as legally entitled to take short positions within the limits prescribed as per circular of 2001. The circular specifically stated that there was no ban on taking up positions by persons acting in concert. The circular makes it clear that the 12 agents could validly take individual position limits without disclosing that they were acting in concert and thus their position limits could not be aggregated, and traded as though the aggregate open Interest of RIL.

114. Before we dwell further on these circulars and Open Interest position, it would be appropriate to take a look into the

agreements executed by the 12 agents with RIL. From a perusal of the agreements, we find that the twelve agency agreements are identical. The trades done by the 12 agents in the F&O segment were only for the benefit of RIL. Clause 1.2 of the agreement provided that each transaction executed by the agent was to be approved by RIL and that the agents had no discretion to execute trades without RIL's authorization. Clause 3.2 of the agreement further provided that all the profits and losses arising out of the transactions would be to the account of RIL and that the 12 agents were only entitled to a commission.

115. In the light of the aforesaid, the WTM, in the impugned order held that the 12 agency agreements whereby the profits and losses of the 12 agents which were to be credited to the account of appellant no. 1 RIL were not benami contracts and were not violation of the provisions of the Benami Transactions (Prohibition) Act 1988. It is thus, not necessary for this Tribunal to dwell on this aspect of the matter.

116. Appellant No. 1, RIL admits that the 12 named entities, namely appellant no. 2 to 13 were its agents. In view of this admission, the principles of the principal- agent relationship

need not be elaborated and is not necessary to go into the case laws cited by the learned senior counsel for the respondent. However, the fundamental principle of agency law is enunciated in Sec 226 of the Contract Act 1872 which provides that contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts has been entered into and the acts done by the principal in person. This concept has been explained by the Calcutta High Court in **Sukumari Gupta vs Dhirendra Nath Roy Choudhary, 1984 SCC online Cal 244** and by the Supreme Court in **Firm of Pratapchand Nopaji vs Firm of Kopike Venkata Shetty (1975) 2 SCC 208** and again by the Supreme Court in **Jagir Singh Vs Ranbir Singh 1979 AIR SC 381.**

117. Sec. 182 of the Contract Act defines an "agent" and "principal", namely, an "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is represented, is called the "principal". We find that the maxim "*qui tacit per alium facit per se*" is fully applicable, namely, whatever a person has power to do himself, he may do so by

appointing an agent. Conversely, what a person cannot do himself, he cannot do so by means of an agent.

118. Thus even though the 12 agents, appellant 2 to 13 had validly taken individual position limits in the Nov 2007 RPL Futures as per the circulars which are applicable to a client/ customer, and even though they were not required to disclose that they were acting in concert at the behest of appellant no. 1 RIL, yet in the given facts and circumstances of the case, since the 12 agents were acting on behalf of the principal RIL who was the ultimate beneficiary, the separate position limits would not apply to each of them. The logic is simple. Since RIL could not have crossed the position limits in its individual capacity, it could not cross the position limits through its agents. The principle that "what could not be done directly, could not be done indirectly" is fully applicable in the instant case. Thus the open position limits taken by the 12 agents when aggregated violates the circular.

119. From a reading of the circulars, we find that the position limits are very clear. The position limits are applicable to a client/ customer. In the instant case every appellant no. 2 to 13

was an independent client/ customer of the broker. The circular of 2001 dispensed with the requirement of disclosure of persons acting in concert. The circular specifically stated that there was no ban on taking up positions by persons acting in concert. We however find that the twelve agents had exploited this loophole by validly taking open interest position within the permissible limits and since no disclosure was required, they validly executed the transactions without disclosing that they were acting in concert. This defect in the circular was exploited by the twelve agents. The breach of the position limits, in our view, being technical only invites a penalty under the circulars.

120. Thus, the trades made by the appellants in the Future Segment beyond position limits violates the circulars and bye-laws. In this regard, we need to refer to Section 18(A), 9(2) and 9(3) of the SCR Act.

Section 18(A) is extracted hereunder:-

> **Contracts in derivative.**
>
> **"18A.** Notwithstanding anything contained in any other law for the time being in force, contracts in derivative shall be legal and valid if such contracts are—
>
> (a) traded on a recognised stock exchange;

(b) settled on the clearing house of the recognised stock exchange, or

in accordance with the rules and bye-laws of such stock exchange.

(c) between such parties and on such terms as the Central Government may, by notification in the Official Gazette, specify."

A perusal of the aforesaid Section 18A indicates that the contracts in derivatives which are traded on the stock exchange and settled on the clearing house of the stock exchange are to be legal and valid. Any person entering trades in the derivate segment of the stock exchange is under an obligation to follow the stipulations of the stock exchange, bye-laws and regulations. In this regard, the rule making power given to the stock exchange to frame bye-laws has been provided under Section 9 of the SCR Act. Section 9(3) specifies the punishment in the event of any contravention of the bye-laws. For facility, Section 9(3) of the SCRA is extracted hereunder:-

"9.(3) The bye-laws made under this section may—

(a) specify the bye-laws the contravention of which shall make a contract entered into otherwise than in accordance with the bye-laws void under sub-section (1) of section 14;

(b) provide that the contravention of any of the bye-laws shall render the member concerned liable to one or more of the following punishments, namely:—

(i) fine,

(ii) expulsion from membership,

(iii) suspension from membership for a specified period,

(iv) any other penalty of a like nature not involving the payment of money."

121. A perusal of Section 9(3) provides that in the event of a contravention, a fine, expulsion from membership, suspension from membership for a specified period or any other penalty of a like nature not involving the payment of money, can be imposed. Based on the aforesaid, various circulars have been issued by the Respondent and by the Stock Exchange under the SCR Act providing monetary penalties for violating the position limits.

122. Thus, from a perusal of Section 9(2) and 9(3) of the SCR Act, we find that breach of the contract for want of compliance with the bye-laws under Section 14 are restrictive to the extent of the punishment depicted in Section 9(3) viz, fine, expulsion or suspension from membership or other non-monetary penalties

could be imposed. The power cannot be extended for fraudulent trading practices under the SEBI Act and its Regulations.

123. In the instant case, we find that for violating the circulars, the WTM did not impose monetary penalty but chose to prohibit the appellants from dealing in equity derivatives in F&O segment of the Stock Exchange directly or indirectly for a period of one year which the appellants have undergone. Thus, the direction given by the WTM, in our opinion, is in consonance with Section 9(3)(iv) of the SCR Act. No further penalty can be imposed.

124. The WTM however did not end the matter here but went on to hold that the concentration of position limits by the 12 agents was with the intention to corner the F&O segment and was therefore fraudulent and manipulative in nature. The WTM held that agency agreement was a shield to cover up the unauthorized acts of the agents and therefore the agreement is a sham. The pattern of position limits assumed by the agents against the individually available position limits as per the circular was premeditated and preplanned was fraudulent in nature u/s 12 A (1) to (3) of SEBI Act and Regulation 3 and 4 of

PFUTP Regulation. This finding is patently erroneous as will be clear in the following paragraphs.

125. On the issue of amassing large position limits thereby denying other market participants, we find from the Show Cause Notice that the aggregate Open Interest positions on 6.11.2007 was 61.5% in Futures and 48.6% across all derivatives segments (i.e. options & futures). On 29.11.07 it was 93.63% in Futures and 40.1% across all derivative segments, i.e. Options and Futures. In this regard, we find that the position limit circulars does not prescribe separate limits for options and separate limits for futures. However, from the SCN itself, we can cull out that on 6.11.07 38.85% of the limits were taken in all derivative segments by others. Similarly, on 29.11.07, 59.9% of the limits were taken in all the derivative segments by others. Further, we are of the opinion that the increase from 61.15% of the Open Interest in the Nov 2007 RPL Futures held by the 12 agents moved to 93.63% on 29.11.07 on account of the fact that this increase could be attributed to others who had closed their Open Interest during this period. Thus without investigating this aspect, the WTM could not attribute the amassing of the Open Interest positions to the actions of the 12 agents.

126. It may be noted here that the position limit circulars specifically states that the client wise/customer wise position limits were being prescribed to "deter and detect concentration of positions and market manipulations". We find that as per the circular on position limits, the prescription of position wide limit is only to deter and detect market manipulation. Assuming that during the course of investigation the concentration was detected, we are of the opinion that neither in terms of the circular, nor in terms of the PFUTP Regulation, such concentration would automatically amount to manipulation. Concentration by itself does not become manipulation unless a separate act is established. If the legislative intent was that concentration itself was manipulative, the framers would have prescribed disclosure by persons acting in concert and also determined the extent of concentration which would amount to manipulation. Breaching position limit only attracts monetary penalty under the circular and cannot automatically attract PFUTP Regulations.

127. In this regard, we find that the contention of the respondent that the circulars mandated the appellant to make

the disclosure and that such non disclosure amounted to misrepresentation and further amounted to manipulation is patently misconceived. At the risk of repetition, the position limit circulars does not prescribe any disclosure for person acting in concert in the case of Single Stock Futures unlike in the case of Index Futures. Even under the SEBI Act or under PFUTP Regulation, there is no provision for a disclosure requirement which clearly means that the exchange did not require disclosure. In this regard, we find that Regulation 4.3.5 (j) of NSE (F&O segment) Trading Regulations provides that the trading member shall not disclose the name and beneficial identity of a constituent to any person except to a F&O segment of the exchange as and when required by it. Therefore, there was no requirement for RIL to disclose that the 12 entities were its agents. We also find, in this regard, that the respondent having realized the loophole in their circular came out with a consolidated circular in Dec 2016 which prescribed the disclosure requirement of connected entities. Not only this, NSE amended the client broker agreement subsequently, to include an undertaking by the client that he is not acting in concert with any other person. Thus aggregation of the position limits would

at best amount to a breach of the position limits inviting a monetary penalty and the same cannot be termed as manipulative or fraudulent.

128. The WTM has also given a finding that the agency agreement were executed for the sole purpose of circumventing he regulatory framework laid down to govern the transactions in the F&O segment and that the whole exercise was premeditated and preplanned and therefore fraudulent in nature and thus qualifies to be so for the purpose of sub sec (1) to (3) of Sec 12A of the SEBI Act and Regulation 3 & 4 of the PFUTP Regulations. In our opinion this finding is not based on sound reasoning and is based on surmises and conjectures. In this regard we find that the execution of the agency agreement was never denied by RIL. In fact the agency agreement were disclosed in the first instance when queries were made by SEBI. It is not a case when SEBI discovered these agreements during the course of its investigation. We find that these agreements were never hidden and were disclosed by RIL at the first opportune moment.

129. The finding that these agreements were executed for the purpose of circumventing the regulatory framework and that it

was a premeditated exercise is purely based on surmises and conjectures. The stand of RIL from the very beginning was clear, namely, that they had to sell 22.5 Cr shares of RPL and therefore executed the agreements with the 12 entities so that they could individually take position limits within the framework of the circulars. Nothing was an afterthought nor can such agreement be called a sham agreement.

130. The WTM held that the cash segment trades of appellant No.1 on 29/11/2007 during the last ten minutes of trading hours is fraudulent and manipulative in nature as contemplated under the PFUTP Regulations. In our view, this finding is purely based on conjectures and is not based on sound reasoning. How are the trades done in the last 10 minutes are fraudulent and manipulative has not been disclosed. The finding that the appellant's trading in the last 10 minutes was only for the purpose to depress the settlement price in the November, 2007 RPL Futures in order to make undue gains and is therefore fraudulent as well as manipulative and is not based on sound reasoning but is based on surmises and conjectures. We find that the findings of the WTM are basically on the basis of intentions, motives and suspicions. This in our view is not

enough to establish fraud or manipulation. We are of the opinion that a manipulation of the share price has to be established and the burden is upon the respondent which they have failed miserably.

131. Admittedly, appellant No.1 sold and delivered 2.25 crore shares. These trades were genuine sales. There is no allegation that the trades done by appellant No.1 in the last 10 minutes were circular trades between appellant No.1 and a set of people resulting in no delivery of shares in the cash segment. There is no evidence to show that the sale of 2.25 crore shares were subsequently repurchased by appellant no.1 and therefore created suspicion on the genuineness of the trades. In the absence of any such evidence coming on record, the sales made by the appellant No.1 in the last ten minutes which resulted in the actual delivery of shares cannot be termed as manipulative.

132. The contention that the selection of the time (i.e. the last 10 minutes) creates suspicion that the trades were intended to manipulate the price especially in the light of the fact that the appellant No.1 did not sell any shares in the cash segment from 24/11/2007 till the last ten minutes on 29/11/2007 and therefore

such entry in the last 10 minutes was solely intended to manipulate the price is patently baseless. In the first instance there is no law, regulation or circular which debars any person from entering the market in the last 10 minutes. A trader has a right to trade at any time during the period when the Stock Exchanges are open. There can be no restrictions on any person from trading in the last 10 minutes. Further, the fact that the appellant No.1 did not trade between 24/11/2007 till the last 10 minutes of 29/11/2007 is immaterial and cannot create a suspicion nor its entry in the last 10 minutes creates a suspicion of the manipulation of the price with an intent. In the first instance, no one can prevent an investor to trade on all days. It is the choice of an investor to enter the market and trade and, such decision is, based on the understanding of the securities market. A person may trade on one day and thereafter may not trade for many days. It is the choice of an investor for whatever compulsion he may have. Thus, not trading from 24th November till the last 10 minutes of 29th November 2007 does not create a suspicion.

133. In this regard, we find that the appellant had traded on 23/11/2007. As per Table 5 of the Vo. III of the Compilation of

Documents, the appellant had traded 0.52 crore RPL shares at an average price of Rs.209.62. It may be noted here that 24/11/2007 and 25/11/2007 were Saturday and Sunday. No trades were possible on these two days on account of the closure of the Stock Exchange. On 26th November 2007, the opening price was Rs.213 per share and the closing price was Rs.204.05. The appellant chose not to enter the market on 27th and 28th November 2007, the weighted average price was only Rs.197.79 and Rs.194.17. Further, only 2.68 cr and 3.08 cr shares respectively were traded on these days which indicates that not many trades were done at or above Rs.200/-. It may be noted here that appellant No.1 never sold the shares below Rs.200/- from 6/11/2007 till 29/11/2007. On 29/11/2007, the opening price was Rs.197.80 and remained below Rs.200/- till 3.00 p.m. on 29/11/2007 when it rose to Rs.208.10 and touched Rs.224.70 at 3:21:40 p.m. as is clear from para 4.B.4 of the impugned order. The appellant No.1 had last traded on 23/11/2007 at the average weighted price of Rs.208.79. Thus, when the price rose to Rs.224.7 at 3:21:40 it made prudent business sense to enter the market and sell the remaining shares in order to get a better price. Such entry in the last ten minutes was not done

deliberately in order to depress the settlement price but was done in order to sell the scrips at a better and higher price. Such entry thus was a business decision and cannot be termed either manipulative or fraudulent. In our view, the motive of RIL was to sell RPL shares in the cash segment at a higher price rather than closing the Open Interest positions at lower prices.

134. There is another aspect. On 27/11/2007 and 28/11/2007 only 2.6 crore and 3.08 crore shares were traded. On 29/11/2007, 17.66 crore of shares were traded and appellant No.1 only traded 1.95 crore which were delivered. Thus, it cannot be said that a large quantity of shares were sold by appellant No.1 when compared with the total trades made on 29/11/2007. The finding of the WTM that a very large quantity of 1.95 crore shares (should be 2.25 cr shares) were dumped in the market without checking as to how many shares were traded by others in the last 10 minutes is clearly unfair. No finding has been given by the WTM as to how much trades were done by others in the last 10 minutes. Without making comparison, it is neither proper nor correct to suggest and give a finding that the appellant No.1 was solely responsible for depressing the price. In this regard, we however, find from a perusal of Table 13 of Vol.3 of

Compilation of Documents that appellant No.1 had traded 1.95 crore shares in the cash segment on the NSE platform in the last ten minutes and during the same period, others had traded 1.06 crore shares. Thus, appellant No.1 cannot be solely responsible for depressing the settlement price, if any. There were others also.

135. There is still another aspect. If it was a well planned manipulation with the intention to depress the settlement price, the appellant would have started selling the shares from 3.00 p.m. onwards since it is common knowledge that the last half hours weighted average price is the settlement price. But the same was not done and only when the price rose to Rs.224.90 at 3:21:40 p.m. the appellant No.1 entered the market in order to reap the average in the cash segment.

136. There is yet another angle to it. On 29/11/2007, total shares traded were 17.66 crore. Appellant traded 2.25 crore shares and delivered 2.25 crore shares. Others traded 15.41 cr shares but delivered 2.78 cr shares which is a mere 17.68% against 100% delivery by appellant no.1. This shows that the sales made by appellant No.1 were genuine and the trades made by others

were speculative. In this view of the matter, SEBI should have conducted an investigation as to why the RPL shares were moving up at such a rapid pace from 3.00 p.m. to 3.20 p.m. The price was Rs.208.10 at 3.00 p.m. and rose to Rs.224.7 at 3:21:40. We find it strange that this sudden increase in the price in the last half hour did not create suspicion nor raised an eyebrow. There was ever likelihood that some forces were trying to raise the price in order to close the gap between the settlement price and the open interest positions taken by the 12 appellants in the F&O segment. On the other hand, cognizance has been taken for the trades done by appellant No.1 for manipulating and depressing the price from Rs.224.7 to Rs.209 at3.3.0 p.m. Between 3.00 p.m. to 3.30 p.m. 7.9 crore shares were traded (Table 13) out of which the appellant No.1only traded 2.25 crore shares. Thus, appellant No.1 was not alone in depressing the price.

137. It may be noted here that on 6/11/2007 the opening price on the NSE platform was Rs.271.70 and the high price was Rs.279.10. Appellant No.1 sold 4.67 crore shares out of 15.03 crore shares traded, the price came down to Rs.220.15 and the low price was Rs.214.10. There was a swing of Rs.64.55 between

high price and low price. No eyebrow was raised by SEBI for depressing the price. No suspicion of manipulation or fraud was raised. On the other hand, much has been analyzed of the last 10 minutes of trades which are genuine sales and, are in any case, not fraudulent /manipulative or speculative. It is natural that when large quantities of shares are sold, such sales generally brings the prices down. Such drop in the price does not amount to manipulation nor such transaction amounts to a fraudulent act. The findings of the WTM are untenable and cannot be accepted since it is not based on a proper analysis but is based on suspicions, motives and intentions, which in our opinion, is based on surmises and conjectures.

138. Much has been argued on the trades made in the last 10 minutes on 29/11/2007. The finding of the WTM is that the sale of a large quantity of 2.25 crore shares had caused the price to fall since large numbers of sell orders were placed below the LTP. It has come on record that out of 17 orders placed by appellant No.1, 10 sell orders were placed below the LTP. A finding has been given that huge selling pressure was created in the scrip which obviously affected the price of the scrip. In this regard, we must understand the concept of 'last traded price'

(LTP). LTP is the price at which a purchase and sale gets executed by matching a purchase and sale order. It has no other significance. When there is a demand for a share, a purchaser will always place a bid which is higher than the LTP. If a seller wants to ensure that his sell order gets executed when there is a huge demand, it is apparent that the seller will not place his sale bids at a price below the LTP but rather would place his bids at a higher price than the LTP there is a demand for a share and a seller puts the ask price at below LTP and finds that his entire sell order has got executed at a price above the ask price, the next sell order placed by him normally will not be lower than LTP. However, if the seller persistently puts lower ask price again and again, it would create suspicion that the seller is depressing the price for whatever reasons which would ultimately lead to manipulation. In the instant case, when we analyze Table 12 of Vol.III of the Compilation of Documents, we do not find that by placing sell orders at below LTP, the appellant were trying to depress the price for the following reasons:-

i) The first sell order at 3:21:40 pm for 20 lac was at an ask price of Rs.222 against LTP of 224.70. In spite of quoting a lower price, all the orders (namely, 3.5 lac shares) were not executed.

ii) The third sell order for 10 lac shares was at a higher ask price of Rs.220/- against LTP of Rs.219.70. Only 1,53,478 shares were sold and approx. 8.5 lac shares did not get sold.

iii) The sell order for 8.33 lac shares was at an ask price of Rs.219 against LTP of Rs.219.50. only 2.82 lac shares were executed and 5.71 lac shares were not executed.

iv) The next sell order for 10 lac shares was at an ask price of Rs.220/- against LTP of Rs.218.55. No shares were executed.

v) At 15:24:26 sell order of 30 lac shares were placed at Rs.218/- against LTP of Rs.218.90. Only 7.91 lac shares got executed and remaining 22.09 lac shares did not get executed.

vi) At 15:25:08, a sell order for 10 lac shares was placed at Rs.215 against LTP of Rs.217/- but only 1.35 lac shares were executed.

The aforesaid indicates that even when sell orders were placed below LTP, there was no demand for shares since majority of the shares were not executed. However, when trades were placed from 15:25:30 onwards at Rs.210 against the LTP of Rs.217.50, all the trades were executed. This by itself will not make the trades of appellant No.1 manipulative for the purpose of depressing the settlement price in the F&O segment. As held earlier, the trades made by the appellant were genuine trades in the absence of any finding that the said sell orders were brought subsequently. The

contention of the appellant No.1 that it had to sell the shares at a lower price in order to get the sales executed seems to be plausible. In any case, such sales cannot be termed manipulative. We also find that no analysis of the trades made by others in the last ten minutes have been made. There could be others who had placed sell orders below the LTP, but such trades have not been analyzed or compared with the trades of the appellant. As per figures in the impugned order, 7.85 crore were traded in the last half hour and the share of the appellant was only 1.95 crore shares which by comparison cannot be held to be a large quantity. Thus, holding that appellant had dumped large quantity of shares in the last 10 minutes is unwarranted.

139. In view of the aforesaid, whether appellant No.1 has manipulated the prices is a question of fact and not of law. On the basis of the aforesaid facts and analysis done, we are of the opinion that no case of manipulation has been made out against appellant No.1 for trading in the last 10 minutes on 29/11/2007. The respondent has not discharged the burden of establishing manipulation. In fact on the basis of the analysis done and the explanation given by the appellant No.1, the preponderance of probability lies in favor of appellant No.1.

140. We may observe here that if all the transactions were manipulative, then there is no logic as to why the WTM has found that the trades of 1.09 cr shares were lawful. This is inconsistent with the conclusions drawn by the WTM. This clearly means that the order for disgorgement of alleged profits pertains to the balance 7.42cr shares only on the basis of exceeding the position limits. As held earlier, exceeding the position limits will not attract Sec.11B of the SEBI Act. The order for disgorgement is thus illegal.

141. The finding that all the transactions taken together was a well planned fraudulent manipulative scheme by appellant no. 1 to earn undue profits based on manipulation and fraud is erroneous. We have already held that the transactions made by appellants were not manipulative in nature. We find that the element of fraud has to be established which in the instant case the respondent has miserably failed.

142. Establishment of fraud requires a higher degree of proof than what is made out in the impugned order. The impugned order establishes fraud on the basis of motive and nothing else.

In this regard, "fraud" is defined under regulation 2(1)(c) of PFUTP regulations, which states as under:-

> **"2(1)(c).** "fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—
>
> (1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;
> (2) a suggestion as to a fact which is not true by one who does not believe it to be true;
> (3) an active concealment of a fact by a person having knowledge or belief of the fact;
> (4) a promise made without any intention of performing it;
> (5) a representation made in a reckless and careless manner whether it be true or false;
> (6) any such act or omission as any other law specifically declares to be fraudulent,
> (7) deceptive behaviour by a person depriving another of informed consent or full participation,
> (8) a false statement made without reasonable ground for believing it to be true.
> (9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.
>
> And "fraudulent" shall be construed accordingly;

A perusal of the aforesaid definition clause will indicate that motive is not a consideration for establishing a fraud. In fact, the essential ingredient for establishing fraud is "inducing others to

trade". A fraud can be established only when inducement is established.

143. In the matter of **Sandip Paul Vs Sebi (2009) SCC Online SAT 82** and in the matter **of Sebi Vs Rakhi Trading Pvt Ltd (2018) 13 SCC 753**, it was found that since manipulation was established therefore inducement was not required to be proved. Therefore, these cases relied upon by the respondent are distinguishable on facts. In the instant case, manipulation has not been established and fraud has been established only on the basis of motive which is not permissible. Reliance was also made by the respondent on a decision of the Supreme Court in **SEBI Vs Kanhaiya Lal Baldevbhai Patel and others (2017) 15 SCC 1** which in our opinion does not support the stand of the respondent in the instant case. The Supreme Court in the said decision held that "fraud" is one which has the effect of inducing another in dealing in securities. In the instant case, there is no finding given by the WTM that the appellant had induced others in dealing in securities. Thus, the respondent has failed to established inducement and accordingly failed to discharge its burden. In this regard, we may also point out that the WTM in the impugned order has held that the charge under regulation

4(2)(b) of the PFUTP regulations, expressly requires inducement as a prerequisite condition.

144. In **Price Waterhouse & Co. vs SEBI, 2019 SCC Online SAT 165**, this tribunal held that inducement is an essential element to constitute fraud. The said decision is squarely applicable in the instant case.

145. The contention of the respondent that the Regulation 3(b) of the PFUTP Regulations is squarely applicable as it does not require the element of fraud and inducement. The contention of the respondent that the employment of 12 agents is a device to exceed the position limits and is thus a misrepresentation which is in contravention of the provisions of the SEBI Act and its Regulations. In our opinion, this contention is not correct. We have already held that the appellant have violated the circulars relating to the position limits and were thus liable for penalty as per the circulars. The circulars have been issued under the SCR Act and have not been issued under the SEBI Act or its rules and regulations. Thus, even if there is a violation of the position limits, it cannot attract the provisions of regulation 3 (b) of the PFUTP regulations which has been framed under the SEBI Act.

The SCR Act prescribes penalty separately for violation of the position limits. Thus Regulation 3(b) is not applicable for violation of position limits.

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146. The Respondents have taken recourse to Section 12A of the SEBI Act read with Regulation 3(a)(b)(c)(d) and 4(1) and 4(2)(d) and (e) of the PFUTP Regulations. In this regard, Section 12A of the SEBI Act and Regulations 3 & 4 of the PFUTP are extracted hereunder:-

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

(d) engage in insider trading;

(e) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the rules or the regulations made thereunder;

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

Regulations 3 & 4(1),(2)(d)&(e) of the PFUTP

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

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

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

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

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

"4. Prohibition of manipulative, fraudulent and unfair trade practices

(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a manipulative, fraudulent or an unfair trade practice in securities markets.

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

(a) inducing any person for dealing in any securities for artificially inflating, depressing, maintaining or causing fluctuation in the price of securities through any means including by paying, offering or agreeing to pay or offer any money or money's worth, directly or indirectly, to any person;

(b) any act or omission amounting to manipulation of the price of a security including, influencing or manipulating the reference price or bench mark price of any securities;

147. A finding has been given by the WTM that the appellants have indulged in manipulative and fraudulent transactions and thus comes within the purview of Section 12A read with Regulations 3 & 4 of the PFUTP Regulations. In this regard, Section 12(A)(a) provides that the contravention with regard to the purchase and sale of any securities is to be made under the provisions of "this Act" meaning thereby violations under the SEBI Act. Regulation 3(b) of the PFUTP Regulations also states that the contravention has to be in accordance with the provisions of the"Act". The word "Act" has been defined under

Regulation 3(1)(a) of the PFUTP Regulations which means the Securities and Exchange Board of India Act, 1992. Thus, a person can be held liable only when he deals in the purchase and sale of any securities and contravenes the provisions of the SEBI Act and the Regulations made thereunder and not otherwise. If a person violates any provisions of the SCR Act, the provisions of the SEBI Act will not automatically come into play.

148. The Respondents have held that placing huge orders below the LTP in the last 10 minutes depressed the settlement price and, therefore, manipulation was established under Regulation 4(2)(e) though no violation was established under Regulation 4(2)(d). In this regard, we have already held that fraud has not been proved in the absence of any finding on inducement. Admittedly, the WTM has found that the charge levelled in the show-cause notice regarding violation of Regulation 4(2)(d) has not been made out, namely, the charge of inducement. If inducement is not made out or proved then the charge of fraud or fraudulent action automatically fails. Thus, in our opinion, Section 12A read with Regulations 3 & 4 of the PFTP Regulations, are not made out.

149. It was contended by the respondent that the charge under Regulation 3(b) of the PFUTP is made out which provision does not require the element of fraud and inducement to be proved. It was contended that employment of 12 agents was the device to exceed the position limits and therefore there was a contravention of the SEBI Act and the Regulations is, in our view, erroneous. As we have held the violation of the position limits circulars which are issued under the SCR Act does not attract provisions of Regulation 3(b) of the Regulations framed under the SEBI Act. Since the burden of proving inducement has not been proved which is an essential ingredient to establish a fraud, we are of the opinion that no fraud has been made out and therefore Regulation 3(b) is not applicable for violation of position limits. Since the position limits was a valid hedge and valid trades were made which were not manipulative or fraudulent, the provisions of Section 12A of the SEBI Act and Reg. 3&4 of the PFUTP Reg. are thus not applicable.

150. The Respondents have exercised the powers under Section 11 and 11B in directing the appellant No.11 to disgorge an amount of Rs.447.27 crore along with interest.

151. In **Securities and Exchange Board of India vs. Pan Asia Advisors Limited and Another, (2015) 14 SCC 71** the Supreme Court has set out the scope of Section 12A of the SEBI Act. The Supreme Court held:-

> "78. Section 12-A of the SEBI Act, 1992 creates a clear prohibition of manipulating and deceptive devices, insider trading and acquisition of securities. Sections 12-A(a), (b) and (c) are relevant, wherein, it is stipulated that no person should directly or indirectly indulge in such manipulative and deceptive devices either directly or indirectly in connection with the issue, purchase or sale of any securities, listed or proposed to be listed wherein manipulative or deceptive device or contravention of the Act, Rules or Regulations are made or employ any device or scheme or artifice to defraud in connection with any issue or dealing in securities or engage in any act, practice or course of business which would operate as fraud or deceit on any person in connection with any issue dealing with security which are prohibited. By virtue of such clear cut prohibition set out in Section 12-A of the Act, in exercise of powers under Section 11 referred to above, as well as Section 11-B of the SEBI Act, it must be stated that the Board is fully empowered to pass appropriate orders to protect the interest of investors in securities and securities market and such orders can be passed by means of interim measure or final order as against all those specified in the above referred to provisions, as well as against any person. The purport of the statutory provision is protection of interests of the investors in the securities and the securities market.
>
> 90. Under Section 12-A, it is specifically provided to prohibit any manipulative and deceptive devices, insider trading and substantial acquisition of securities or control by ANY PERSON either directly or indirectly. If SEBI's allegation listed out earlier as well

as all the other allegations fall under Sections 12-A(a), (b) and (c), there will be no escape for the respondents from satisfactorily explaining before the Tribunal as to how these allegations would not result in fully establishing the guilt as prescribed under sub-clauses (a), (b) and (c) of Section 12-A. Similar will be the situation for answering the definition under Regulations 2(1)(b), (c), 3, 4(1), (2)(a), (b), (c), (d), (e), (f), (k) and (r) of the 2003 Regulations, apart from taking required penal action against those who are involved in any fraud being played in the creation of securities."

152. In **N. Narayanan vs Securities and Exchange Board of India, (2013) 12 SCC 152** the Supreme Court held:-

"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".

153. Thus, Section 12A of the SEBI Act creates a clear prohibition of manipulative and deceptive devices, insider trading and acquisition of securities. Section 12A(a),(b) & (c) stipulates that no person should directly or indirectly indulge in such manipulative and deceptive devices in connection with the issue, purchase and sale of any securities or use any device or engage in any act which would operate as fraud or deceit on any person while dealing in securities.

154. The scope of PFUTP Regulations, 2003 has been set out by the Supreme Court in Kanaiyalal's case (supra). The Supreme Court held:-

> "10. The 2003 FUTP has three chapters, namely, "Preliminary", "Prohibition of fraudulent and unfair trade practices relating to securities market" and "Investigation". Regulation 1 contains the short title and commencement. Regulation 2 consists of certain definitions. Clause (b) of Regulation 2 defines "dealing in securities" which includes an act of buying, selling or subscribing pursuant to any issue of any security or agreeing to buy, sell or subscribe to any issue of any security or otherwise transacting in any way in any security by any person as principal, agent or intermediary referred to in Section 12 of the SEBI Act. Clause (c) of Regulation 2 defines "fraud".
>
> "23. The object and purpose of the 2003 FUTP is to curb "market manipulations". Market manipulation is normally regarded as an "unwarranted" interference in the operation of ordinary market

> forces of supply and demand and thus undermines the "integrity" and efficiency of the market"

155. SEBI under the SEBI Act enjoys wide powers under Section 11, 11A and 11B to protect the interests of the investors in the securities market by taking such measures as it thinks fit. In **Securities and Exchange Board of India vs Pan Asia Advisors Limited and Others (2015) 14 SCC 77**, the Supreme Court held:-

> "75. On a reading of the above statutory provisions, we find under Section 11(1) of the SEBI Act, 1992, a duty has been cast on SEBI to protect the interest of the investors in securities and also to promote the development of the securities market as well as for regulating the same by taking such measures as it thinks fit. The paramount purpose has been shown as protection of interest of investors on the one hand and also simultaneously for promoting the development as well as orderly regulation of the security market. By way of elaboration under Sections 11(2)(a) to (e) it is stipulated that the duty of SEBI would include regulating the business in the stock exchanges and any other securities market which would include the working of stockbrokers, share transfer agents and similarly placed other functionaries associated with securities market in any manner, registering and regulating the working of the depositories, participants of securities including foreign institutional investors in 80 particular to ensure that fraudulent and unfair trade practices relating to securities markets are prohibited and also prohibiting insider trading in securities.
>
> 76. Under Sections 11(4)(a) and (b) apart from and without prejudice to the provisions contained in subsections (1), (2), (2-A) and (3) as well as Section 11-B, SEBI can by an order, for reasons to be

> recorded in writing, in the interest of the investors of securities market either by way of interim measure or by way of a final order after an enquiry, suspend the trading of any security in any recognised stock exchange, restrain persons from accessing the securities market and prohibiting any person associated with the securities market to buy, sell or deal in securities. On a careful reading of Section 11(4)(b), we find that the power invested with SEBI for passing such orders of restraint, the same can even be exercised against "any person".
>
> 77. Under Section 11-B, SEBI has been invested with powers in the interest of the investors or orderly development of the securities market or to prevent the affairs of any intermediary or other persons referred to in Section 11 in themselves conducting in a manner detrimental to the interest of investors of securities market and also to secure proper management of any such intermediary or person. It can issue directions to any person or class of persons referred to in Section 11 or associated with securities market or to any company in respect of matters specified in Section 11-B in the interest of investors in the securities and the securities market. The paramount duty cast upon the Board, as stated earlier, is protection of interests of the investors in securities and securities market. In exercise of its powers, it can pass orders of restraint to carry out the said purpose by restraining any person."

Thus, the powers conferred on SEBI under Section 11 and 11B is to protect the interests of investors in securities and to promote the development of and to regulate the securities market. Therefore, the measure to be adopted by SEBI is remedial and not punitive.

156. In view of the aforesaid there is no manipulative or fraudulent transaction which comes under the purview of Sec.12A of the SEBI Act read with Reg. 3&4 of the PFUTP Regulations. We reiterate that the respondent has failed to discharge the burden of establishing manipulation. No case of manipulation or fraudulent transactions in the last ten minutes of trading has been made out. The violation of the circulars only invites a penalty under the SCR Act.

157. In the absence of any contravention, the direction issued under Section 11-B of the SEBI Act to the appellant no.1 to disgorge an amount of Rs.447.27 cr. alongwith interest is without any authority of law and, to that extent, the order is set aside.

158. In the result, the appeal is allowed in part. In the circumstances of the case, parties shall bear their own costs.

Justice Tarun Agarwala
Presiding Officer

05-11-2020
dg

Per: Dr. C.K.G Nair, Member

159. We are unable to agree with the findings and conclusions reached by the Honourable Presiding Officer in his Order. Therefore, we proceed to write a separate Order in this matter.

160. This appeal has been filed aggrieved by the order of the Whole Time Member ('WTM' for short) of the Securities and Exchange Board of India ('SEBI' for short) dated March 24, 2017. By the said order the appellants have been prohibited from dealing in equity derivatives in the Futures and Options Segments (F&O) of the Stock Exchanges directly or indirectly for a period of one year, except for squaring off or closing out their existing open position and appellant no. 1, in addition, has been directed to disgorge an amount of Rs. 447.27 crore along with interest at the rate of 12% per annum calculated with effect from November 29, 2007 till the actual date of payment. The period of restraint of one year imposed on the appellants is over during the pendency of the appeal.

161. The core question raised in this appeal is whether the Principal-Agent model/"agency model" adopted by appellant no. 1 RIL and implemented with the help of other 11 appellants

(because of merger of 2 of the original 12 other Noticees, there are 11 other appellants) in cornering huge position limits in the 2007 November single stock futures contract in the shares of Reliance Petroleum Ltd. ('RPL' for short) and the offloading of substantial quantities of RPL shares in the cash segment of the stock exchanges in the last 10 minutes (effectively 8.40 minutes) of the trading hours on 29 November, 2007, the settlement day, allegedly with an intention to artificially depress the price in the cash segment to make larger gains in the future contracts, are violative of the stated provisions of the Securities Contracts (Regulations) Act, 1956 ('SCRA' for short), Securities and Exchange Board of India Act, 1992 ('SEBI Act, 1992' for short), SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 ('PFUTP Regulations' for short) and the cited circulars issued by SEBI/Exchanges regarding position limits.

162. Facts relating to the appeal are not disputed; what is disputed is the interpretation and analysis of those facts and interpretation of the relevant laws and circulars. That means *what* is not disputed, only *why* and *legality of the actions* are disputed.

163. On November 6, 2007, open position in the single stock futures contracts of Reliance Petroleum Ltd. (RPL) reached 95% of the market-wide position limit in National Stock Exchange (NSE). Therefore, as per the existing rules, no further increase in open interest was possible and therefore, on 7th November, 2007, further increase in open position was banned by the NSE. This has alerted SEBI and an investigation was directed. A Show Cause Notice (SCN) dated April 29, 2009 was issued to Appellant no.1. After some correspondence a corrigendum dated October 8, 2009 was issued. Upon consideration of the reply and the material found during investigation, in suppression of the above SCN, a fresh SCN dated December 16, 2010 was issued by respondent SEBI to the appellant no.1 as well as to 12 other entities.

164. It is the case of the appellants that, on 29 March 2007, the Board of Directors of Appellant No.1 decided to raise resources, *inter alia*, by offloading approximately 5% of its holdings of equity shares of Reliance Petroleum Limited (RPL), a subsidiary of RIL. While Appellant No.1 undertook the transactions in the cash segment of RPL in November 2007, it enlisted the services of other 12 Noticees, as agents to operate on its behalf in the

single stock futures segment of RPL. During November 1, 2007 and November 6, 2007 these 12 entities took substantial short-sell positions in the November Futures contract of RPL. Appellant No.1, RIL itself did not take any position in the Futures segment. As a result, on November 06, 2007, the open position in the RPL November Futures reached 95% of the market-wide position limit (MWPL) thereby leading to ban by the NSE on further increase in open interest (OI) position as per extant rules pertaining to trading in the derivatives segment. As part of the investigation which followed, price-volume trends in the cash market vis-a-vis the F&O segment of RPL shares were analyzed by SEBI to ascertain violations of the provisions of the SCRA, 1956; SEBI Act, 1992; and the Rules and Regulations framed thereunder especially with respect to the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 (PFUTP Regulations) and the circulars on 'position limits' issued by SEBI and NSE relating to derivatives trading. After the investigation, SEBI issued the December SCN, which is the subject matter of the present proceedings.

165. In order to take short sell position in the November RPL futures contract, admittedly, Appellant No. 1 engaged the

services of 12 front entities who, by trading through different brokers, took a total net short position of 9.92 crore shares of RPL and locked in an average price of Rs. 265.67 in four trading days between November 1 - 6, 2007. Thereafter Appellant No. 1 sold 20.29 crore shares of RPL in the cash segments of the stock exchange between November 6 – 29, 2007. Out of these 20.29 crore shares 2.24 crore shares were sold in the last 8.40 minutes on November 29,2007 before closing of trade and the rest in earlier 11 trading days between 6-24 November. While two of the Noticees squared off their position in the Futures segment before November 29, 2007, 10 Noticees continued with their combined net short position of 7.97 crore shares and allowed it to be cash settled on expiry. The RPL November futures contract was to expire on November 29, 2007. In the process the appellant sold a total of 20.29 crore shares of RPL for about Rs. 4500 crores in the cash segment and made a profit in the F&O segment to the tune of Rs. 513 crores.

166. The agency agreements separately entered into by Appellant no. 1 RIL with the 12 entities were identical. Investigation revealed that these front entities opened trading accounts with different brokers during October – early

November 2007. It was also revealed that, except appellant no.12 Dharti Investment and Holding Pvt. Ltd, other 11 entities were green horns. Their agency-wise, date-wise details and their connections, are all exhaustively given in the impugned order. Since it is an admitted position of Appellants that these 12 entities were in fact engaged by RIL for taking positions in the November futures contracts of RPL and the details of their trading etc. are not disputed, we do not propose to elaborate on this issue. However, it is important to note that, admittedly, these 12 front entities were engaged on a commission basis and the entire profit and loss emanating from their trading activities would flow to the accounts of RIL. It is also to be noted that the entire trading activities of these front entities were executed by an employee (Mr. Sandeep Agarwal) of a wholly owned subsidiary of RIL, who also placed orders in the cash market for selling the RPL shares. Information available on records also shows that RPL, a subsidiary of RIL, got listed in May 2006 when it came out with an Initial Public Offer (IPO) of equity shares at the rate of Rs. 60/- which reached the peak price of Rs. 294/- on November 1, 2007, the date on which RIL entered the RPL stock futures segment through its enlisted agents/entities. RIL, at the

relevant time held 75% of the equity shares of RPL, from which it had decided to sell approximately 5% of the shares in its Board meeting held on March 29, 2007, as contended by the appellants. During July 2008 to January 2009, there had been a number of correspondences between SEBI and RIL during the course of which only RIL disclosed the fact relating to the agency agreements with 12 front entities. Accordingly, on the basis of the information gathered SEBI issued a SCN on April 29, 2009 only against RIL alleging violation of SEBI Act, 1992 and PFUTP Regulations. Subsequently, on October 8, 2009 a corrigendum to the SCN was also issued to RIL asking to show cause why directions should not be issued under Regulation 11 of SEBI (Prohibition of Insider Trading) Regulations, 1992. Based on the replies filed by RIL, SEBI re-investigated the matter and issued a second SCN dated December 16, 2010 to RIL as well as to the 12 front entities in supersession of the first SCN dated April 29, 2009 and its corrigendum dated October 8, 2009.

167. Summary of the allegations in the SCN are:-

(a) RIL took massive short positions through the 12 entities in November 2007 RPL Futures, in breach of the position limits prescribed in circulars issued by SEBI, NSE

and National Securities Clearing Corporation Limited (NSCCL) with the knowledge of the impending sales in the cash market. This was a well-planned, fraudulent, manipulative trading scheme and unfair trade practice violating Section 12A of SEBI Act and PFUTP Regulations, 2003.

(b) RIL's trades in the F&O segments are illegal and invalid under Section 18A of the Securities Contracts (Regulations) Act, 1956 (SCRA), which provides conditions for contracts in derivative to be legal and valid.

(c) RIL depressed the settlement price of November futures of RPL by dumping large number of shares in the last 10 minutes of trading in the cash segment on November 29, 2007 and thereby earned an unjust profit of Rs 513.12 Cr.

(d) The futures transactions carried out by the 12 entities are benami transactions and thus illegal and void.

(e) In view of the fraudulent scheme employed by Noticee No.1 to derive profits in F&O segment by depressing the settlement price on the expiry day, besides the violation of the circulars governing the position limits

issued by SEBI and NSE and Section 18A of SCRA, it was alleged that the whole scheme was a fraudulent and manipulative practice in the securities market and attracts the provisions of Section 12A of the SEBI Act, 1992 read with Regulations 3(a),(b),(c) and (d) and 4(1) and 4(2)(d) and (e) of the SEBI (Prevention of Fraudulent and Unfair Trade Practices) Regulations. Accordingly, the Noticees were called upon to show cause as to why all or any of the actions, including disgorgement of the undue and illegal profits made, and such other measures as deemed fit, in terms of the SEBI Act, the SCRA 1956 and SEBI (PFUTP) Regulations, 2003 should not be initiated against them.

168. Based on an evaluation of the facts and circumstances brought out in the SCN and, the replies submitted, the impugned order has been passed with the following findings:

(i) Noticee no.1 by employing 12 agents to take separate position limits of Open Interest on its behalf by executing separate agreements with each one of them and cornering 93.63% of the November futures of RPL, has acted in a fraudulent manner while dealing in RPL scrip.

(ii) The Noticee No.1, by manipulating the F&O segment through 12 of its agents (Noticees Nos. 2 -13) and allowing them

to hold the contracts till the last day of expiry and thereafter by closing out the derivative contracts on the 29th of November, 2007 has engaged in a pre-planned fraudulent practice and the same cannot be held to be a mere breach of position limits by the clients attracting penalty under the exchange circulars.

(iii) On the basis of the analysis of the trading strategy/pattern adopted by Noticee No.1 in the cash market during the month of November 2007 and specifically on the 29th of November 2007, being the expiry day of the November Futures of RPL, it is found that there has been a manipulation of the last half an hour settlement price.

(iv) In short, the actions of Noticee No.1 and Noticees Nos.2-13, described in sub-paras (i), (ii) and (iii) above constitute a violation of the provisions of section 12A of SEBI Act, 1992 read with regulations 3, 4(1) and 4(2)(e) of the SEBI (PFUTP) Regulations, 2003. Noticees Nos. 2 to 13 have also violated provisions of the SEBI circular No. SMDRP/DC/CIR-10/01 dated November 2, 2001 and NSE circular No. NSE/CMPT/2982 dated November 7, 2001.

169. The crux of the findings and assessment of the WTM in the impugned Order are the following.

(a) RIL's act of employing 12 entities to take separate short positions (aggregating to 9.92 Cr on Nov. 6, 2007 in Nov. 2007 RPL Futures), is not a hedging strategy, as claimed by RIL in reply to the SCN, but is a pre-planned

fraudulent scheme for cornering positions and manipulation of Nov. 2007 RPL Futures market to make unlawful gains. This cannot be construed as mere breach of position limits by the clients attracting penalty under the exchange circulars.

(b) The sale of 1.95 Cr RPL shares (an error because only data from NSE is taken, actual sales 2.24 cr shares when data of 29 lakh shares sold in BSE is added; as elsewhere given in the impugned order itself) in the cash segment by RIL during the last 10 minutes of trading on Nov. 29, 2007 have been done for depressing the last half an hour weighted average price (which is the settlement price for Nov. 2007 RPL Futures) to make gains on the 7.97 Cr outstanding short positions in Nov. 2007 RPL Futures is manipulative as contemplated under the PFUTP Regulations.

(c) RIL made unlawful gains of Rs 513 Crore by this fraudulent and manipulative strategy/pattern of trading. The actions of RIL and the other 12 entities constitute violation of the provisions of Section 12A of the SEBI Act read with Regulations 3, 4(1) and 4(2)(e) of

PFUTP Regulations. The 12 entities have also violated provisions of 2001 SEBI Circular and 2001 NSE Circular relating to position limits in single stock futures segment.

170. Since charges/allegations relating to Benami transactions raised in the SCN were dropped by the WTM we do not propose to deal with the same in this Order.

171. We have heard Mr. Harish Salve, learned Senior Advocate along with Mr. Janak Dwarkadas, learned Senior Advocate, Mr. Raghav Shankar, Mr. Rohan Rajadhyaksha, Mr. Ashwath Rav, Mr. Kashish Batia, Mr. Vivek Shetty, Mr. Amey Nabar, Mr. Geetanjali Sharma, Ms. Arundhati Kelkar, Mr. Armaan Patkar, Ms. Cheryl Fernandes and Mr. Vedant Jalan, learned Advocates for appellants. We have also heard Mr. Darius Khambata, learned Senior Advocate with Mr. Gaurav Joshi, learned Senior Advocate, Mr. Aditya Mehta, Mr. Mihir Mody and Mr. Shehaab Roshan, learned Advocates for the respondent.

172. In addition, we have also heard two individual Interveners, Mr. Arun Kumar Agarwal and Mr. Shailesh Mehta, who appeared before us in person. Before we proceed with the

submission made by the appellants and the respondent on the merit of the matter, we proceed to deal with the submissions made by the Interveners. Apart from seeking various documents, appeal papers etc. the crux of the submissions made by the Interveners are that if SEBI had investigated the matter in its totality and covering a longer period it would have been clear that the extent of violations committed by appellant no. 1 would have been of a much higher magnitude. According to Intervener Mr. Arun Kumar Agarwal the unlawful gains made by RIL should have been Rs. 3500 crore and not Rs. 513 crore if SEBI had investigated the massive increase in the share prices of the RPL during September 2006 to October 2007 from Rs. 67/- to Rs. 295/-. Similarly, the insider trading angle also should have been investigated. Accordingly, investigation conducted by SEBI is faulty and the matter should therefore be remanded to SEBI for reinvestigation.

173. Intervener Mr. Shailesh Mehta, submitted that the appellants have concealed material facts in their appeal, including that one of the entities on appeal has been deleted from the list maintained by the Registrar of Companies (RoC) and all the trades done by the appellants between June 1, 2007 to

December 31, 2007 should be annulled and monies refunded to the investors in the scrip of RPL.

174. Since the Interveners were not parties before SEBI, we did not consider it appropriate to make them party respondents to the appeal. However, despite strong opposition from the Appellants against the intervention applications stating that they are not necessary parties, in the interest of justice, we heard the Interveners in person and have perused their written submissions. The interveners submitted that the respondent SEBI has not conducted the investigation properly. The price rise of the shares being miraculous ought to have been investigated by the respondent SEBI since beginning. They further submitted that this Tribunal has co-extensive power as that of SEBI in view of the declaration on this issue in the case of ***Clariant International Ltd. &Anr. Vs. SEBI (2004) 8 SCC 524.***

175. We find it untenable to accept the arguments of the Interveners because the crux of their submissions is for expanding the scope (both the issues and the time span) of the investigation. It is an established position in law that an Intervener is entitled only to address the arguments in favour of

or against the impugned order. Any intervention to expand / enlarge the scope of the appeal is not relevant to the matter in hand as well as the mandate assigned to this Tribunal. Similarly, issue such as oppression of minority shareholders and mismanagement are not within the purview of this Tribunal and this Tribunal has to go by the mandate assigned to it under Section 15T of the SEBI Act, 1992 as Section 15T(4) states that this Tribunal may pass orders confirming, modifying or setting aside the order appealed against. This is the crux of the decisions in ***Clariant (supra),*** which though relied on but not correctly interpreted by the Interveners. The decision in the case of ***Clariant (supra)*** is explained by the Supreme Court in the case of ***National Securities Depository Ltd. vs. SEBI (2017) SCC Online 256*** wherein in para no.24 the Supreme Court clarified as under:-

> *"24. It may be stated that both Rules made under Section 29 as well as Regulations made under Section 30 (of SEBI Act) have to be placed before Parliament under Section 31 of the Act. It is clear on a conspectus of the authorities that it is orders referable to Sections 11(4), 11(b), 11(d), 12(3) and 15-I of the Act, being quasi-judicial orders, and quasi judicial orders made under the Rules and Regulations that are the subject matter of appeal under Section 15T. Administrative orders such as circulars issued under the present case referable to Section 11(1) of the Act are obviously*

outside the appellate jurisdiction of the Tribunal for the reasons given by us above. Civil Appeal No.186 of 2007 is, therefore, allowed and the preliminary objection taken before the Securities Appellate Tribunal is sustained. The judgment of the Securities Appellate Tribunal is, accordingly, set aside."

176. It would be seen that Securities Appellate Tribunal exercises its appellate powers as derived from Section 15T of the SEBI Act. Since only judicial and quasi-judicial orders passed by SEBI are appealable, direction to reinvestigate the case would be administrative in nature and therefore the plea of the interveners in this regard also cannot be accepted. Accordingly, after consideration of the submissions made by the Interveners, we reject the intervention applications.

177. Coming back to the merit of the appeal, Mr. Harish Salve, the learned Senior Counsel appearing on behalf of the appellants elaborately contended as follows:

i. It is an undisputed fact that RIL, appellant no. 1 had decided to mobilize additional funds to the tune of about Rs. 87000 crore and one of the means of mobilizing part of the said funds was by offloading about 5% of the shares of its subsidiary RPL.

ii. On October 31, 2007 the share price of RPL reached a peak of Rs. 271.70. However, around the same time (September – October 2007) analysts such as Goldman Sachs, Kotak and Morgan Stanley came out with reports stating that RPL shares were over-valued and therefore RIL decided to enter the market and maximize its profits.

iii. Being the majority promoter of RPL holding 75% of its shares, RIL had a huge inventory of shares of RPL and when it decided to sell 5% stake it had to take a hedge position because of the possibility of price fall in the cash segment. Since there was an underlying exposure taking a hedge position in the futures segment was neither a manipulation nor even speculation. Speculation, it was added by the learned senior counsel, is not an offence at all since hedgers and speculators have to be part and parcel of the derivative market for transactions to takes place. Upon sale of substantial number of shares in the cash market by 19th November, 2007 the hedge became "naked", i.e. without the corresponding underlying

exposure and that "any hedge position left open like the one RIL did is termed as a naked hedge transaction". A naked hedge transaction is a recognised concept and Reserve Bank of India also permits naked hedge derivative transaction in forex to continue until the maturity date in relation to the hedge transaction. To buttress the said submission the Master circular dated 5th July, 2016 issued by Reserve Bank of India was placed before us. The circular *inter alia* provides as under:-

*"**i) Forward Foreign Exchange Contracts***

Participants

Market-makers *- AD Category I banks*
Users - Persons resident in India

Purpose

a) To hedge exchange rate risk in respect of transactions for which sale and /or purchase of foreign exchange is permitted under the FEMA 1999, or in terms of the rules/ regulations/directions/orders made or issued there under.

b) To hedge exchange rate risk in respect of the market value of overseas direct investments (in equity and loan).

i)Contracts covering overseas direct investment (ODI) can be cancelled or rolled over on due dates. If a hedge becomes naked in part or full owing to contraction (due to price

> *movement/impairment) of the market value of the ODI, the hedge may be allowed to continue until maturity, if the customer so desires. Rollovers on due date shall be permitted up to the extent of the market value as on that date."*

178. The learned senior counsel for the Appellants adverted our attention to the above clauses and contended that so far as forward foreign exchange contracts participants are concerned this circular provides that transaction to hedge exchange rate risk is permitted under the FEMA, 1999. More particularly clause (b) of the said circular permits continuation of holding position in derivative market even after the hedge has become 'naked'. A naked hedge transaction cannot be called illegal.

179. Learned senior counsel Mr. Salve further submitted that given the underlying exposure, RIL decided to take a reasonable level of hedge and therefore engaged 12 entities to take net short positions in the RPL November futures. Given the market position limits of about a crore shares applicable to each entity and since each entity remained within the position limited allowed them to take, a total net short position of only about 9.97 crore shares was taken though the decision was to sell about 22.5 crore shares in the cash segment. Therefore, the appellant no 1

was actually under-hedged till the 15th November by which time it had sold substantial quantity of RPL shares in the cash segment. He further submitted that the finding in the impugned order that RIL did not have any hedging policy in 2007 is like a joke, given that mandatory hedging policy came into force only in 2016.

180. His further submissions are that engaging 12 front entities to take positions in the F&O segment for RIL, who had a huge underlying exposure, was not against the exchange rules relating to position limits. In fact, it was contended that in the first circular relating to position limit etc. issued by SEBI dated July 28, 1999 on "index based futures and options" no client level position limits were even fixed. Further, there was a provision for 'acting in concert' and thereby if the position limit exceeds 15% of the open interest a disclosure had to be made to the stock exchanges. In subsequent circulars, though client level position limits were introduced, particularly, for single stock futures and options, there was no ban on 'acting in concert' or on aggregation of positions; therefore, there is no violation of position limit related laws by RIL when it engaged 12 front entities to take positions on its behalf in the futures segment.

Even if it is held to be a position limit violation, without admitting the same, at worst it is a case of position limit violation under relevant stock exchange circulars and only a penalty under the said circulars/Exchange Rules can be imposed on the appellant.

181. According to him, there is no fraud, no manipulation, no attempt to deceive the market and the impugned order has failed miserably to prove even by a whisper how exceeding position limits in the face of substantial exposure of the underlying, is market manipulation and fraud as defined under Section 12A of SEBI Act, 1992 and under the stated provisions of the PFUTP Regulations as wrongfully held in the impugned order. Accordingly, the finding in the impugned order that the appellants have violated provisions relating to PFUTP Regulations is patently erroneous and based on conjectures and surmises.

182. He further contended that for proving 'fraud' an element of 'inducement' has to be proved which is not the case of the impugned order. There is no evidence on record to show that the appellants were guilty of inducement. The total trades

undertaken by the appellants in RPL futures in November 2007 were to the tune of only 8% of the total trades in the futures market that too which was executed on the anonymous system with delivery / settlement. Therefore, the impugned trades were genuine trades conducted in an orderly and *bona fide* fashion. As a responsible promoter of RPL it was the duty of RIL to carry out its trading operations in an orderly fashion without adversely impacting the market and therefore the hedge in the futures segment and calibrated sale in the cash segment was for upholding that responsibility.

183. According to Mr. Salve, if the intention of RIL was to make money at any cost to the market and to the minority investors it could have offloaded the entire 22.5 crore shares on November 1, 2007 itself or on other days in November when the spot price was ruling high. Similarly, it could have squared off the positions in the futures segment on those days in November 2007 when the spot prices were low and thereby earned a much larger spread. The learned senior counsel produced various charts before us to show that sales in the cash segment and squaring off the futures positions on various dates in November which would have fetched the appellants much more than what

was ultimately earned. Those iterative positions / simulation tables were heavily relied on by the learned senior counsel to show that appellant RIL was behaving as a responsible promoter and a *bona fide* market participant in its entire dealing in RPL shares / F&O in November 2007.

184. Citing an office note of SEBI, it was emphatically submitted by Mr. Salve that the whole exercise of respondent SEBI in conducting the investigation and initiating the proceedings against the appellants was biased. It was contended that while the appellants fully cooperated with the respondent during investigation by providing all information and documents as required by the respondent, the attitude of the respondent has been prejudicial. The relevant office note was part of Misc. Application no.427 of 2019 filed in the present proceedings which was disposed of by this Tribunal on 20th August, 2019. The said application was filed for staying the implementation of SCN dated November 21, 2017 issued by the AO of SEBI with a view to impose penalty. Reading of the Office note of respondent SEBI dated November 6, 2009 would show that a personal hearing in the case was scheduled before the WTM on November 7, 2009 at 2.30 p.m. The advocate of the

respondent SEBI was briefed for presenting the case on behalf of SEBI. However, the Advocate had advised to obtain certain information from appellant no.1 'in order to strengthen the evidence against the entity'. Therefore, vide the office note it was decided that the respondent SEBI would seek adjournment of the hearing to be held on November 7, 2009. On the strength of this material, Mr. Salve submitted that the very act of the respondent of collecting information with a view "to strengthen the evidence against appellant no.1" would show that the respondent SEBI instead of acting as an independent regulator was bent upon collecting evidence against the appellant. Therefore, he submitted that the order of the WTM is also on the similar lines.

185. As regards the last 10 minutes trades which is also found by the Respondent SEBI to be contravening provisions of SEBI Act, 1992 and PFUTP Regulations, the learned senior counsel Mr. Salve submitted that when RIL had another about 4.50 crore shares to be sold on 29 November as per its earlier decision, it actually sold only 2.25 crore shares on the last day of trading. Therefore, if the intention, as alleged in the impugned order, was to suppress RPL spot prices and thereby to impact the settlement

price in order to earn a larger spread on the remaining net short position of 7.97 crore shares in the futures segment it could have dumped more shares in the spot market / cash segment.

186. Regarding the allegation that the RIL was impacting the Last Traded Price (LTP) by placing sell orders below the LTP in the cash segment, it was contended that the impugned order failed to understand that when large orders are to be placed in the market price would fall and a counter party could be found only if big orders are placed a bit below the LTP. When some orders were placed at the LTP much could not be sold, as data would confirm. There is no manipulation in such a trading strategy as discovered by the impugned order. In fact, when the appellant placed 5 out of 17 orders in the last 10 minutes at LTP only limited quantity of shares could be sold and even in cases where orders were placed below LTP the full quantity could not be sold. The learned senior counsel produced the complete trail of the trades and the price data relating to trade in the last 10 minutes to prove this contention and concluded that it was trying to 'match the prices at which the demand existed' rather than under pricing the RPL shares and manipulating the LTP.

187. According to Mr. Salve, all trades were delivered and/or settled as per exchange rules and therefore the finding in the impugned order that the position limits taken by the Appellants were violative of Section 18A of SCRA and hence illegal is without any legal basis. In fact, trades by the Appellants fulfilled all the conditions stated under Section 18A of SCRA. Therefore, even if this Tribunal finds it to be violation of the position limits circular only a penalty under the exchange rules could have been imposed. The WTM's finding holding the Appellants to be violating Section 12A of SEBI Act and PFUTP Regulations is completely arbitrary as a position limit violation under the SCRA/exchange rules cannot be used to hoist a charge of PFUTP violations. This is all the more important, it was contended, when Section 12A of SEBI Act reads as below and states that the said section can be invoked only when provisions of the SEBI Act and Rules are violated, not for violation of other laws.

> *12A. No person shall directly or indirectly—*
> *(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance* ***in contravention of the provisions of this Act or the rules or the regulations made thereunder****;*
> *(emphasis added by the appellant)*

188. It was vehemently contended that possible SCRA violation of position limits cannot be artificially converted into PFUTP violations under the SEBI Act, particularly when no fraud or inducement has been proved in the impugned order.

189. Learned senior counsel for the appellant further submitted that the WTM, while summarizing the case at para no.5.4, had declared that the appellants have violated the provisions of Section 12A of Securities and Exchange Board of India Act, 1992 read with Regulation 3, 4(1) and 4(2)(e) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003. However, in the SCN, in addition to above sub-Regulations, violation of Regulation 4 (2) (d) as well was stated. Thus, the learned WTM did not find the appellants guilty of violation of the provisions of regulation 4(2)(d) of the SEBI PFUTP Regulations, 2003 which deals with engaging others to cause fluctuation in the security market. Therefore, the learned WTM did not find that the appellants had indulged into manipulative practices.

190. As far as the issue of fraud is concerned, it was argued as well as underlined in the written submissions by the appellant at page no.77 clause (1) that the learned WTM had for the purpose of disgorgement computed the purported profits made out of 7.42 crore shares (8.51 crore shares – 1.09 crore shares). This, concession of 1.09 crore shares was given on the basis that the average net short open position limit for one client during the period was 1.09 crore shares. Thus, the impugned order itself conceives that only the violation committed by the appellants is that of position limits under the position limit circulars and there has been no manipulation, much less fraud.

191. The learned senior counsel for appellants also objected to the proposal from the side of respondent SEBI during the latter's argument for rectification of the findings by this appellate tribunal. He submitted that a statutory order issued by an authority cannot be supplemented by fresh reasons in appeal and one cannot go beyond the order under challenge in appeal. Reliance was placed on decision of the Hon'ble Supreme Court in the case of ***Mohinder Singh Gill vs. Election Commissioner (1978) 1 SCC 404*** and a decision of this Tribunal in the cases of

Sterlite Industries (India) Ltd. vs. SEBI (2001) SCC Online SAT 28 to support this contention.

192. In short, the learned senior counsel for the Appellants categorically contended that the engagement of 12 front entities by RIL was a valid act as per the provisions of the Contract Act; taking positions by acting in concert or by aggregation is not violative of client-wise position limits and is not a contravention of relevant exchange rules and circulars; no evidence of fraud, inducement or manipulation has been brought out in the impugned order and hence provisions of SEBI Act, 1992 and PFUTP Regulations could not have been invoked and an order under Sections 11 and 11B of SEBI Act could not have been issued against the appellants and no penalty/disgorgement could have been ordered. Without admitting, it was contended, that the actions of the Appellants may be at worst interpreted as a position limit violation under the relevant exchange circulars and a penalty under the same could have been the only punishment, if at all any, that could have imposed on the appellants.

193. On the other hand, the learned senior counsel Mr. Darius Khambata appearing for the respondent SEBI strongly contended that the scheme perpetrated by the appellants was an unparalleled manipulation of the securities market. The magnitude of the offence is clear from one single fact that effectively one party (RIL), through a clandestine scheme of engaging 12 front entities cornered 93.6% of the open interest on the settlement day of November futures contract and as on November 6, 2007 it had cornered 61.5% of the open interest. In terms of numbers the net short position of the appellants was 9.92 crore as on November 6, 2007 and 7.97 crore shares on the settlement day. Client level maximum position limit that could have been taken as on these dates were 101 lakh and 90 lack shares respectively. Such a cornering of the market is a fraud on the system and the market as a whole thereby impacting all the participants in the RPL counters and would spill on to the rest of the markets. Moreover, such a fraud was committed by employing a scheme and artifice of splitting the trades across 12 agents so that the market remained completely in the dark. The market equilibrium had been impacted by the fraudulent

behavior of one single player accomplished through a 'principal-agent model' innovated and implemented by RIL.

194. In addition to violation of SEBI Act, 1992 and PFUTP Regulations, appointing 12 agents by RIL to take up short positions in RPL futures was a clear violation of the stock exchange circulars also, Mr. Khambata contended. This is clear from a reading of the SEBI circular dated November 2, 2001 and NSE Circular dated November 7, 2001 in respect of position limits for single stock futures as part of the "risk containment measures to deter and detect concentration of positions and market manipulation". As per these circulars the "maximum client wise position limits could have been the higher of 1% of the free float market capitalization or 5% of the open interest in a particular derivative". In terms of numbers the maximum client wise position limits could have been 101 lakh shares on November 6, 2007 and 90 lakh shares on November 29, 2007. Against this the appellant had accumulated 992 lakh and 797 lakh shares respectively (more than 9 times the permissible level) which is a gross violation of the position limits and thereby undermining the risk containment capacity and the integrity of the market and the systems in place.

195. Mr. Khambata further submitted that, it is now an admitted position that appellant no. 1 and other 12 noticees were having a Principal-Agent relationship. Such an arrangement under Section 226 of the Contract Act, 1872 would entail all the legal consequences on the Principal as if such contracts had been entered into and acts done by the Principal in person. Accordingly, the Principal could not have cornered the market by taking up huge net sell position by engaging agents to do the same since under the provisions of the Contract Act, 'what is prohibited directly cannot be done indirectly by engaging others'.

196. Accordingly, the learned senior counsel for SEBI contended that when a Principal-Agent model was used by the appellants they could not have adopted the argument that there is no prohibition on acting in concert or aggregation in the SEBI / NSE circulars, though such an interpretation of the Circulars would be a complete misreading to totally undermine the principles behind imposing position limits in the derivatives market as a major risk management strategy.

197. As regards manipulation and violation of Section 12A of SEBI Act, 1992 read with Regulation 3, 4(1) and 4(2) (e) of the PFUTP Regulations the learned senior counsel submitted that once manipulation was established inducement would automatically follow. By the manipulative activities of the appellants integrity of the market in RPL shares in November 2007 was compromised and market integrity is essential for a market to perform its functions in a normal fashion. It was a vitiated market because of the manipulation perpetuated by the appellants in terms of taking huge net short positions through a manipulative scheme of a Principal-Agent arrangement set up at the back of the market participants. Since the market was already manipulated rest of the market participants were facing a fraudulent market which was inducing them to behave in a particular fashion. Given this position, the argument of the appellant that specific finding is needed to prove "inducement" is patently erroneous. In order to prove this contention, the learned senior counsel relied on the decisions of the Apex Court in ***Securities and Exchange Board of India vs Rakhi Trading Private Ltd., (2018) 13 SCC 753*** which established that once the factum of manipulation was proved no further proof was

required that the investors were induced and consequentially fraud is deemed to be established. In fact, the learned senior counsel proceeded to emphasize that once fraud is established in terms of engaging an artificial device to defraud the market it becomes immaterial even whether positions limits have been violated or not because through such a device (clearly a PFUTP Regulations) the appellant had already tried to manipulate the market whether succeeded or not.

198. In answer to the submissions on omission of sub-Regulation 4(2)(d) of PFUTP Regulations, the learned senior counsel for the respondent contended that so far as the exclusion of Regulation 4(2)(d) of SEBI PFUTP Regulation, 2003 is concerned it was clearly a clerical mistake caused in the impugned order. The reasoning of the learned WTM recorded extensively in the order would show that the learned WTM came to the conclusion that the transactions in dispute were also manipulative as well fraudulent in nature by engaging entities with view to cause fluctuation in the security market i.e. violation of the provisions of Regulation 4 (2) (d). Merely a clerical mistake in not quoting the said provision in the summarizing paragraph would not change the nature of the

findings. Mr. Khambata submitted that in view of the decision of the Supreme Court in ***Clariant's case (supra)*** this Tribunal in appeal can correct these mistakes.

199. As regards the contention of the appellant that the learned WTM himself considered that there was no fraud but only a violation of the position limit circular it was submitted that the reading of the impugned order in entirety would show that the learned WTM had also came to the conclusion that the appellants have indulged into fraudulent transaction since "fraud" has a very wide meaning under the PFUTP Regulations.

200. Shri Khambata further submitted that the action of RIL in dumping of 2.25 Cr shares (with most of the orders placed well below LTP) in the last ten minutes of trading on 29 November, 2007 was with the sole purpose of manipulating the settlement price of the RPL Futures contracts. Such manipulation amounted to a fraudulent act. He stated that on 29 November, 2007, RPL scrip opened at Rs 193.80 and rose to Rs 208.20 at 3:00 p.m. and thereafter increased further to Rs 224.35 at 3:20 p.m. The graph of RPL share price during the last half hour showed that the price was rising steadily. Such continuous price rise was not

suiting RIL, as a rise in price of the RPL shares in the cash segment would mean reduction in RIL's realization on its open position in the RPL Futures segment. The learned senior counsel, thus, submitted that in order to avert a situation of reduced margin on their locked in price in the futures segment, RIL started dumping RPL shares in the cash segment during the last 10 minutes of trading. This dumping was with a view to reverse the rising trend in RPL's share price. All these activities, according to Mr. Khambata debunks the defense of 'hedging' taken by the Appellant No. 1.

201. It was further contended that in the last 8 minutes and 15 seconds of trading, RIL placed 17 sell orders for 2.43 Cr shares in which 12 out of 17 orders were placed at prices lower than Last Traded Price (LTP). As a result of placing sell orders below LTP, RIL managed to reduce the price of RPL shares from Rs 224.35 price per share to about Rs. 210 thereby lowering the last half hour weighted average price (settlement price) to Rs 215.25 per share resulting in RIL making higher profits on RPL Futures. The learned senior counsel submitted that dumping of huge quantity of shares in the last 10 minutes was clearly manipulative and a fraud on the market, as it clearly influenced

the settlement price in the Futures segment. Therefore, the WTM was justified in holding that the dumping of large quantity of shares in the last 10 minutes was to influence the settlement price in order to gain huge profits in the F&O segment is the correct finding. The said act was solely with a *mala fide* intention. The learned senior counsel submitted that the contention of RIL that they were selling the shares in order to take advantage of the higher price in the last 10 minutes of the trading was totally erroneous. In fact, the selling of the shares was only with the intention to manipulate the market in order to bring the price down.

202. The learned senior counsel placed reliance on the decision of this Tribunal in ***Sandeep Paul vs SEBI- Appeal No. 418 of 2015 decided by this tribunal on JULY 12, 2019*** in which it was held that factors such as volume of trading, percentage of market share, timings of trades in the last half hour would establish that the person had engaged in market manipulation. It was thus urged that selling 2.25 Cr shares in the last 10 min which led to undermine the settlement price was sufficient to establish market manipulation and fraudulent act on the side of the Appellant no 1.

203. Shri Khambata, further contended that the defense of 'hedging' adopted by RIL was nothing but an afterthought to cover up the motive of making speculative gains. Short selling 9.92 Cr shares in the Futures segment was not a legitimate hedge in as much as RIL's intention was to corner futures positions and take advantage of the price dip in the cash segment induced by RIIL itself. The appellants' contention that the transactions executed in the Futures segment were hedge transactions since it expected RPL prices to fall when shares were sold in the cash segment was nothing but an afterthought. The learned senior counsel placed reliance on a decision of the Gujarat High Court in ***Pankaj Oil Mills vs Comm. of Income Tax, AIR 1978 Guj. 226*** which distinguished hedging from speculative transactions as "the genuine transactions entered into for purposes of insuring against adverse price fluctuations" and further held "in order to be genuine and valid hedging contracts of sales, the total of such transactions should not exceed the total stocks of the raw materials or the merchandise on hand which would include existing stocks as well as the stocks acquired under the firm contracts of purchases."

204. The learned senior counsel also placed reliance on a decision of the Supreme Court of Canada in ***Ontario (Minister of Finance) vs Placer Dome Canada Ltd, 2006 SCC Online Can SC 20,*** which has explained the difference between hedging and speculation in the following terms:

> "29…… This distinction between speculation and hedging is an important one. A transaction is a hedge where the party to it genuinely has assets or liabilities exposed to market fluctuations, while speculation is "the degree to which a hedger engages in derivatives transactions with a notional value in excess of its actual risk exposure".

205. Accordingly, the learned senior counsel contended that, there must be a correlation in the quantities of shares exposed to market fluctuations and the quantity of the hedge transaction undertaken in the futures market. If the quantities in the futures market exceed the quantity of shares actually exposed to market fluctuations then the transaction would not be a genuine hedge. Reliance was also made on another decision of The Supreme Court of Montana in ***Whorley vs Patton-Kjose Co., Inc. 90 Mont.461*** in which it was held that "Country elevator hedging involves a purchase of grain and a sale of a future as simultaneously as possible, as insurance against the fluctuation of the market between the time of purchase and the arrival of the

grain in Minneapolis for sale, and, on arrival, an equally simultaneous executing of the reverse of these transactions. It is a hedge only in so far as the transactions are simultaneous and the amount of grain sold for future delivery offsets the grain purchased. If the operator, having sold his actual grain, fails to buy back his hedge in the future market, he is backing his individual judgment against the fluctuations of market prices and is speculating and no longer hedging."

206. Shri Khambata further submitted that unwinding of a hedge transaction has to be almost simultaneous with the sale of the shares in the cash segment. Further, the quantity of the hedge transaction unwound must be substantially the same as the quantity of shares sold in the cash segment. If the hedge transaction is not unwound simultaneously and to the same extent as the sale in the cash segment, then the transaction would cease to be hedge transaction.

207. Before dealing with the submissions and contentions of the parties on merits it would be appropriate to extract the relevant provisions of Section 12A of the SEBI Act as well as Regulations

3 and 4 of the PFUTP Regulations for convenience, which reads as follows: -

> ***"SEBI Act***
>
> ***Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.***
>
> *12A. No person shall directly or indirectly—*
>
> *(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;*
>
> *(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;*
>
> *(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;*
>
> ***"PFUTP Regulations, 2003***
>
> ***Prohibition of certain dealings in securities***
>
> ***3. No person shall directly or indirectly—***
>
> *(a) buy, sell or otherwise deal in securities in a fraudulent manner.*
>
> *(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in*

a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under;

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

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

4. Prohibition of manipulative, fraudulent and unfair trade practices

(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

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

(a) …….
(b) …….
(c) …….
(d) paying, offering or agreeing to pay or offer, directly or indirectly, to any person any money or money's worth for inducing such person for dealing in any security with the object of inflating, depressing, maintaining or causing fluctuation in the price of such security;
(e) any act or omission amounting to manipulation of the price of a security;

208. We have heard the extensive submissions and contentions made by the learned Senior Counsel representing the parties and perused the voluminous documents submitted before us. The central contention of the learned senior counsel for the appellant is that the issue in question is a simple, linear one of taking positions as a hedge in the derivative markets by someone who has an underlying exposure. Whether such a position limit is taken by one entity or with the help of multiple entities for the benefit of that one entity is immaterial or violative of the circulars issued by SEBI / NSE on November 2/7 2001 in this regard because those circulars do not prohibit position taken in 'aggregation' or by 'acting in concert'. This submission is too simplistic, patently erroneous and gravely mischievous. In fact, if such a submission is adopted/accepted it would lead to a complete decimation of the derivatives market as position limit in the derivative market is arguably the most important regulatory tool available to manage/mitigate the considerable extent of risks associated with derivatives products. The impugned order itself explains the sanctity of position limits in preserving the integrity of derivatives market and to minimize risk as under: -

"4.A.11 'Position limits' define the maximum position, either total or net long / short that may be held or controlled by one entity or one class of traders. The concept of "client level position limits" in equity derivatives markets stems from the prime objective of avoiding / limiting concentration of positions in a few hands and ensuring a wide dispersal of positions. Section 18A was introduced in the SCRA with effect from 22.2.2000 enabling the trading in derivative contracts subject to those contracts being traded on the stock exchanges in accordance with the rules and bye-laws of such stock exchanges. The SEBI and NSE circulars issued in this connection in the year 2001, empowered the stock exchanges to introduce position limits with respect to derivative futures to prevent market manipulation, distortion as well as excessive speculation. The SCRA and the circulars / exchange bye laws require the exchanges to put in place (more stringent) position limits to ensure that market does not become too concentrated and the diversity of the financial actors is maintained.

4.A.12 The imposition of position limits will naturally result in risk mitigation apart from bringing into play heterogeneity in views of market participants which will add an element of robustness to the price discovery process. This has also been echoed in many studies done in India prior to the introduction of derivative trading such as the LC Gupta Committee report and the Prof. J R Varma Committee report. Thus, in short, position limits are designed to deal with market integrity. Therefore, stock-wise, client-wise and broker/ member-wise position limits are recommended / prescribed by rules so as to reduce concentration risk. The position limit stipulation is one among the risk containment measures in the field of derivatives amongst others such as capital adequacy, stringent margin requirements, automatic disentitlement from trading when limits are crossed etc.

4.A.13 In para 12.2 of its reply, Noticee No.1 has submitted that " the position limits for derivative contracts prescribed by stock exchanges and by SEBI are

applicable to a customer/client and we believe that these limits apply to each customer / client individually and independently. In any event, the relevant circulars do not provide for aggregating the position limits". The noticees have also quoted the SEBI circular at para 12.4 of its written submission, as shown below:

> *"the gross open position across all derivatives contracts on a particular underlying of a customer / client should not exceed the higher of :*
>
> *(a) 1 % of the free float market capitalization (in terms of number of shares) or*
>
> *(b) 5 % of the open interest in the derivatives contract on a particular underlying stock (in terms of number of contracts)".*

By citing the said provision, it has been argued by the appellants that the thresholds prescribed are "with respect to a specific customer or client only". It has also been contented that SEBI has not provided for any concept of aggregation of holdings in this circular unlike in the Takeover Regulations (reference made to "persons acting in concert" etc.)"

4.A.14 In my view, the interpretation as advanced by Noticee No.1 holds good only if the words 'clients' or 'customers' would mean different clients or customers and not in a case where several clients or customers were acting on behalf of one common ultimate beneficiary. If the argument of Noticee No.1 is adopted, the stipulation of a client-wise limit in the relevant circular itself becomes irrelevant and redundant. Further, it would throw open the possibility of grave misuse by a person to multiply his position by enlisting agents to act on his behalf rather than to limit itself to the stipulated criteria laid down in law. Such a concentration of the position limits by one person deprives the other market players of the availability of the OI in a particular scrip. If a client corners position by

procuring position limits clandestinely from their trading members showing different names and identities, it is nothing but perpetration of a large scale fraud on the market including the trading members, the public shareholders in the scrip and the investors in general. The other arguments of the noticees relating to aggregation of holdings of a client not being provided in law, does not merit any consideration in view of the above observations.

4.A.15 The circulars authorizing exchanges to impose penalty for breaches committed with respect to client-wise position limits cannot be construed in such a way to impose a limitation upon the inherent powers of the regulator to check and curb the perpetration of fraudulent and manipulative practices in the securities market and to protect and preserve the market integrity. From the manner and the time frame in which the agency agreements were executed, it is obvious that these agreements were executed by Noticee No. 1 for the purpose of circumventing the regulatory framework laid down to govern the transactions in the F&O segment. The whole exercise of position limit violation has been perpetrated from the time the noticees 2-13 were identified and appointed as agents by Noticee No.1 for the sake of taking positions in F&O segment. Therefore, this appears to be a premeditated and pre planned exercise of Noticee No.1 as alleged in the SCN.

209. The aforesaid clarifications and analysis of the principles behind the regulatory provisions relating to position limits answer a number of other contentions of the appellant. It was contended that the 1999 Circular relating to position limits in index futures and options did not even put any client level position limits and provided for aggregation, which only

necessitated a disclosure. It is factually correct. However, the stipulations in the 1999 Circular was to be revisited after 6 months as it was issued when 'Index Futures' were just about to be introduced in Indian market. That is why when single stock futures were introduced later, the 2001 circulars (supra) came into operation with a well-defined client-level position limit. Further, in the 1999 circular the threshold of aggregate position limit which needed to be disclosed to the exchanges was 15% of the market-wide position limit, which is far less than the 62 % or 93% cornered by the appellants on 06 November and 29 November 2007 respectively. In any case when client-wise position limit was introduced and effected in 2001, the appellants are not entitled to even invoke the provisions relating to a circular of 1999 issued in respect of index products, which are quite different from single stock products, and that too for trading done in 2007, six years after the relevant circulars came into effect and when volumes in the derivatives segment had become very large.

210. By interpreting Section 18A of SCRA, the learned Senior Counsel for the appellants contended that since all their trades were in accordance with the conditions specified therein those

trades were legal and hence the finding in the impugned order that the trades were illegal is patently wrong. A reading of the said Section, 18A reproduced below, would make such an argument hollow.

> ***Contracts in derivative.***
>
> ***"18A.*** *Notwithstanding anything contained in any other law for the time being in force, contracts in derivative shall be legal and valid if such contracts are—*
>
> *(a) traded on a recognised stock exchange;*
> *(b) settled on the clearing house of the recognised stock exchange, or*
> *in accordance with the rules and bye-laws of such stock exchange.*
> *(c) between such parties and on such terms as the Central Government may, by notification in the Official Gazette, specify."*

211. Section 18A was introduced in SCRA to provide legality to derivatives contracts which had been otherwise considered *wagering contracts* which were illegal. Therefore, exchange trading and clearing house settlement were made necessary conditions for making derivatives contracts legal. Any person entering into dealing in the derivate segment of the stock exchange is under an obligation to follow the stipulations of the stock exchanges/clearing houses in this regard. While Section 18A made a class of contracts called derivatives contracts traded

in stock exchanges and settled in clearing houses legal vis a vis wagering contracts, the section does not make trades done in violation of SCRA and SEBI Act and Rules and Regulations thereunder and Rules and bylaws of the Exchange/Clearing houses legal just because those trades had been done through the exchange/clearing house eco system. The contention of the appellant is both spurious and devious, striking at the very root of Section 18A. Therefore, when the WTM has held that since the appellants' trades were vitiated because of its fraudulence and hence illegal, such a finding is far from being faulty.

212. Moreover, the contention of the appellants that position limit violation, by whatsoever means, is a question of only violating the stock exchange circulars and thereby providing only a penalty to the exchange is a disastrous argument for derivatives market in particular and for securities market in general. In fact, the ensuing disaster will not be restricted to the securities market because there are derivatives market in currencies and in commodities, in addition to that in securities. Just to give an example of the potential disaster; assuming that an entity with the help of a few other entities corner the market-wide open position and in the process control the futures

contracts in wheat. The consequences for the commodity market in India and consequently for agri-sector and for the entire economy will be disastrous. So will be case if an entity corners the position limits in the forex market, say in US Dollar-INR futures. Position limit violation envisaged under the exchange circulars is simple and straight forward : when a particular entity, identifiable to the exchange surveillance mechanism by their code number / name, exceeding its position limit that the exchange could immediately monitor the same and take appropriate regulatory step to rectify the same such as directing its winding down to the permissible level or by imposing a penalty etc. In the context of the present appeal, the 12 entities in picture were distinct entities and hence for the exchange surveillance mechanism there was no way to capture that these entities were indeed agents of any particular entity. In fact, when one of the entities (Appellant no.12 -Dharti Investment and Holding Private Ltd.) exceeded the maximum permissible position limit of 101 lakh shares on November 6, 2007 when its net short position became 104.79 lakh shares, a penalty was imposed by the NSE on it. Therefore, the contention of the appellant that when an entity exceeds the permissible position

limits only a penalty under the exchange rules is applicable has already been implemented in the case of one entity. This is not the case when a device, a scheme, a manipulative arrangement of a principal-agent model was innovated and implemented by the appellants at the back of the exchanges and other securities market participants at great cost to the latter and for the short-term gains of the appellants. Such a scheme, a device would squarely fall within the ambit of Section 12A of the SEBI Act, 1992 and under the many provisions in Regulation 3 and 4 of the PFUTP Regulations. Therefore, we have no doubt in our mind that the route taken by the appellant RIL with the help of other appellants/Noticees who perpetuated the scheme in cornering a substantive portion of the market-wide position limit in the range of 62% to 93% (depending on the dates) in the November RPL Futures contract is manipulation of market, unknown to the players therein. Such manipulation cannot be treated simply as a position limit violation, as has been argued before us. It is undoubtedly a pre-planned strategy of manipulation, with all actions done by a single entity, RIL, and hoisted upon an unsuspecting market, inducing other market participants to deal with a vitiated market.

213. Further, such a manipulative scheme, device used for cornering about 62/93 % (as on November 6/29) the market-wide position limit, cannot be camouflaged in the garb of 'hedging'. Every market participant having an underlying exposure is free to hedge its position if a hedging instrument (derivative contracts in the instance case) is available in the market. That does not mean that it would use a scheme or device and corner a substantial portion of the position limit thereby becoming a powerful tool to corner and squeeze the market. Such a scheme strikes at the very root of limits on position as a strategy for preserving derivatives market integrity. Any hedge has to be in tune with the underlying regulatory principles and such regulatory principles led to the creation of tools such as client level position limit, broker level position limit, market wide position limit etc. in promoting and preserving market integrity. Undermining these regulatory tools and the principles behind them is like playing with fire. In the case of large corporates which depend substantively on the securities market for their funds, undermining the regulatory principles governing the market is like cutting the branch on which they are perched. When it comes to dealing in the securities market, it is also

important to distinguish between different types / categories of participants such as promoters, speculators, hedgers, arbitragers and so on. There are also players like day traders, hedge funds, long terms investors etc. Here, hedging as a risk mitigating tool can only be used to a limited extent by promoter entities, as in the instant case the promoter's decision was to offload more than 5000 crore worth of shares in a few trading days. Further, they had an inventory of another 70% of the shares of RPL. The derivatives market position limits, even the market-wide position limit, do not have the depth to hedge such huge exposure. Not that all the listed securities are in the derivatives segment providing the exiting/diluting promoters or other investors in such shares any hedging option/tool. Therefore, the submission that a promoter entity trying to offload a large quantity of its equity holding of a subsidiary company in the cash segment can effectively hedge their exposure in one single contract (like the November future contracts) is a wild dream and efforts in achieving the same through devious, manipulative schemes would fall in a rare breed of serious PFUTP violations Further, the scheme was hoisted on the market in a fraudulent fashion and it continued as such. The underlying exposure limit

and the position limit crossed each other on November 15, 2007 and therefore even assuming its submission of hedge, as a hedger, appellant should have reduced their position limit more or less concomitantly, even if not on exact proportional basis, with their underlying exposure. However, the appellants decided to retain 7.97 crore shares as their net open position as "naked hedge" from November 16 till the expiry of the contract on November 29. The finding that this was done deliberately to reap the difference between the settlement price and the locked in price cannot be faulted. Therefore, we find no defect in the finding in the impugned order that the scheme hoisted by appellant no. 1 and other appellants together was a fraudulent and manipulative scheme as defined under the provisions of Section 12 of SEBI Act, 1992 and under Regulation 3 and 4 of the PFUTP Regulations. The ratio of the Apex Court Judgment in ***Rakhi Trading (supra),*** that once the factum of manipulation was proved no further proof was required that the investors were induced and consequential fraud is deemed to be established, squarely applies to the matter. Similarly, once fraud is established in terms of engaging an artificial device to defraud the market it becomes immaterial even whether positions limits

have been violated or not because through such a device (clearly a PFUTP Regulations) the appellant had already tried to manipulate the market whether succeeded or not.

214. Reliance placed by the appellants on the RBI Master Circular dated 05 July, 2016, is fallacious (apart from the fact that this circular came into effect 9 years after the violation in question) for the following reasons. Clause b(1) of the circular relates to the forward foreign exchange participants, clarifies that if a hedge becomes naked either in part or fully, "owing to contraction in price (due to price movement/impairment) of the market value of the overseas direct investment, the hedge may be allowed to continue until maturity if the customer so desires". Therefore, it is only on "contraction of value of the investment due to unforeseen events". In fact, operational guidelines following thereafter in the same circular clearly provides as under:

> "**Operational Guidelines, Terms and Conditions**
> General principles to be observed for forward foreign exchange contracts.
>
> a) The maturity of the hedge should not exceed the maturity of the underlying transaction. The currency of hedge and tenor, subject to the above restrictions, are left to the customer. Where the

> currency of hedge is different from the currency of the underlying exposure, the risk management policy of the corporate, approved by the Board of the Directors, should permit such type of hedging.
>
> b) Where the exact amount of the underlying transaction is not ascertainable, the contract may be booked on the basis of reasonable estimates. However, there should be periodical review of the estimates.
>
> c) Foreign currency loans/bonds will be eligible for hedge only after final approval is accorded by the Reserve Bank, where such approval is necessary or Loan Registration Number is allotted by the Reserve Bank."

Thus, the operational guidelines of RBI provide that the maturity of the hedge should not exceed the maturity of the underlying transactions. Further there should be correlation, may be approximate, between the position held in derivate and the intended transaction. Periodic review is also required in this regard. Only when due to unforeseen and unavoidable market conditions as detailed earlier in the master circular, if the hedge becomes naked the continuation of transaction in derivative is permitted.

215. In the present case, however, we have to find the intention of the appellant no. 1 in cornering the F&O market i.e. whether it was a hedge transaction with innocent breach simplicitor of the

SEBI circular providing for position limit or with an intention to manipulate the market. Appellant no 1 deliberately held on to far excessive open position in the F&O segment even after sale of substantive part of the underlying shares in cash market. Thus the so called hedge has not "become naked" due to "unavoidable circumstances" as described in the Reserve Bank of India Circular quoted above but was deliberately "made naked" by holding on to the position in F& O segment far in excess of the pending sale of shares in cash market.

216. Reliance placed by the Learned Senior Counsel for the Appellants on the judgment of this Tribunal in ***Price Waterhouse & Co. vs Securities and Exchange Board of India (2019) SCC Online SAT 165*** is distinguishable since the applicability of fraud to a matter concerned with trading in securities is not the same thing as to auditing entities who were not trading in securities and hence a higher degree of evidence about inducement and fraud was necessary in the case of an auditor as held by this tribunal as well as in the order of the High Court of Bombay in a related appeal filed by the Price Waterhouse & Co.

217. As regards the power and scope of this Appellate Tribunal to rectify/substitute or add reasons recorded by the original forum i.e. WTM of SEBI in the present case, reliance of the appellant in ***Mohinder Singh Gill (supra)*** and ***Sterlite (supra)*** has no merit. In the case of ***Mohinder Singh Gill (supra)*** the Hon'ble Supreme Court was hearing an appeal against the order passed in a writ petition by Punjab and Haryana High Court concerning a statutory order passed by the Election Commission of re-polling in an election. This statutory order was sought to be justified by supplementing additional reasons which were foreign to the original order. In the circumstances in Paragraph no. 8 the Supreme Court has observed –

> *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out".*

218. In the case of ***Sterlite (supra)*** the appellants were charged and found guilty by respondent SEBI in two transactions being manipulative. This Tribunal however did not find those two transactions to be manipulative. Respondent SEBI argued that

those two transactions were only illustrative and there were many more manipulative transactions. In this background this Tribunal referred the ratio of the case of ***Mohinder Singh Gill*** and at Paragraph no. 96 observed as under –

> *"96. Shri Dada had submitted that the two transactions are only illustrative and there are other instances as well to show manipulation by the appellant. I am afraid this is a new finding, not found in the order. In this connection I fully agree with Shri Sundaram that a statutory order issued by an authority cannot be supplemented by fresh reasons. This position is clear from the following observation made by the Hon'ble Supreme Court in Mohinder Singh Gill's case (supra):……"*

219. Thus, in Sterlite Respondent SEBI tried to bring new material not found in the SCN and consequently not found in the impugned order. This tribunal therefore rejected the same. In the case of ***Mohinder Sing Gill*** the Supreme Court was dealing with a Writ Petition where in a statutory order of the Election Commission of India directing re-polling was in question. Further additional reasons beyond record were argued in the writ petition. In the present appeal under Section 15T of SEBI Act this Tribunal exercises appellate jurisdiction as a final fact-finding tribunal, against a fact-finding order of the Respondent SEBI. These powers can be equated with the powers

of an appellate Court as provided by Order XLI of Code of Civil Procedure. The appellate Court in suitable case can even allow amendment to the pleadings, accept additional evidence and documents. The very purpose of appeal is to test the correctness and validity of the impugned order. If the trial Court ignores some material on record, the appellate court can take it into consideration and arrive at its own conclusion. The powers of the first appellate Court are co-extensive to the powers of the trial Court. More particularly the powers of the appellate court can be underlined by reproducing the provisions of Rule 33 of Order XLI of Code of Civil Procedure as under –

> *"33. Power of Court of Appeal— The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees……"*

220. This is also the mandate of the ratio of ***Clariant's*** case as explained in the case of ***National Securities Depository Ltd. vs. SEBI (2017) SCC Online 256*** by the Supreme Court (cited and

explained above in Paragraph No. 16 while dealing with the cases of interveners) that the power of this appellate tribunal are co-extensive with the powers of SEBI in quasi-judicial orders like the present impugned order. While exercising appellate powers this Tribunal is within its mandate to look into the impugned order in its entirety. When reasons are already supplied in the impugned order, merely a clerical mistake in not reproducing the provision i.e. 4(2)(d) of the SEBI PFUTP Regulations 2003 in the concluding paragraph would not amount to supplying any fresh reasons by this tribunal. The reading of the impugned order as a whole would show that the learned WTM had concluded that the appellants indulged in manipulative and fraudulent practices. As regards the 'mistake' of giving concession regarding one position limit we are of the view that once the learned WTM came to the conclusion that the act of the appellants in cornering the F&O segment and the attempt to depress the share price in cash segment during the last 10 minutes amounted to fraudulent activities, merely because a concession of one position limit was granted on some wrong notion would not lead us to jump to the conclusion that the WTM concluded that the transactions in question were not

fraudulent. It was merely a mistake. However, in an appeal by the party who has been granted the said concession, it is not expedient to increase the amount of disgorgement. Therefore, we do not deem it fit to interfere with the impugned Order.

221. Learned Senior Counsel for the Appellants has raised an issue of bias by the Respondent. In our view however, no bias is traceable in the impugned order. In fact, it was noted in the SCN, respondent SEBI had come with a case that appellant nos.2 to 12 were the green horns who came into existence solely for acting as agents for the appellant no.1 and were funded by persons associated with the appellant no.1 through two entities namely NMSEZ and MSEZ. However, as noted earlier learned WTM did not even touch the said aspect in the impugned order. Therefore, only because of an office note in which the lawyer for the respondent advised for seeking further information from the appellant, that too at the early stages of the proceedings, cannot be used to conclude that the exercise of the respondent SEBI was biased. The impugned order read as a whole would show that in the proceedings before the WTM, while all the facts were admitted, the issue remained only of interpretation of the facts.

In the circumstances, we do not find any substance in the submission of the appellant in this regard.

222. Similarly, the contention of the appellant that they entered the market in the last 10 minutes only to mobilize more funds as pre-decided, by selling at a reasonably high price in the cash segment, is devoid of any merit. It is an admitted position that the appellants did not sell any shares in the cash segment after November 23 till the last few minutes on November 29. It could have remained so even on November 29 and let the market to decide the settlement price but it woke up in the last 10 minutes to offload a massive amount of 2.24 crore shares worth about 480 crore rupees. Juxtaposing this amount with the 4000 crore they mobilized in 11 prior trading days will show that on average they raised less than 400 Crore on a full trading day but raised about 480 crores in the last 10 minutes on the expiry day of the November futures contract. Therefore, the finding that a frenetic effort was made by the appellant no 1 in pulling down the price in the cash segment by offloading massive number of shares as the second stage of manipulation cannot be faulted. Submission that appellant no1 was placing limit orders, not pulling down or impacting LTP, has no merit in the context that 12 out of 17

trades were placed below LTP and out of which 4 trades were placed at prices less by Rs. 7.25, 6.75, and 2.70 (twice). No rational investor, that too while selling crores of shares, would place sell order that much below the LTP in the absence of other intentions behind such action.

223. The vehemently argued stand of the learned Senior Counsel that appellant No 1, as a responsible promoter, was executing its trading with minimum market disruption falls flat the way the entire scheme was implemented: adoption of the principal- agent model for cornering position limits and the last 10 minutes trading in the cash segment. If the appellant was a responsible promoter, the appellant would have spread its sales, of the 5% equity of RPL they were planning to offload, across a much longer period. The decision to sell shares was admittedly taken on March 29, 2007. A well calibrated strategy of sale would have involved a reasonably long period during which they could have disposed off those shares in relatively smaller lots. At the same time, they could have also hedged those positions in the futures contract of multiple months (after all there were other than November contracts running concurrently) without violating any position limits or hoisting a manipulative scheme

for the same. We do not want to convey the message that we are tutoring the appellants on dealing in the market, when they are the experts and we do not have any experience for the same; but we are forced to explain in the face of the strong contentions that the appellant has been responsible promoters and were fully complying with all applicable laws and regulations. If they were responsible market players, they would not have concentrated 100% of their trading activities in both the cash and F&O segments in one month and instead spread it across multiple months.

224. Simulation exercises produced by the appellants before us is without any merit. Tables showing what could have been done if the appellants had sold shares on other select days or if they had squared off their open positions on other days instead of holding till the expiry day more money could have been earned etc. have no merit since such events did not actually happen. It is a known fact that large transactions themselves would move the market (supply and demand) and the market prices. Therefore, on the basis of assumptions we cannot predict market movements with certainty. In any event those actions would not have erased the first leg of manipulation; that of

taking a huge net short sell position of 9.92 crore shares of RPL by using a scheme of engaging 12 front entities masquerading as independent participants in the derivatives market. Similarly there is no merit in appellants' alternative contention and calculation of actual profits made on 29 November, at a small sum following a methodology they only invented. We find no error in the calculation of profits made by Appellant No 1, as given in the impugned Order.

225. It was also contended before us that Appellants' holding of the net short sale position in the November Futures segment increased from 62% to 93% because other investors squared off their position and therefore, relative share of the appellants increased. We agree; but the question of why did the appellants kept a short sell position of 7.97 Crore shares intact to be expired on 29 November when their 'hedging' requirement was only that for 4.45 Crore shares from 16th November? Such an act cannot escape the inevitable conclusion as held in the impugned order, that the appellants were involved in a manipulative, devious scheme. On an observation made by the WTM in the impugned order that appellant No 1 did not have a hedging policy/strategy in response to the appellant's submission on

hedging we are told that compulsory hedging policy was introduced only in 2016 and as such the WTM is even ignorant of facts. However, we note that the statement is not on a legal requirement, but a practical business sense for a big Company who tries to enter the market to sell huge stakes of a subsidiary and deciding to hedge ought to have a well-documented hedging strategy, irrespective of whether there is a mandating law or not.

226. In none of the arguments / submissions the appellant No 1 has clarified to us on why it was in a tearing hurry to do everything relating to sale of the 5% of their equity holding in one trading month i.e. November 2007, though according to it the decision to sell shares was taken long back in March 2007, and the sale could have been spread for several months, except stating that share price of RPL was overvalued in the findings by three analysts. It is an irony that outside analysts, who basically produce their reports for general investors, and not for promoters who are insiders, knew more than the insiders and the insiders placed their full bet on such analyst reports. Even ignoring this irony; the first analyst report came in September, 2007 and Appellant 1 could have started trading soon thereafter

itself because the board decision and authorization etc. were admittedly already there. Moreover, it is also important to note that prices did not fall as predicted by these analysts even after November 2007. Prices continued to be in the range of Rs. 225-250 during December, 2007 and till 21 January 2008, whereafter it came to the 200 level. Therefore, there was a window of at least four months available after the analysts reports, when reasonable price was ruling. Further, as per the Board decision of RIL dated 29 March, 2007 funds were needed to be raised only within 2 years. For the next 7 months appellant no. 1 did nothing as regards the disposal of shares of RPL. All of a sudden, they decided to act in a hurry in the month of November 2007, and only in November, lock, stock and barrel. They decided to sell the entire 22.5 crore shares (5%) and to take a short sell position, in the name of hedge, in the futures segment, all in November itself as if there was not even a December, 2007 for RPL. Even if it was assessed, based on outside analysts' reports, that there would be no spring, a long winter was still available. Therefore, the entire argument of the need to compress the disposal of 5% shares to the month of November 2007 alone and therefore the need for 'aggregation' of short sell position in the futures

segment, again only in November 2007 contract, is devoid of any merit and does not gel with any realistic explanation of the facts and applicable law. Therefore, finding in the impugned order that submissions of the appellants such as need for 'hedging' and 'needing funds now' etc. are afterthoughts cannot be faulted.

227. Contention of the appellant is that provisions of the SEBI Act could not have been invoked for at worst a violation of position limits, which are part of exchange byelaws and circulars. In the aforesaid paragraphs we have already held that cornering about 62% / 93% of the market-wide position limit by one entity through a manipulative scheme or device is not the same thing as exceeding the position limit by a client in a transparent manner, visible to the exchange/clearing corporation/house. Therefore, the finding in the impugned order that it is a rare case of violation of section 12A of the SEBI Act and Regulation 3 and 4 of the PFUTP Regulations is perfectly in order. Further, it is an established fact that SEBI administers the SCRA, 1956, SEBI Act, 1992, Depositories Act, 1996 and the delegated provisions of the Companies Act, 1956/2013. Therefore, if the nature of the violations specified in any

legislations spills over to the mandate under another legislation, SEBI is fully within its rights to invoke the provisions of both/all those legislations. In the instant matter, therefore, when it was held that the position limit violation had been achieved through a dubious, manipulative scheme or a device, such an act would squarely fall within the provisions of SEBI Act and PFUTP Regulations. We, therefore, find no error or mistake on the part of the WTM in invoking the relevant provisions of SCRA, SEBI Act and the PFUTP Regulations, 2003 and in passing the Order under section 11 and 11B of SEBI Act accordingly.

228. It was contended that disgorgement is a punishment/penalty, while powers granted to SEBI under Section 11B of SEBI Act are remedial in nature. Therefore, no order for disgorgement could have been passed as the same is a penalty imposed on the appellant no. 1. We do not agree with this contention at all. In the Securities Laws (Amendment) Act, 2014 effected from July 18, 2013, it is clearly stated that "power of disgorgement, an amount equivalent to the wrongful gain made or loss averted by such contravention" was always with SEBI. For facility we reproduce the text and footnote of the amended provision as follows:

Section 11 of SEBI Act:

32. " ***The amount disgorged, pursuant to a direction issued, under section 11B of this Act or section 12A of the Securities Contracts (Regulation) Act, 1956*** *or section 19 of the Depositories Act, 1996 , 33[or under a settlement made under section 15JB or section 23JA of the Securities Contracts (Regulation) Act, 1956 or section 19-IA of the Depositories Act, 1996,]* ***as the case may be, shall be credited to the Investor Protection and Education Fund established by the Board and such amount shall be utilised by the Board in accordance with the regulations made under this Act.]***

Footnote 32: Inserted by the Securities Laws (Amendment) Act, 2014 w.e.f. 18-07-2013.

42[Power to issue directions 43[and levy penalty]. 11B*. 44[(1)[Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,— (i) in the interest of investors, or orderly development of securities market; or (ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or (iii) to secure the proper management of any such intermediary or person, it may issue such directions,— (a) to any person or class of persons referred to in section 12, or associated with the securities market; or (b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market.]*

45[Explanation.—For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain

made or loss averted by such contravention.] (emphasis added)

45 Inserted by the Securities Laws (Amendment) Act, 2014, w.e.f. 18-07-2013.

229. As per the afore-quoted provisions of the SEBI Act, *disgorgement is an amount equivalent to the wrongful gain made or loss averted* and therefore it is an equitable remedy; not a penal action. Moreover, equity is further served when the disgorged amount is credited to the Investor Protection Fund of SEBI, for the benefit of the market participants, particularly small investors; not to the Consolidated Fund of India as in the case of fine/penalty. Therefore, both the contentions that disgorgement is a penalty and SEBI does not have the power to impose disgorgement under section 11B of SEBI Act are contrary to the expressly stated provisions of the SEBI Act and therefore have no merit and are rejected forthwith.

230. Further, fact that disgorgement of Rs. 447.27 crore (+interest) imposed on the appellant no. 1 is a sizable sum does not make that direction harsh both because (1) it is only a remedial action and (2) what is disgorged is only what has been gorged by contravention of the specified laws. Nothing has been

taken out of the appellant's own funds/assets in the process. Since it is only an equitable remedy there is no question of that being harsh or a penal action.

231. Given the aforesaid reasons, appeal lacks any merit and is hereby dismissed. No orders on costs. Appellant no. 1 is directed to make payment of the disgorged amount of Rs. 447.27 Crore along with simple interest calculated at the rate of 12% p.a. with effect from November 29, 2007 till the actual date of payment to SEBI within 60 days from the date of this Order.

232. Before parting we would also like to state that preparing and finalizing this Order took some time on account of the unexpected closure of the office of this Tribunal and other major disruptions on account of the Covid-19 pandemic, voluminous documents, including extensive written submissions, as well as differences of views within the three-member Bench.

Dr. C.K.G Nair
Member

Justice M. T Joshi
Judicial Member

05.11.2020

233. In view of the majority opinion, the appeal is dismissed with no order as to costs. Appellant no. 1 is directed to make payment of the disgorged amount of Rs. 447.27 Crore along with simple interest calculated at the rate of 12% p.a. with effect from November 29, 2007 till the actual date of payment to SEBI within 60 days from the date of this Order.

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234. This Order has been pronounced through video conference due to Covid-19 pandemic, since the matter had been reserved only a few weeks prior to the lockdown. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Presiding Officer on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

Justice Tarun Agarwala
Presiding Officer

TARUN AGARWAL

Digitally signed by TARUN AGARWAL
DN: c=IN, o=PUBLIC WORKS DEPARTMENT UTTAR PRADESH, postalCode=221505, st=Uttar Pradesh, 2.5.4.20=30fcf68685192bbc53e6ff1608a83fb3881de7ac2ab7954d509c85ed6e0f7c41, serialNumber=095f8b286bb0b1cd07ff676611f4f5e7999727d404aa38ca422f9d3529bdb8a3, cn=TARUN AGARWAL
Date: 2020.11.05 15:24:42 +05'30'

Dr. C.K.G Nair
Member

Justice M. T Joshi
Judicial Member

05.11.2020
dg & mb