

(2019) 09 ATPMLA CK 0001

In the Appellate Tribunal Under Prevention Of Money Laundering Act

Case No : MP-PMLA-3364, 3365, 3622, 3663, 3710/MUM/2017, 4694/
MUM/2018, FPA-PMLA-1736, 1738, 1739, 1860, 1862/MUM/2017

63 Moons Technologies Ltd.

APPELLANT

Vs

Deputy Director, Directorate Of Enforcement, Mumbai

RESPONDENT

Date of Decision : 17-09-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 1 Rule 8
Prevention Of Money Laundering Act, 2002 — Section 2(1)(u), 2(1)(y), 3, 5, 5(1), 8,
8(1), 8(2), 24, 44, 45, 50, 70, 71
Forward Contracts Regulation Act, 1952 — Section 2(c), 2(i), 27
Companies Act, 1956 — Section 209A, 388B, 388C, 396, 396(3), 397, 401, 403, 406,
408
Negotiable Instruments Act, 1881 — Section 141
Evidence Act, 1872 — Section 65(g)
Indian Penal Code, 1860 — Section 120B, 409, 465, 468, 471, 474, 477A
Maharashtra Project Affected Persons Rehabilitation Act, 1999 — Section 4, 5

Citation : (2019) 09 ATPMLA CK 0001

Hon'ble Judges : Manmohan Singh, J;G. C. Mishra, Acting Chairman

Bench : Division Bench

Advocate : Mukul Rohtagi, Dayan Krishnan, Tanvi Manchanda, Priyanka Vora,
Rajeev Awasthi

Final Decision : Partly Allowed

Judgement

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FPA-PMLA-1735-1736, 1860, 1738-1739 & 1862/MUM/2017"////////

1. By this order, we propose to decide all the above-mentioned appeals. The
appeal nos. 1738/2017, 1739/2017 and 1862/2017 filed by National Spot
Exchange of India Ltd. (for short"////////

â??NSELâ?) in the appellant has challenged the following Orders passed by the
Adjudicating Authority, confirming the Provisional Attachment Orders (for short
â??PAOsâ?)"////////

passed by Respondent no.1 â?" ED attaching the properties of the appellantâ?s parent company â??63 Moons Technologies Ltdâ?â?? (formally known as Financial Technologies,,,,,,,,,,,,,

India Ltd.) to the tune of Rs.1348.6 Crores:-,,,,,,,,,,,,,

(i) Order dated 09.03.2017 confirming PAO no. 17/16 dated 14.09.2016 in OC no. 645/16 (Appeal no. 1739/2017),,,,,,,,,,,,,,

(ii) Order dated 22.03.2017 confirming PAO no. 19/16 dated 30.09.2016 in OC no. 663/16 (Appeal no. 1738/2017),,,,,,,,,,,,,,

(iii) Order dated 14.07.2017 confirming PAO no. 1/17 dated 31.01.2017 in OC no. 697/17 (Appeal no. 1862/2017) (collectively â??Impugned ordersâ??),,,,,,,,,,,,,,

2. The second set of appeals bearing no. 1735/2017, 1736/2017 and 1860/2017 have been filed by â??â??63 Moons Technologies Ltd.â?â?? (for short â??63 MTLâ?). With regard",,,,,,,,,,,,,,

to the allegations of ED, the same will be tested at the time of trial under the schedule offence and PMLA. The charges are yet to be framed. In the meanwhile, â??63 MTLâ? and",,,,,,,,,,,,,,

Jignesh Shah & his family members are restrained not to sell, alienate or to create any third party rights in their assets till the final order is passed. Shri Jignesh Shah and his family",,,,,,,,,,,,,,

members who are shareholders of â??63 MTLâ? shall furnish Indemnity Bond for sum of Rs.1095,27,17,055/- along with an undertaking that if after the trial and final order, if it is",,,,,,,,,,,,,,

found that the attached amount is a proceed of crime, then they shall deposit the said amount with the respondent. The same be filed within one month. Subject to above two",,,,,,,,,,,,,,

conditions, the provisional attachment orders shall be treated as quashed with regard to â??63 MTLâ? by releasing all the movable properties i.e. DEMAT account i.e. investment in",,,,,,,,,,,,,,

bonds belonging to â??63 MTLâ?. The liberty is also granted to â??63 MTLâ? that, if after hearing, if two orders passed by CLB and EOW are vacated that â??63 MTLâ? can file",,,,,,,,,,,,,,

either to move the application for review petition before this Tribunal or may approach to the Special Court for vacation of modification of the interim direction issued by us.,,,,,,,,,,,,,,

3. Though, no properties of the NSEL are attached, however, on behalf of NSEL, it is stated that the impugned orders contain serious unsubstantiated findings against them and have",,,,,,,,,,,,,,

characterized the entire legitimate gross revenue of the appellants for the period of FY 2008-09 to FY 2013-14 as "proceeds of crime". These findings will cause grave prejudice,,,,,,,,,,,,,

to the appellant's trial in the PMLA case no. 4 of 2015 pending before the Special Judge, PMLA, Mumbai. Therefore, NSEL is aggrieved and has filed the present appeals no.",,,,,,,,,,,,,

1738/2017, 1739/2017 and 1862/2017.",,,,,,,,,,,,,

4. "63 MTL" (a technology service company) was incorporated in 1988. It is a public listed company with its shares listed on the BSE, NSE & ASE and has about 63,000",,,,,,,,,,,,,

shareholders. "63 MTL" founded and promoted 9 exchanges in commodities and securities market worldwide. Multi Commodities Exchange ("MCX") was one such,,,,,,,,,,,,,

exchange in which the Appellant held 26% stake at the relevant point of time,,,,,,,,,,,,,

5. MCX, an erstwhile subsidiary of the FTIL incorporates NSEL (Respondent No. 2) in the appeals filed by "63 MTL" for carrying on inter alia the business of running a spot",,,,,,,,,,,,,

trading platform for commodities,,,,,,,,,,,,,

6. In September, 2005, the entire shareholding of Respondent No.2 was transferred by MCX to the "63 MTL". This resulted in "63 MTL" becoming 99.99% shareholder",,,,,,,,,,,,,

(Respondent No.2). The National Agricultural Co-operative Marketing Federation of India holds 0.01%. NSEL applied for a license for establishment of e-marketing in the State of,,,,,,,,,,,,,

Gujarat under Sec. 31C (2) (B) of the Agricultural Produce Markets Act, 2007. The relevant authority under the Agricultural Produce Markets Act, 2007, directed that NSEL should",,,,,,,,,,,,,

neither be a subsidiary nor have as its shareholders, a commodity exchange recognized under FCRA. Accordingly, the shareholding of MCX [a recognized commodities exchange",,,,,,,,,,,,,

under the Forward Contract Regulation Act, 1952 (hereinafter referred as "FCRA") and its nominees were transferred to FTIL. It is the claim of NSEL that it was managed by",,,,,,,,,,,,,

a well-qualified and experienced MD & CEO and a group of senior officials having adequate experience in commodities markets. At the relevant time Mr. Anjani Sinha was,,,,,,,,,,,,,

NSEL's MD & CEO. It was alleged that NSEL functions from a separate office with a separate infrastructure and was not run as a division/department of NSEL but as an,,,,,,,,,,,,,

independent subsidiary,,,,,,,,,,,,,

7. Out of a Board comprising of 8 Directors, only 2 Directors (Mr. Jignesh Shah & Mr. Ramnathan Devrajan) were also Directors of the "63 MTL". Both these Directors were",,,,,,,,,,,,,

non-executive Directors of NSEL. It is submitted that in pursuant to the listing agreement, NSEL became a subsidiary of the "63 MTL" & in compliance with the Provisional",,,,,,,,,,,,,

Listing Agreement, two non-executive directors of FTIL were appointed to the Board of NSEL.",,,,,,,,,,,,,

8. "63 MTL" provided a platform for spot trading of commodities and by virtue of a Notification S.O. 906E dated 05.06.2007 issued by the Department of Consumer Affairs,,,,,,,,,,,,,

("DCA") and was also granted an exemption from the provisions of the Forward Contracts Regulation Act, 1952 ("FCRA") under Section 27 thereof for trading in forward",,,,,,,,,,,,,

contracts of one day's duration. It is submitted that the similar exemptions were also granted to NCDEX and NMCE for setting up "spot exchanges",,,,,,,,,,,,,,

9. NSEL commenced operations with effect 15.10.2008. Under NSEL's Bye Laws:,,,,,,,,,,,,,

All trades must be backed by the commodity traded in and the commodity was required to be first deposited`/delivered in the warehouse of the exchange.,,,,,,,,,,,,,,

NSEL was not liable for the failure of any defaulting party to deliver goods on maturity (Bye Law 7.9; 9.5; 10.7; 10.9; 10.11; 10.12 & 10.14),,,,,,,,,,,,,,

Modality followed for trading on NSEL's Exchange: Platform,,,,,,,,,,,,,

A "Member and Constituent Agreement" is entered into by and between the "Trading Clearing Members" of NSEL and "the Client" for purposes of authorizing the,,,,,,,,,,,,,

Trading Clearing Member "to trade in the contracts admitted for dealing" on the NSEL, on behalf of the Clients. It is stated that there was no privity of contract between NSEL",,,,,,,,,,,,,

and Trading Clients "who transacted through Brokers. It is stated on behalf of NSEL that as an exchange platform facilitated the sale and purchase of

commodities where trading,,,,,,,,,,,,,

members wishing to sell commodities (â??Commodity Sellersâ?), or trading clients wishing to purchase commodities (â??Trading Clientsâ?), could sell/purchase commodities on the",,,,,,,,,,,,,

Exchange through their broker (the â??Trading Member Brokerâ?). The transactions were required to be settled by payment and delivery within a fixed period.,,,,,,,,,,,,,,

10. The procedure for transacting as mentioned, is as under:-",,,,,,,,,,,,,

i) In the first leg of the transaction, a Trading Client (through its Trading Member Broker), would purchase specified commodity from a Commodity Seller, for which the Commodity",,,,,,,,,,,,,

Seller was required to deliver the requisite commodity and the Trading Client (through its Trading Member Broker), was required to make payment of the purchase price within 2 days",,,,,,,,,,,,,

of the contract date (the â??T+2 contractâ?). The Trading Client received a Delivery Allocation Report, which was based on a Warehouse Receipt issued by NSEL, representing the",,,,,,,,,,,,,

commodities deposited in the warehouse.,,,,,,,,,,,,,,

ii) In the second leg of the transaction, the Trading Client (through its Trading Member Broker), would sell back to the same Commodity Seller the same commodity which had been",,,,,,,,,,,,,

earlier purchased in the T+2 contract (by handing over the same Delivery Allocation Report), for which the Commodity Seller was required to pay the purchase price and the Trading",,,,,,,,,,,,,

Client was required to deliver the requisite commodity within 25 days of the contract date (the â??T+25 contractâ?).,,,,,,,,,,,,,

iii) As the contracts were paired, actual physical delivery of the specified commodity in the T+2 contract was not taken instead the parties traded on the basis of the Delivery",,,,,,,,,,,,,

Allocation Report issued by NSEL. The Delivery Allocation Report was surrendered in the T+25 contract in lieu of delivery of the sold commodity by the Trading Client (through its,,,,,,,,,,,,,

Trading Member Broker), to the original Commodity Seller.",,,,,,,,,,,,,

11. As per by law 7.9.2: No doubt, it was stipulated that â??â?|â?|.The Exchange however, shall not be responsible for the performance of such contracts. If any party to such",,,,,,,,,,,,,

contract defaults in respect of his financial obligations or fails to deliver goods on

maturity of the contract, the defaulting member shall be liable for appropriate disciplinary action by" ,,,,,,,,,

the relevant Authority and his contract will be closed outâ?¡..â?¿,,,,,,,,,

12. During the period June â? August, 2013, all 24 commodity sellers registered with NSEL defaulted on their pay-in obligations resulting in a settlement default of Rs.5600 Crores to" ,,,,,,,,,

approximately 13000 Trading Clients. Upon discovery of the alleged fraud, the Board of NSEL filed a criminal complaint in this regard." ,,,,,,,,,

13. Grant Thornton, a forensic Auditor was appointed by NSEL on 27.08.2013 pursuant to FMCâ?¿s directions, to:" ,,,,,,,,,

a. establish the books of accounts, trade pending settlement;" ,,,,,,,,,

b. quantify the outstanding settlement liabilities ;,,,,,,,,

c. quantify and verify the collateral available;,,,,,,,,

d. examine NSELs revised plan for settlement of transaction monetary liabilities.,,,,,,,,,

14. The former MD and CEO of NSEL, Anjani Sinha in an Affidavit on 11.09.2013, stated inter alia:" ,,,,,,,,,

a. accepted full liability for the defaults that took place on the exchange platform;,,,,,,,,

b. categorically stated that the Board of NSEL was not aware of the lapses and irregularities in the functioning of the exchange;,,,,,,,,

c. Anjani Sinha and his senior management team (which included Amit Mukherjee and Jai Bhahukandhi) alone were aware of the day-to-day workings of NSEL.,,,,,,,,,

15. It is stated on behalf of appellants that the Grant Thornton (appointed by NSEL pursuant to FMCâ?¿s direction) submitted its Report on 21.09.2013. In its Report, it has been stated" ,,,,,,,,,

the following:,,,,,,,,

(i) It has not â?¿independently verified or validatedâ?¿ any information provided to it.,,,,,,,,,

(ii) The Report â?¿did not constitute an auditâ?¿ and therefore â?¿cannot be relied upon to provide the same level of assurance as a statutory audit.â?¿,,,,,,,,,

(iii) Should additional information or documentation become available, which impacts upon conclusions reached in the Report, Grant Thornton reserves its right to amend its findings" ,,,,,,,,,

accordingly.,,,,,,,,,

16. Admittedly, the Report contains prima facie allegations of wrong-doing by some officers of NSEL, including the MD & CEO." ,,,,,,,,,

17. FIR No. 216/2013 filed by with the MRA Marg, Police Station, Mumbai u/s 409, 465, 468, 471,474, 477A r/w 120B of IPC against NSEL and â??63 MTLâ?? on 30.09.2013, its" ,,,,,,,,,

directors and key officials of 25 defaulters of Respondent No. 2 and others.,,,,,,,,,

18. Based on the FIR, both the Economic Offences Wing of the Mumbai Police (â?? EOWâ??) as well as the Enforcement Directorate initiated investigations under the provisions of" ,,,,,,,,,

the Maharashtra Protection of Interest of Depositors (in Financial Establishment) Act, 1999 and the Prevention of Money Laundering Act, 2002." ,,,,,,,,,

19. Enforcement Case Information Report (ECIR) No. 14/MZO/2013 was registered on 14.10.2013 against Respondent No.2, Directors and key officials of NSFL and 25 defaulters" ,,,,,,,,,

for investigation under PMLA Act.,,,,,,,,,

Appellant (â??63 MTLâ??) is neither mentioned as an accused, nor is there any allegation made qua it in the said ECIR. On 30.03.2015 a Prosecution Complaint was filed against" ,,,,,,,,,

NSEL and 67 others before the competent Special Court, PMLA. Subsequently on 27.07.2018, a supplementary Prosecution Complaint was filed against the Appellant before" ,,,,,,,,,

competent Special Court, PMLA." ,,,,,,,,,

20. Bombay City Civil on 27.11.2013 passed an Order in R.A. No. 5 of 2013 in C.R. 89/2013 (proceedings initiated under the MPID Act), rejecting bail to Nilesh Patel, Promoter/" ,,,,,,,,,

Director of N.K. Proteins, declared a Defaulter of NSEL. The Court observed that â??it prima facie appears that the only person responsible for the entire fiasco are these" ,,,,,,,,,

defaultersâ??. ,,,,,,,,,

21. Charge-sheet / Supplementary Charge-sheet filed by the EOW pursuant to the investigations carried out by it. It is stated on behalf of appellants that it is not established about the ,,,,,,,,,

ill-gotten money trail to the â??63 MTLâ?? in the charge-sheets, who is not even named as accused in any of the three charge-sheets. The details are given as under:-" ,,,,,,,,,

6.1.14: Chargesheet against Anjani Sinha, ex-MD & CEO, Amit Mukherjee and Jai Bahukhandi - ex-employees of NSEL, and 2 defaulters - NK Proteins and Lotus Refinery." ,,,,,,,,,

2.6.14: 2nd Supplementary Chargesheet against PD Agro.,,,,,,,,,

4.8.14: 3rd Supplementary Chargesheet against Jignesh Shah.,,,,,,,,,

22. Bombay HC granted bail to Jignesh Shah in Criminal Bail Application 1263/2014. In the Order, the BHC inter-alia, observed that" ,,,,,,,,,

â??though the case has been projected as a â??scam of Rs.5600 crores,â? it needs to be kept in mind that these amounts have not been received by NSELâ? !..The money invested" ,,,,,,,,,

has not come to NSEL, but has gone to the borrowers i.e. bogus sellers. It is the borrowers who have benefited by the transactions and the money of the â?? investorsâ? has gone to" ,,,,,,,,,

them.â?? ,,,,,,,,,

23. UOI preferred a Company Petition No.1 of 2015 invoking the provisions of Sections 388B, 388C, 397 and 398 r/w 401-403, 406 and 408 of the Companies Act, 1956 before the" ,,,,,,,,,

erstwhile Company Law Board (â??CLBâ??), inter alia seeking removal of the Board of Directors of â??63 MTLâ??" ,,,,,,,,,

24. The investigation was initiated by the relevant authority under the PMLA Act and pursuant thereto a Prosecution Complaint No. 04/2015 filed against NSEL and 67 others before ,,,,,,,,,

the Competent Special Court.,,,,,,,,,

25. The relevant details of investigation under PMLA are given as under:- ,,,,,,,,,

a) Investigations under the PMLA, 2002 in this matter were initiated by conducting enquiries with NSEL. Upon enquiries with NSEL, it was gathered that NSEL was incorporated in" ,,,,,,,,,

2005. The controlling shareholder of NSEL is M/s. Financial Technologies (India) Ltd. (FTIL) holding 99.99% of the shareholding of NSEL. The exchange offered an electronic ,,,,,,,,,

platform for compulsory delivery based spot contracts in various agricultural and non-agricultural commodities. The basic idea was to provide a place where farmers, traders," ,,,,,,,,,

corporate, processors, planters, manufacturers and importers can sell and buy their commodities at the best possible and competitive rates. NSEL undertook to provide services like" ,,,,,,,,,

quality certification, storage of goods and other customized value added service. NSEL allowed trades on various contracts with settlement cycle ranging from T+0 to T+36 days." ,,,,,,,,,

Contracts were settled by delivery and payment after trade date referred herein above as "T". There were some contracts of the same commodity wherein members enter into a ,,,,,,,,,

buy contract in T+1, T+2, T+3 and simultaneously enter into reverse contract in T+25 or T+34 or T+36. The Plant owners who needed funds against their stock inventory used to sell" ,,,,,,,,,

it on exchange platform on short duration contracts. Simultaneously, they bought same quantity of commodity under long duration contract on the same day, thereby ensuring that the" ,,,,,,,,,

stock remained with them by way of re-purchase. Simultaneously, the buyer of the short duration contract sold in long duration contract at a higher price thereby getting profit on its" ,,,,,,,,,

investment for a period of 30 - 35 days. Since, the purchase & sale of goods were done through transfer of warehouse receipts, investor did not have any botheration to take delivery" ,,,,,,,,,

of the commodity or worry about the quality/quantity of the commodities. The rate of return for the buyer member of T+2 contract was the difference between the contract value ,,,,,,,,,

which used to vary between 14 - 15% p.a. being the profit made after deducting the transaction costs. ,,,,,,,,,

b) The trades on NSEL platform were stopped on 31.07.2013 and the outstanding amount to be settled as on that day by the exchange was to the tune of Rs. 5600 Crores. These ,,,,,,,,,

funds included the NSEL charges of warehousing, financial charges, interests etc. The net funds outstanding on account of bogus trades effected on NSEL platform amounted to" ,,,,,,,,,

approx. Rs. 5600 Crores. ,,,,,,,,,

c) Investigation revealed that funds were diverted from the settlement and client accounts by the defaulters to their company/firm accounts from where they were channeled to scores ,,,,,,,,,

of other accounts including group company accounts, personal accounts, third party accounts, traders accounts, and accounts of fictitious companies/firms/persons. The funds were" ,,,,,,,,,

then laundered either by way of merging it in their regular business activities or placing it in movable and immovable properties/assets. ,,,,,,,,,

d) During the course of investigation, a Prosecution Complaint No. 04/2015 has been filed against NSEL & 67 others before the Competent Special Court, PMLA, Mumbai on",,,,,,,,,

30.03.2016. The Special Court has taken cognizance of the said complaint on 04.12.2015 and has issued summons against all the accused persons/entities.,,,,,,,,,

e) During the course of investigation, inquiries were made with Income Tax Department who had verified stock position with the various defaulters of NSEL. Ongoing through the",,,,,,,,,

report received from IT department, it was observed that no equivalent stock was found in any of the godowns of the defaulters. The godowns of the defaulters lacked the capacity to",,,,,,,,,

store the equivalent quantity of the goods. In many cases the godowns were locked and no stock verification was allowed. In some case, godowns could not be located at the given",,,,,,,,,

address. Similarly, audit conducted by SGS India Pvt. Ltd, the agency contracted by NSEL, also reported the inspection of the warehouses/stock as "aborted" (SGS was not",,,,,,,,,

permitted to audit the warehouse by the warehouse owner). This fact substantiates the charge of EOW, Mumbai Police vide their abovementioned FIR that the defaulting members",,,,,,,,,

were fabricating the warehousing receipts.,,,,,,,,,

f) During the investigation, Summons was issued to key management officials of NSEL and their statements were recorded under section 50 of the PMLA, 2002. The gist of their",,,,,,,,,

depositions is as under:-,,,,,,,,

(i) Shri Anjani Sinha, the former MD & CEO of NSEL, had vide his letter dated 09.2013 forwarded a copy of his affidavit dated 11.09.2013 regarding matters concerning NSEL. He",,,,,,,,,

had stated in his affidavit that he and his managing staff were solely responsible for the crisis at NSEL; that the defaulting members had in connivance with the employees of NSEL.,,,,,,,,,

siphoned off the funds received from NSEL; that such funds were diverted to acquire real estate, repay existing loans, plant expansion, etc. Accordingly, statement of Shri Anjani",,,,,,,,,

Sinha was recorded under the provisions of Section 50 of the Prevention of Money Laundering Act, 2002 on 16.10.2013, wherein, he admitted the contents of his affidavit dated",,,,,,,,,

11.09.2013 and stated that NSEL was a spot exchange organizing delivery based transactions between various buyers and sellers through electronic network spread in 17 states,,,,,,,,,,,,,

across the country; that it had appointed members, who executed transactions on behalf of their clients; that NSEL project was launched on 10th February, 2005, and later on, the",,,,,,,,,,,,,

company was incorporated in May 2005; that in June, 2007, it got exemption from Department of Consumer Affairs, 1952, for conducting trading in one day duration forward",,,,,,,,,,,,,

contracts. Thereafter, NSEL commenced membership drive in June, 2008, and in October, 2008, it started actual trading.",,,,,,,,,,,,,

(ii) On being asked to furnish the details of the clearing/settlement procedure and what were the company's guidelines to the brokers for dealing with the clients, he stated that all",,,,,,,,,,,,,

members were required to open designated bank accounts with one of the designated banks listed by the Exchange; that the members had to open two accounts - (1) Settlement,,,,,,,,,,,,,

account, & (2) Client account; that the clearing and settlement system generated bank files for debiting or crediting the settlement accounts of respective members and such files",,,,,,,,,,,,,

were sent to the bank electronically; that based on such instructions, the banks debited/credited respective members settlement accounts; that in the settlement account, members did",,,,,,,,,,,,,

not have cheque book facilities and so settlement account could be used only for (1) transfer or receipt of funds to/from NSEL settlement account; (2) transfer of funds to members's",,,,,,,,,,,,,

client account and receipt of funds from any account; that the operation of client account was totally in the hands of issue cheques to his clients from this account.,,,,,,,,,,,,,,

(iii) On being asked to explain function of business development section and warehousing section of NSEL, he stated that business development team was responsible for development",,,,,,,,,,,,,

of the market, introduction of new members, identifying new commodities, carrying out ground level due diligence of the parties and if found fit, to introduce them to the Exchange",,,,,,,,,,,,,

system; that identifying and approving warehouses, maintaining stock in the warehouses, keeping control and vigil on actual commodity inward and outward along with current stock",,,,,,,,,,,,,

level and to upload actual stock statement on the website. On being asked to explain the reasons for crisis in NSEL, Shri Anjani Sinha stated that the defaulting members were in",,,,,,,,,

collusion with the warehousing staff of NSEL; that they manipulated the stock and duped the entire exchange mechanism; that the members submitted false and fabricated stock offer,,,,,,,,

letters, submitted false sale bills without actually offering the physical stock in connivance with the NSEL warehousing team; that the offer letters submitted by the defaulting parties to",,,,,,,,,

the Exchange at the time of sale of stock were not backed by physical stock.,,,,,,,,,

(iv) In order to ascertain the veracity of the claim made by Shri Anjani Sinha in his statement with regard to manipulation of the stock by defaulting members, statement of Shri Bihari",,,,,,,,,

Lal, Assistant Manager, Warehousing Department of NSEL was recorded under Section 50 of PMLA, 2002, on 26.10.2013. He inter-alia explained the activities of warehousing",,,,,,,,,

department in detail and stated that the selling members used to send stock offer letters on daily basis by e-mail to NSEL stating that the total quantity of goods traded on that day had,,,,,,,,

been delivered to the designated warehouses.,,,,,,,,,

(v) Shri Jai Bahukhandi, Ex-Assistant Vice President of NSEL: During his statement recorded on 10.04.2014, he stated that he was responsible for all warehousing functions of",,,,,,,,,

NSEL; that he used to receive instructions directly from Shri Anjani Sinha, MD & CEO of NSEL. He admitted that he was aware about the non-existence of underlying stock and",,,,,,,,,

trading at NSEL without the corresponding stock.,,,,,,,,,

(vi) Statement of Shri Amit Mukherjee, Assistant Vice-President, Business Development Department of NSEL - During the investigation, statement of Mr. Amit Mukherjee, was",,,,,,,,,

recorded on 10.04.2014, he stated that his job was to develop business and find new members on exchange. He stated that he sometimes used to do liasioning work of behalf of the",,,,,,,,,

members of NSEL with IBMA and no knowledge about the quantity of stocks in godown. He submitted that he had not received any direct or indirect benefit from any Defaulters of,,,,,,,,

NSEL,,,,,,,,,,,,,

(vii) Statement of Mrs. Bohni Mukharjee, wife of Mr Amit Mukharjee_- During the investigation, statement of Smt. Bohni Mukharjee was recorded on 31.10.2013 and 27.11.2013,",,,,,,,,,,,,,

wherein, she inter alia stated that the immovable property situated at Flat No. 1202, Samarpan Royale, 12thFloor, village Magathane, off Western Express Highway, Borivali (East),",,,,,,,,,,,,,

Mumbai-400066, was jointly owned by her husband ShriAmit Mukherjee and herself; that the said property was purchased in their joint name in 2013 and payment for the said",,,,,,,,,,,,,

property was made by Mr. Jai Shankar Srivastav, Director in one of the defaulter member i.e. M/s. Mohan India Pvt. Ltd, M/s. Brinda Commodity & M/s. Tavishi Enterprises. As",,,,,,,,,,,,,

regards the Range Rover vehicle, she stated that though the same was purchased in her name, the payment for the said vehicle was made by Shri Jai Shankar Srivastav. On being",,,,,,,,,,,,,

asked to furnish the details of funds received from Mohan India Group and its Directors, she stated that she had no knowledge but Shri Amit Mukherjee had told her that Shri Jai",,,,,,,,,,,,,

Shankar Srivastav had paid for the flat situated at 1202 in Samarpan Royale and the Range Rover.,,,,,,,,,,,,,,

In view of the findings of the Income Tax Authorities and M/s. SGS and the depositions of Shri Anjani Sinha and Shri Bihari Lal and other key management official of NSEL in their,,,,,,,,,,,,,

respective statements and scrutiny of documents, it became evident that all the defaulter members were dealing on NSEL platform without having physical stock of their commodity",,,,,,,,,,,,,

or were having almost no quantity.,,,,,,,,,,,,,,

g) During the investigation, summonses were issued to Directors of NSEL and their statements were recorded under Section 50 of the PMLA, 2002. The gist of their depositions is as",,,,,,,,,,,,,

under:-,,,,,,,,,,,,,

(i) Shri_Jignesh Shah, Non-Executive vice chairman of NSEL",,,,,,,,,,,,,

During the investigation, statements of Shri Jignesh Shah were recorded on 15.04.2014, 12.07.2016, 13.04.2016, 14.07.2016, 15.07.2016, 17.07.2016; during which he inter-alia stated",,,,,,,,,,,,,

that he had founded Financial Technologies India Limited which used to deal in

exchange software business; that his shareholding in FTIL through his family holding company i.e. La-,,,,,,,,,,,,,

fin (27%) and individually 18%; that NSEL was a spot exchange organizing delivery based transactions between various sellers and buyers through electronic network spread across,,,,,,,,,,,,,

the country; that he was the non-executive Vice-Chairman of NSEL; that the Board of Directors used to interact only with the Managing Director of NSEL; that Shri Anjani Sinha,",,,,,,,,,,,,,

Managing Director of NSEL was given a free hand to run the company; that NSEL was a loss making company for four years; that when NSEL started earning income especially,,,,,,,,,,,,,

from 2010-11, the Board had not made any specific inquiries regarding its reasoning; that Shri Anjani Sinha, MD & CEO of NSEL, Shri Amit Mukherjee and their team was",,,,,,,,,,,,,

responsible for the growth of NSEL business; that the contracts of NSEL were launched by way of circulars; that the MD & CEO was the final authority to launch the contracts; that,,,,,,,,,,,,,

during the board meetings, the particulars of circulars launched since the last meeting were just informed to the board and the board used to ratify and approve the same; that NSEL",,,,,,,,,,,,,

used to submit quarterly financial statements to FTIL; that there was a very detailed warehouse selection and management policy at NSEL; that the said policy was violated by,,,,,,,,,,,,,

management of NSEL; that after launching of the contracts the same were informed to the Board for ratification; that FMC had declared him as not fit and proper to be on the board,,,,,,,,,,,,,

of commodity exchange as per their fit and proper guidelines and not to hold any shares of commodity exchange; that one of the NSEL employee & his friend Shri Kalpesh Shah,,,,,,,,,,,,,

received funds to the tune of Rs 1 Crores from one of the defaulter Mohan India and paid the same to La-Fin (one of the major shareholder of FTIL having share holding of approx 27,,,,,,,,,,,,,

%); that however he returned the said Rs 1 Crores to Kalpesh Shah immediately after media reports; that as of today Rs. 1 Crores still outstanding with Mr. Kalpesh Shah,,,,,,,,,,,,,

(ii) Shri Srikant Javalqekar. Non Executive Director of NSEL & IBMA (Indian Bullion Market Association, a subsidiary of NSEL)-",,,,,,,,,,,,,

During the statement recorded on 15.04.2014 and 05.07.2016, he submitted

that from some members maintaining some part of the stock, in most cases, the underlying goods/stock" ,,,,,,,,,

was not maintained by the defaulting members; that the same fact has come to light only after the investigations after August 2013; that NSEL Board were never in knowledge of the,,,,,,,,,

absence of stock as at all times, the NSEL management stated that the warehouses had adequate stocks. During the statement recorded on 05.07.2016, he submitted that IBMA is" ,,,,,,,,,

the step down subsidiary of NSEL and engaged in bullion trading; that initially the stake of NSEL in IBMA was 10% to 20% which was gradually increased to 61% later; that IBMA,,,,,,,,,

was trading cum clearing member of NSEL; that IBMA undertaken certain transactions with defaulter Members i.e. Louts Refineries Pvt Ltd, N. K Proteins Pvt Ltd, P. D Agro" ,,,,,,,,,

processors Pvt Ltd, White Water Foods Pvt Ltd, Shree Radhey Trading Pvt. Ltd, Vimladevi Agrotech; that there are no supporting documents available with IBMA except purchase" ,,,,,,,,,

invoices in respect of transactions with P. D oprocessors Pvt Ltd, White Water Foods Pvt Ltd, Shree Radhey Trading Pvt , Vimladevi Agrotech; that invoices to the tune of Rs. 20" ,,,,,,,,,

crores had been raised by IBMA on LOIL Group towards â?|â?|. Charges provided in 2012-13 that there is no details available with â?|. With regard to actual nature of services,,,,,,,,,

provided by IBMA to LOIL group; that IBMA had also received Rs 10 Crores from Mohan Infracon Pvt Ltd, a group company of one of the defaulter i.e. Mohan India group; that" ,,,,,,,,,

the said funds were not labeled as income from trade as there is no corresponding business transaction with the said company Mohan Infracon Pvt Ltd; that this amount later adjusted,,,,,,,,,

towards liability; that Anjani Sinha was holding independent charge of NSEL & IBMA; that however, he was answerable to Board of Director of FTIL whom he was submitting" ,,,,,,,,,

quarterly compliance reports,,,,,,,,,

(iii) Shri Mukesh P Shah, internal auditor of NSEL from 2009-10 to 2011-12 and the statutory auditor from 2007-08 to 2008-09 and 2012-13-" ,,,,,,,,,

During statement recorded on 20.10.2015, he stated that he had received detailed management representation letter which also confirmed to adherence of applicable laws by the" ,,,,,,,,,

company, that he had also relied on quarterly compliance report given to FTIL; that the entire management of NSEL actively connived and perpetuated the fraud; that data was made" ,,,,,,,,,

up and reports generated from the lower levels to the top management level, by which no discrepancy was noticed in the functioning of NSEL and its warehouses; that he did not" ,,,,,,,,,

include the visits of warehouse accredited by NSEL for conducting sample/random checking of stock as he was informed by the NSEL; that NSEL has an independent team which ,,,,,,,,,

carried out such work and the same need not be repeated by them. ,,,,,,,,,

h) During the course of investigation statement of various defaulters of NSEL were recorded under Section 50 of the PMLA, 2002. A gist of their statements is as under-" ,,,,,,,,,

(i) Shri Mohit Aqarwal Director of M/s Aastha Minmet (India) Pvt Ltd. and the main controlling person of Juggernaut Projects Ltd.- ,,,,,,,,,

During the statements recorded on 21.12.2013, 23.12.2013 & 06.02.2014, he submitted that initially their company used to deliver the goods to the NSEL godown; that thereafter, they" ,,,,,,,,,

made an arrangement with NSEL whereby they used to just send an email to NSEL declaring that the traded quantity of goods have been delivered; that there were no deliveries and ,,,,,,,,,

the trades with NSEL were just paper transactions; that contracts were launched without any physical stock of goods. ,,,,,,,,,

(ii) Shri Kailash Aggarwal, Director of M/s Ark Imports Pvt. Ltd.:-" ,,,,,,,,,

During his statement recorded on 13.02.2015, he admitted that his company had delivered the goods to NSEL warehouse initially, that the suggestion of Shr. Manish Pandey," ,,,,,,,,,

Executive of NSEL indicating that there would be no requirement of raw wool stock, no physical stock of raw wool was delivered to the warehouse and trade was carried out on the" ,,,,,,,,,

basis of warehouse receipts generated by them. ,,,,,,,,,

(iii) Shri Arun Sharma, Director of M/s. Lotus Refineries Pvt Ltd. -" ,,,,,,,,,

During his statement recorded on 27.05.2014 he stated that M/s Lotus Refineries Pvt Ltd became a member of NSEL and started trading on the NSEL exchange in March, 2012," ,,,,,,,,,

which continued upto March, 2013; that they used to trade in Cotton seeds, Soyabean, Palm Oil, Mustard Seeds and Mustard Oil; that they had provided

various premises and" ,,,,,,,,,,

warehouses adjacent to the plants of the company to NSEL; that as all goods traded by them on NSEL exchange were ultimately re-purchased by them, no deliveries were ever" ,,,,,,,,,,

effected, and no stock was transported to the NSEL warehouse; that their employees used to prepare and email the stock offer letter to NSEL, stating that equivalent stock has been" ,,,,,,,,,,

delivered to the NSEL warehouse; that funds received from NSEL were utilized in their business activities.,,,,,,,,,,

(iv) Shri Narayan Nageswara Rao, Managing Director of NCS Sugar Mills Ltd." ,,,,,,,,,,

- During his statements recorded on 14.05.2015 & 19.05.2015 , he deposed that M/s NCS Sugars Ltd had sold sugar through contracts launched on the NSEL platform without having" ,,,,,,,,,,

corresponding physical stock of the same; that the said sale transactions were only paper transactions; that the funds received from NSEL through such bogus sale transactions were,,,,,,,,,,,,,

diverted for the purpose business needs including purchase of raw materials, payment of bank loans & interest, capital expenditure required for the plant, payment of taxes, etc." ,,,,,,,,,,

(v) Shri Inder Singh. Director of M/s Namdhari Food International Pvt Ltd:,,,,,,,,,,,,,

- During his statement recorded on 20.01.2015, Shri Inder Singh claimed that they had delivered equivalent quantities of stock of paddy to the NSEL designated godowns at the time of" ,,,,,,,,,,

their T+2 transactions, however, when confronted with the income tax verification report that stock of only Rs. 2 Crores was found lying at the godowns, he claimed that NSEL" ,,,,,,,,,,

shifted the stock, though the godowns were effectively under their control. When confronted with the SGS Ltd stock taking report wherein they did not allow M/s SGS Ltd to verify" ,,,,,,,,,,

the stock. When asked to submits evidences regarding their delivery of stock by them, he could not provide any evidence to back his claim." ,,,,,,,,,,

(vi) Shri Jai Singh, the Managing Controller of M/s Namdhari Rice & General Mills:-" ,,,,,,,,,,

In his statement recorded on 04.03.2015, Shri Jai Singh claimed that they had delivered equivalent quantities of stock of paddy to the NSEL designated

godowns at the time of their" ,,,,,,,,,

T+2 transactions, however, when confronted with the income tax verification report that stock of only Rs. 0.75 Crores was found lying at the godowns, he claimed that NSEL shifted" ,,,,,,,,,

the stock, though the godowns were effectively under their control. When confronted with the SGS Ltd stock taking report wherein they did not allow M/s SGS Ltd to verify the stock," ,,,,,,,,,

he stated that the stock of paddy belonged to them and therefore they did not allow M/s SGS Ltd to verify the stock. When asked to submit evidences regarding their delivery of stock,,,,,,,,

at the NSEL designated godowns and the removal of stock by NSEL as claimed by them, he could not provide any evidence to back his claim." ,,,,,,,,,

(vii) Shri Ranjeev Aggarwal. Ex CFQ of P.P. Agrop-ocessors Pvt. Ltd. â?" ,,,,,,,,,

During his statement recorded on 02.01.2014,13.02.2014,14.02.2014, 19.02.2014 and 15.03.2014, he submitted that initially, they deposited the stock of paddy/rice with the NSEL" ,,,,,,,,,

warehouse; that in subsequent trades, no physical stock of paddy/ice was delivered to the warehouse and trade was carried out on the basis of warehouse receipts generated by them" ,,,,,,,,,

that as per the need of the finances required; that he used to instruct his subordinate staff to punch the trades and prepare documentation accordingly; that the paper transactions for,,,,,,,,

the contracts were launched declaring M/s Dulisons Foods (a Dunar group company) as the client of M/s P D Agro processors Pvt Ltd, selling the paddy in T+2 contracts and M/s" ,,,,,,,,,

Dulisons Cereals (another Dunar group company) also a client of M/s P D Agroprocessors Pvt Ltd, purchasing the said goods in corresponding T+25 contracts; that the next" ,,,,,,,,,

transaction would be vice-versa to square off the pay in-payouts of M/s Dulisons Foods and M/s Dunar Cereals; that as facilitation towards the services rendered, Shri Amit" ,,,,,,,,,

Mukherjee, ex-AVP of NSEL, asked him to arrange a foreign trip to Bangkok for him (Shri Amit Mukherjee), his wife (Smt. Bonhi Mukherjee), children, parents & some other" ,,,,,,,,,

relatives that he booked the trip to Bangkok in April, 2013, through a travel agent M/s Vishwas Travels Delhi, and paid an amount of approx. Rs. 7 Lakhs from the account of M/s" ,,,,,,,,,

Prime Zone Developers Pvt. Ltd. towards air tickets and hotel charges for the said trip of around 7-8 days.,,,,,,,,,

viii) Shri Ghanta Kamesware Rao, Director of Spincot Textiles Pvt. Ltd.- During his statement recorded on 11.07.2014 & 21.07.2014he submitted that no equivalent stocks were",,,,,,,,,

either maintained or delivered to the said NSEL designated godowns and trade was carried out on the basis 'of paper transactions declaring M/s Spincot Textiles Pvt Ltd as the seller.,,,,,,,,,

of the goods in T+ 2 contracts and M/s BSPN Exports Pvt Ltd as the purchaser of the said goods in corresponding T+25 contracts; that the funds received from NSEL were utilized.,,,,,,,,,

towards repayment of their earlier bank loans and towards purchase of raw materials and other business needs relating to their cotton plant.,,,,,,,,,

(ix) Shri Nilesh Patel, the Managing Director of M/s N K Proteins Ltd and the N K Group of Industries -" ,,,,,,,,,

During his statements recorded on 20.05.2014, 03.07.2014, 09.07.2014, 05.08.2014, 15.09.2014 and 16.02.2014, he interalia stated that no equivalent stocks were either maintained or" ,,,,,,,,,

delivered to the designated NSEL godown and trade was carried out on the basis of paper transactions; that as per the need of the finances required, Shri Anjani Sinha discussed the" ,,,,,,,,,

issues with their executive Shri Rajiv Todi and accordingly the trades were punched; that no physical stock of castor seeds/castor oil/washed cotton seed oil was delivered to the.,,,,,,,,,

warehouse and trade was carried out on the basis of warehouse receipts generated by them.,,,,,,,,,

(x) Shri Rajesh Mehta, Power of Attorney holder & Actual Controller of Swastik Overseas Corporation-" ,,,,,,,,,

- During his statements recorded on 13.01.2015, he disclosed that he was working as a Purchase Manager in M/s N K Industries; that that Shri Rajiv Todi, who was the plant" ,,,,,,,,,

manager of the Kadi Plant of M/s N. K Industries Ltd(one of the defaulter member of NSEL), suggested him that they could start their own business of commodity trading on NSEL" ,,,,,,,,,

exchange and make secure funds; that they did not had any plant or factory; that they started trading on NSEL exchange in November, 2011; that the trading undertaken by them on" ,,,,,,,,,

NSEL exchange had nothing to do with the stock in the warehouses; that no equivalent stocks were either maintained or delivered to the said NSEL designated godown; that the,,,,,,,,,,,,,

paper transactions for the trades that is the contracts were launched declaring one of their clients of M/s Swastik Overseas Corporation as the seller of the goods in T+3 contracts and,,,,,,,,,,,,,

another client as the contracts were launched declaring one of their clients of M/s Swastik Overseas Corporation as the seller of the goods in T+3 contracts and another client as the,,,,,,,,,,,,,

purchaser of the said goods in corresponding T+36 contracts; that the funds received from NSEL were utilized towards providing loans and advances to business entities, investment",,,,,,,,,,,,,

in agricultural cultivation, purchase of property at Karnal, etc.",,,,,,,,,,,,,

(xi) Shri Kamal Kant Dewan. Director of White Water Foods Pvt Ltd. â?",,,,,,,,,,,,,

During his statement recorded on 06.06.2014, Shri Kamal Kant Dewan submitted that M/s White Water Foods Pvt Ltd became NSEL member and started trading on the NSEL",,,,,,,,,,,,,

exchange; that no equivalent stocks were either maintained or delivered to the designated NSEL godown and trade was carried out on the basis of paper transactions declaring one of,,,,,,,,,,,,,

their clients as the seller of the goods in T+ 2 contracts and another as the purchaser of the said goods in corresponding T+25 contracts; that the funds received from NSEL were,,,,,,,,,,,,,

utilized towards their business needs including purchase of raw materials, payment of bank loans & interest, capital expenditure, payment of taxes, etc.",,,,,,,,,,,,,

(xii) Shri Gaqan Suri, Director of Yathuri Associates- During his statement recorded on 04.03.2014 and 08.03.2014, he disclosed that his firm was controlled by his brother in law, Shri",,,,,,,,,,,,,

Onkar Anand; that he used to get around Rs. 1 lakh to Rs. 1.50 lakh per month from Shri Onkar Anand.,,,,,,,,,,,,,,

(xiii) Shri Onkar Anand. Director of Rahul Sales and Narainqarh Sugar Mills - During his statement recorded on 12.03.2014, he submitted that he was approached by an acquaintance",,,,,,,,,,,,,

Shri Sanjeev Bhasin, who informed him that funds from NSEL were available for a 5 year period, if a company becomes member of NSEL, a commodity trading exchange; that Shri",,,,,,,,,,,,,

Sanjiv Bhasin claimed that he can manage around Rs. 1000 crores from NSEL for a period of 5 years on an interest @ 15% to 15.5%; that as they were always in requirement of,,,,,,,,,,,,,

funding, the proposal seemed to be very lucrative and they accepted it; that after his approval, Shri Sanjeev Bhasin alongwith Shri Manish Pandey of NSEL managed the",,,,,,,,,,,,,,

documentation for becoming NSEL member; that his brother in law Shri Gagan Suri was without much work, and used to request him for work; that he therefore asked Shri Gagan",,,,,,,,,,,,,,

Suri to form a company which would become NSEL member; that the funds were utilized towards loan repayments, plant expansion and other business needs of the group; that the",,,,,,,,,,,,,,

transactions entered for the sale / purchase of sugar on the NSEL exchange were paper transactions to generate funds without any physical movement of goods.,,,,,,,,,,,,,,

(xiv) Shri Jag Mohan Garg of M/s Mohan India Pvt. Ltd. M/s Tavishi Enterprises Pvt. Ltd. and M/s Brinda Commodity Pvt. Ltd.- During the statement recorded on 31.10.2013 and,,,,,,,,,,,,,

01.11.2013 he admitted that there was no physical stock of sugar against the trades effected by M/s Mohan India Pvt. Ltd, M/s Tavishi Enterprises Pvt. Ltd. and M/s Brinda",,,,,,,,,,,,,,

Commodity Pvt. Ltd. through the NSEL platform; that he was under the impression that physical stock of commodities was not required for trades effected on NSEL platform.,,,,,,,,,,,,,,

(xv) Shri Jaishankar Shrivastav, other director of Mohan",,,,,,,,,,,,,,

India Pvt. Ltd.- In his statement recorded on 01.11.2013, he has confirmed the depositions of Sh. Jagmohan Garg and admitted that no stocks of sugar were maintained by them or",,,,,,,,,,,,,,

delivered to NSEL designated godowns against the NSEL trades execute by them.,,,,,,,,,,,,,,

26. It is the case of 63 MTL that 63 MTL that the entire flow of money has been reflected to have gone to the defaulters.,,,,,,,,,,,,,,

27. On 30.06.2015, CLB granted ad-interim reliefs to the UOI, directing the 63 MTL not to sell / alienate / create third party rights in its assets and investments till further order.",,,,,,,,,,,,,,

28. In the meanwhile, on 4.12.2015, cognizance is taken by the Special Court based on Complaint No. 4/2015.",,,,,,,,,,,,,,

29. On 18.04.2016, the Honâ??ble Supreme Court in Civil Appeal No.4391-4392 of 2016 confirmed CLBâ??s order dated 30.06.2015." ,,,,,,,,,

30. The National Company Law Tribunal (hereinafter referred to as NCLT), on 24.06.2016, which took over from CLB while modifying the order dated 30.06.15, constituted a" ,,,,,,,,,

committee (â??NCLT Committeeâ??) to, inter-alia, monitor and approve the treasury operations of the Appellant. The NCLT Committee comprises of : " ,,,,,,,,,

(i) Two Independent Directors of the Appellant; ,,,,,,,,,

(ii) Managing Director of the Appellant; ,,,,,,,,,

(iii) Retired Judge of the Honâ??ble Supreme Court and ,,,,,,,,,

(iv) A nominee of the Union of India inter-alia to monitor and approve treasury operations of the Appellant. ,,,,,,,,,

The Retired Judge of the Honâ??ble Supreme Court and nominee of the Union of India have individual veto powers in the NCLT Committee. By order dated June, 2018, NCLT" ,,,,,,,,,

disposed of the C.P. No. 1 of 2015. The said order has been challenged by â??63 MTLâ? as well as UOI and the same is pending adjudication before the NCLAT. Vide order dated ,,,,,,,,,

27.06.2018, NCLAT has stayed the order dated 04.06.2018 and continued the aforesaid interim arrangement." ,,,,,,,,,

31. EOW on 18.07.2016 directed the Appellant not to dispose of, alienate, encumber, part with possession of or create any third party right, title and/or interest in, to, upon or in respect" ,,,,,,,,,

of any assets of the Appellant. ,,,,,,,,,

32. Special Judge, PMLA in PMLA Spl. Case No. 4/2015 granted bail to chairman and MD of the Appellant on 6.8.2016." ,,,,,,,,,

33. On 9.8.2016, on the basis of certain newspaper reports suggesting the likelihood of ED attaching the assets of the â??63 MTLâ?, a letter was addressed by the appellant to ED" ,,,,,,,,,

requesting not to take any adverse action. ,,,,,,,,,

34. A letter dated 12.08.2016 was addressed by â??63 MTLâ?? to ED based on the aforesaid newspaper reports. In this letter particulars of total outflow from Appellant to NSEL and ,,,,,,,,,

inflow from NSEL to Appellant were given, thereby demonstrating a net negative outflow/payment of Rs.248.43 Crores from â??63 MTLâ? to NSEL. Apart from

that the ED was" ,,,,,,,,,,

also apprised of the various restraining orders operating against 63 moons preventing it from alienating its assets in any event and thereby requesting ED not to take any adverse ,,,,,,,,,

action. ,,,,,,,,,

35. Respondent No.1/ED on 22.8.2016 directed the representative of â??63 MTLâ?? that â??63 MTLâ?? should furnish details of the payments regarding Rs.84 Crores deposited ,,,,,,,,,

by the â??63 MTLâ?? with the Bombay High Court in WP No. 2187 of 2015. The said detail was immediately supplied by the Appellant vide email dated 23.08.16. ,,,,,,,,,

36. On 9th September, 2016, the agenda for the meeting of NCLT Committee scheduled for 15.09.2016 was circulated. One of the agendas for the proposed meeting was to permit" ,,,,,,,,,

the â??63 MTLâ?? for conducting treasury operations. ,,,,,,,,,

37. â??63 MTLâ?? received an email dated 9.9.2016 from the Enforcement Officer through representative of â??63 MTLâ?? . The Enforcement officer, vide the said email, directed" ,,,,,,,,,

the â??63 MTLâ?? to provide the details of investments mentioning the date of investment value and present investment value urgently preferably by the same evening. However, no-" ,,,,,,,,,

details were mentioned as to for what purpose the information was sought by the Enforcement Officer. ,,,,,,,,,

38. On 9.9.2016, Enforcement Officer sent another e-mail at about 3.31 pm, requesting the â??63 MTLâ?? through representative of Respondent No.2, to provide all bank accounts of" ,,,,,,,,,

the Appellant and IBMA urgently by the same evening. ,,,,,,,,,

39. â??63 MTLâ?? vide its Solicitors letter dated 13.09.16 requested the Respondent No.1 not to take any coercive action against the â??63 MTLâ?? and to grant an opportunity for ,,,,,,,,,

personal hearing to the Appellant prior to any such proposed action. ,,,,,,,,,

40. â??63 MTLâ?? on 14.09.2016 filed a Criminal Writ Petition No. 3218 of 2016 against ED as a preemptive measure in anticipation of an attachment order, inter-alia seeking a writ" ,,,,,,,,,

of Mandamus directing the Respondent No.1, to offer a pre-decisional hearing before taking any action of attachment of the property. The intimation regarding filing of the writ was" ,,,,,,,,,

served upon ED on the same day and the ED was well aware about the filing about the said Writ Petition.,,,,,,,,,

41. NCLT Committee in its meeting approved the treasury operations of the 63 MTL. The said approval also included the liquidation of some of the investments which were.,,,,,,,,,

part of the Provisional Attachment Order No.17/2016 and reinvestment of the same in other instruments is obtained.,,,,,,,,,

Pursuant to the approval given by the NCLT Committee, 63 MTL issued instructions on 15/16.9.2016 to various Financial Institutions for the liquidation of some of the",,,,,,,,,

investments and reinvestment of the same in other instruments.,,,,,,,,,

42. In the meanwhile, Provisional Attachment Order bearing PAO No.17 of 2016 dated 14.09.2016, was served on the Appellant on 20.09.2016.",,,,,,,,,

43. It is stated on behalf of 63 MTL that in 63 MTL the absence of any communication from the Complainant or the knowledge of the issuance of the 1stPAO, which",,,,,,,,,

admittedly was dispatched by the Complainant only on 16.09.2016 by post at 18:51 Hrs, 63 MTL in keeping with practice of prudential financial management of the liquid assets,",,,,,,,,,

had liquidated some of the investments which were part of the PAO and had reinvested the same in other instruments (viz Bonds) after obtaining the due approval of the NCLT.,,,,,,,,,

Committee.,,,,,,,,,

44. The facts of liquidation of the assets after obtaining the prior approval of the NCLT Committee was brought to the notice of the Respondent No.1 by way of a letter dated.,,,,,,,,,

27.09.2016. Appellant gave full particulars of reinvestments made and even undertook not to deal with Rs.306.71 Crores (the value of the attachment made under the 1st PAO).,,,,,,,,

45. On 30.09.2016, another second PAO No.19 of 2016 was issued by the Respondent No.1 attaching the investment in bonds belonging to the 63 MTL having a face value of",,,,,,,,,

Rs.1065 and the balance of Rs.30,27,17,055/- in HDFC bank account 00600340030108. It is pertinent to mention that PAO No.17 and PAO No.19 are both issued based largely on",,,,,,,,,

the same set of facts, directed against the Appellant and founded on the same premise for attachment.",,,,,,,,,

46. Pursuant to 1st PAO, Complaint being O.C. No.645/16 was filed before the Adjudicating Authority, PMLA. In OC No.645/16, SCN u/s 8 was issued and the same was served" ,,,,,,,,,

upon the Appellant on 20.10.16 without RUD. OC No.645/16 along with RUD was served upon the Appellant on 16.11.2016.,,,,,,,,,

47. â??63 MTLâ?? on 9.12.2016 filed its reply to SCN in OC 645/16, who also filed two Misc. Applications seeking copy of RUD and for Cross-Examination of certain persons." ,,,,,,,,,

48. Pursuant to 2nd PAO 19/2016 on 9.11.2016, Complaint being O.C. No.663/16 was filed before the Adjudicating Authority, PMLA, New Delhi." ,,,,,,,,,

49. Show Cause Notice under Section 8(1) of PMLA was issued in OC no.663/16 on 9.11.2016. While the SCN received on 09.11.2016 distinctly stated that â?? copy of the,,,,,,,,

complaint and annexure/relied upon documents thereto are enclosed herewithâ??, as a matter of fact, no such" ,,,,,,,,,

complaint, annexures or relied upon documents were received along with the SCN as per the â??63 MTLâ?? who also stated that as a further anomaly, the SCN in the Post Script No." ,,,,,,,,,

03 mentioned that the â??Notice along with Relied upon documents (RUD) shall be served by the complainant directly to all defendants as per law. Only Advance notice has been,,,,,,,,

sent to defendants.â? and the Complaint along with some statements and relied upon documents came to be served upon them only on 08.12.2016, that is, just two weeks before the" ,,,,,,,,,

23.12.2016 when they were required to appear before the Adjudicating Authority. Accordingly, they sought extension of time for filing its reply to the Complaint before the" ,,,,,,,,,

Adjudicating Authority.,,,,,,,,,

50. Complaint along with the relied upon documents finally came to be served upon the â??63 MTLâ? on 8.12.2016. They filed its reply to the Show Cause Notice dated 09.11.16 in,,,,,,,,

O.C. No.663/16 and they also filed two Miscellaneous Applications seeking copy of the Relied Upon Documents and also for Cross-Examination of certain persons.,,,,,,,,,

51. Adjudicating Authority allowed 1st OC No. 645/16, confirming 1st PAO i.e. PAO 17/16 on 9.3.2017." ,,,,,,,,,

52. Adjudicating Authority allowed 2nd OC No. 663/16, confirming 2nd PAO i.e. PAO 19/16 on 22.3.2017." ,,,,,,,,,

53. PAO No.1 of 2017 was issued by the Respondent No.1 on 30.01.2017 attaching the investment in bonds belonging to the â??63 MTLâ? having a face value of Rs.135. PAO ,,,,,,,,,

1/17, PAO17/16 and PAO19/16 are issued based largely on the same set of facts, as stated on behalf of â??63 MTLâ? against them and founded on the same premise for" ,,,,,,,,,

attachment. ,,,,,,,,,

54. Pursuant to 3rd PAO, Complaint being O.C. No. 697/17 was filed before the Adjudicating Authority on 28.02.2017. SCN u/s 8(1) of PMLA was issued by the Adjudicating" ,,,,,,,,,

Authority, PMLA in 3rd OC on 6.3.2017. 3rd OC along with RUD served upon the â??63 MTLâ?? on 29.03.2017 who filed its reply to 3rd OC i.e. OC 697/17 on 18.4.2017." ,,,,,,,,,

55. â??63 MTLâ? preferred application in 3rd OC on 19.4.2017 thereby seeking release of investments amounting to Rs.94.52 Crores attached vide 3rd PAO and which are in ,,,,,,,,,

excess of the amount of proceeds of crime alleged to have been received by the Appellant - â??63 MTLâ??. ,,,,,,,,,

56. In Appeals being Appeal Nos.1735/17 and 1736/17 against order dated 09.03.2017 and 22.03.2017 respectively preferred by them on 9.5.2017. This Tribunal while issuing notice ,,,,,,,,,

directed parties to maintain status quo with respect to the attached parties. ,,,,,,,,,

They preferred I.A. No.3622 of 2017 in Appeal No.1735 of 2017 thereby seeking conversion of Rs.30.27 Crores lying in HDFC Bank account of Appellant to a fixed deposit. ,,,,,,,,,

57. Adjudicating Authority allowed 3rd OC i.e. No. 697/17, confirming 3rd PAO i.e. PAO 1/17 on 14.7.2017." ,,,,,,,,,

58. This Tribunal after hearing parties in Appeal No.1860/17 (challenging order dated 14.07.2017 passed by Adjudicating Authority in 3rd OC) while issued notice directed parties to ,,,,,,,,,

maintain status quo with respect to the attached properties. ,,,,,,,,,

59. â??63 MTLâ? preferred application being I.A. No.3710 of 2017 on 17.08.2017 in Appeal No.1860/17 seeking direction for release of assets attached by the Respondent No.1 in ,,,,,,,,,

excess of the proceeds of crime.,,,,,,,,,

60. This Tribunal while issuing notice on 18.08.2017 in the said application continued the interim order dated 01.08.2017. They also filed application being I.A. No.4694 of 2018 on,,,,,,,,

27.07.2018 seeking release of properties attached vide PAO No. 17/2016 (dated 14.9.16); PAO No.19/2016 (dated 30.0.16) and PAO No.1/2017 (dated 31.1.17) since the said,,,,,,,,

attachment under Section 5(1) of PMLA has expired /lapsed.,,,,,,,,,

61. These are the facts mentioned above, now we have to decide as to whether three orders passed by the Adjudicating Authority are sustainable or not in the light of these facts." ,,,,,,,,,

62. Firstly, we will refer the case put up by NSEL before many authorities and before us in their ground of appeals and their written submission." ,,,,,,,,,

Case of NSEL who is referred as respondent.,,,,,,,,,

a) The FMC Order was passed way back in December 2013 when investigations in the payment defaults at NSEL's exchange platform were at nascent stage. Thereafter, criminal" ,,,,,,,,,

investigations by the EOW-Mumbai culminating in filing of 3 (three) chargesheets dated 06.01.2014, 02.06.2014 and 04.08.2014, and the investigation by R-1 culminating in the" ,,,,,,,,,

Complaint No. 4 of 2015, have revealed the true and different picture that the entire fraud was perpetrated by the 24 defaulters who abused the trading platform provided by the" ,,,,,,,,,

Appellant by colluding with few employees of the Appellant. All this material and findings of investigation were placed on record by the Appellant in its reply before the Adjudicating,,,,,,,,

Authority. However, the Adjudicating Authority failed to consider the same and went on to record adverse findings against the Appellant majorly based on the FMC Order. It is stated" ,,,,,,,,,

that FMC Order was passed in a completely different context, under a completely different legal regime of the Forward Contracts (Regulation) Act, 1952 (FCRA) and with a" ,,,,,,,,,

completely different purpose. The findings therein could not have been used by the Adjudicating Authority on face value without any independent application of mind of its own to the,,,,,,,,

material produced on record by the Appellant along with its reply.,,,,,,,,,

b) The entire gross total income of NSEL for the period of FY 2008-09 to FY

2013-14 has been sweepingly characterised by R-1 as the alleged "proceeds of crime" without,,,,,,,,,,,,,

going at all into the source, nature and legitimacy of the income of NSEL for each financial year under each income-head during the period of FY 2008-09 to FY 2013-14. The",,,,,,,,,,,,,

Adjudicating Authority failed to consider and deal with the material produced by the Appellant on record as part of its reply clearly demonstrating the source and nature of its income,",,,,,,,,,,,,,

all of which clearly show (as detailed hereinafter) that no proceeds of crime whatsoever have been received by the Appellant. The Adjudicating Authority failed to appreciate that,,,,,,,,,,,,,

NSEL was engaged in multiple businesses, being: (a) Exchange Business; (b) Procurement Business; (c) Trading Business; (d) In addition to the above major revenue streams, NSEL",,,,,,,,,,,,,

also had some collateral management income as well as non-operating revenues such as interest and dividend from investments. Vide letter dated 23.08.2016, NSEL had submitted",,,,,,,,,,,,,

details of its gross income from all of its businesses from FY 2008-09 to FY 2013-14 to the Complainant ED. In Annexure B of the said letter dated 23.08.2016 of NSEL to ED,",,,,,,,,,,,,,

NSEL had provided a break-up of its income under various heads to ED,,,,,,,,,,,,,

c) The Adjudicating Authority failed to appreciate that out of the gross total income of NSEL for the period of FY 2008-09 to FY 2013-14, being Rs. 1111.96 Crores, gross income of",,,,,,,,,,,,,

only Rs. 375.31 Crores pertains to the Exchange Business of NSEL, while the balance gross income of Rs. 736.66 Crores pertains to the Non-Exchange Businesses of NSEL.",,,,,,,,,,,,,

d) Insofar as the present case is concerned, the payment defaults of more than Rs. 5,000 Crores - which form the centre point of the entire case - have occurred only on the",,,,,,,,,,,,,

Exchange platform of NSEL. The entire Scheduled Offences registered vide the EOW-FIR pertain only to the Exchange business of NSEL. Admittedly, the Non-Exchange Business",,,,,,,,,,,,,

of NSEL is not even the subject matter of the EOW-FIR and hence is not the subject matter of any Scheduled Offence as is also evident from Para 6.1 and 6.2 of the Complaint,,,,,,,,,,,,,

itself. Therefore, the Authority failed to appreciate that the gross income of Rs. 736.66 Crores pertaining to the Non-Exchange business of NSEL cannot be

characterised as" ,,,,,,,,,,

â??proceeds of crimeâ?? as defined under Section 2(1)(u) of the PMLA.,,,,,,,,,,

e) The Adjudicating Authority failed to appreciate that the Exchange Business of NSEL comprised of trading in commodities in the Tradersâ?? Contracts, e-Series Contracts and Other" ,,,,,,,,,,

Contracts. The only contracts where payment defaults of more than Rs. 5,000 Crores have occurred and which are the subject matter of the Scheduled Offences registered vide the" ,,,,,,,,,,

EOW-FIR and under investigation by the Complainant ED (as is evident from Para 6.1 and 6.2 of the Complaint itself), are the Tradersâ?? Contracts, and that NSELâ??s gross income" ,,,,,,,,,,

for the period of FY 2008-09 to FY 2013-14 from the Tradersâ?? Contracts was only Rs. 245.81 Crores. The balance income of NSEL from the Exchange Business for the period of ,,,,,,,,,,

FY 2008-09 to FY 2013-14 being Rs. 129.50 Crores was derived from contracts other than Tradersâ?? Contracts (such as e-Series contracts, farmersâ?? contracts etc.) - all of which" ,,,,,,,,,,

admittedly are not the subject matter of any Scheduled Offence as is evident from Para 6.1 and 6.2 of the Complaint itself.,,,,,,,,,,

f) The Adjudicating Authority failed to appreciate that even within NSELâ??s gross income of Rs. 245.81 Crores from the Tradersâ?? Contracts, income of only Rs. 131.73 Crores has" ,,,,,,,,,,

been earned by NSEL from the defaulting members. The balance income of Rs. 114.08 Crores has been earned by NSEL from the non-defaulting members. Hence, the income of" ,,,,,,,,,,

Rs. 114.08 Crores earned by NSEL from the non-defaulting members is not relevant for the purpose of the present case. The Adjudicating Authority failed to appreciate that even the ,,,,,,,,,,

gross income of Rs. 131.73 Crores earned by NSEL from the defaulting members comprised of various charges levied by NSEL from its members for providing them various ,,,,,,,,,,

legitimate services in the form of providing the facility of trading on the exchangeâ??s online trading platform, transfer of warehouse receipts, delivery services, warehousing and" ,,,,,,,,,,

storage services etc. Thus, even the said gross income of Rs. 131.73 Crores earned by NSEL from the defaulting members also cannot be said to be â??proceeds of crimeâ? as" ,,,,,,,,,,

defined under Section 2 (1)(u) of the PMLA since the same is legitimately earned by NSEL over a period of six years (i.e. FY 2008-09 to FY 2013-14) from legitimate business,,,,,,,,,,,,,

activities of NSEL as a service provider. There is no allegation in the entire Complaint or the EOW-FIR that the very act of providing these legitimate services by NSEL to the,,,,,,,,,,,,,

defaulting members constituted a Scheduled Offence. Absent such an allegation and some material on record supporting such an allegation, the legitimate income of Rs. 131.73 Crores",,,,,,,,,,,,,

earned by NSEL from the defaulting members for providing them various legitimate services over a period of six years cannot be termed as "proceeds of crime" as defined in,,,,,,,,,,,,,

Section 2(1)(u) of the PMLA,,,,,,,,,,,,,

g) The Adjudicating Authority failed to appreciate that as per the EOW-FIR as well as Para 6.1 and 6.2 of the Complaint, the alleged Scheduled Offences of forgery and criminal",,,,,,,,,,,,,

conspiracy in the instant case relate only to the unsettled transactions in the Traders' Contracts where the payment of more than Rs. 5,000 Crores by the defaulting members to their",,,,,,,,,,,,,

non-defaulting trading-counterparties in T+25 contracts is still outstanding. This outstanding amount also includes the various charges leviable by NSEL from these defaulting,,,,,,,,,,,,,

members. For these outstanding/unsettled transactions, NSEL has not "actually received" income from any of the defaulting members yet, although an income of about Rs. 85",,,,,,,,,,,,,

losses against these unsettled trades has been booked in NSEL's books of account because the same are prepared on "accrual basis" and not on "actual receipt" basis,,,,,,,,,,,,,

Therefore, NSEL has not yet actually received income from the Scheduled Offences alleged in the instant case, and accordingly NSEL cannot be said to be recipient of any alleged",,,,,,,,,,,,,

"proceeds of crime" as defined under Section 2(1)(u) of the PMLA. In absence of any proceeds of crime being traced to the Appellant, the Respondent had no jurisdiction to",,,,,,,,,,,,,

pass the PAO under Section 5 of the PMLA either against the Appellant or against its parent company,,,,,,,,,,,,,

h) The Adjudicating Authority failed to appreciate that Para 7.1 of the Complaint (which corresponds to Para 8 of the PAO) contains incorrect facts contrary to the

record. Para 7.1,,,,,,,,,,,,,

states that, "on going through the report received from IT Dept., it was observed that no equivalent stock was found in any of the godowns of the defaulters." This is completely",,,,,,,,,,,,,

contrary to the record available with the Complainant inasmuch as the report of the IT Dept. at pages 19 and 20 of Vol. 1 of the RUD clearly states that at least in case of the,,,,,,,,,,,,,

godowns of 3 defaulters, namely Sankhya Investments, Metcore Alloys & Industries Ltd. and Topworth Steels & Power Ltd., adequate stock of commodities was found. It is further",,,,,,,,,,,,,

stated in Para 7.1 of the Complaint that, "similarly, audit conducted by SGS India Pvt. Ltd. the agency contracted by NSEL, also reported the inspection of the warehouses/stock",,,,,,,,,,,,,

as "aborted" (SGS was not permitted to audit the warehouse by the warehouse owner)". Similar allegations have also been made in Para 17 of the PAO. The said allegations in,,,,,,,,,,,,,

the Complaint and the PAO in respect of the SGS Report are also contrary to the record inasmuch as the SGS report at pages 21 to 172 of Vol. 1 of the RUD clearly demonstrates,,,,,,,,,,,,,

that SGS was not permitted to audit only some of the warehouses and not all the warehouses. In fact, a bare perusal of the SGS report reveals that adequate stock was found in few",,,,,,,,,,,,,

warehouses, few warehouses had less than adequate stock and some had no stock. Further, the mere fact that the IT department or SGS was not allowed to enter certain warehouses",,,,,,,,,,,,,

does not mean that there was no stock. The possibility of the stock being there is equal to the stock not being there in such cases. Therefore, the one-way reading of the non-access to",,,,,,,,,,,,,

certain warehouses by the Complainant to only mean "no-stock" shows the biased and convenient presumption drawn by the Complainant which is not sustainable in law,,,,,,,,,,,,,

i) The Adjudicating Authority erred by not appreciating that NSEL did not fail to comply with the conditions of the Exemption Notification dated 05.06.2007. In fact, the same",,,,,,,,,,,,,

allegation was made in the show cause notice dated 27.04.2012 issued by the Ministry of Consumer Affairs, Govt of India to the then MD & CEO of NSEL. The said Show Cause",,,,,,,,,,,,,

Notice was replied in detail by the then MD & CEO of NSEL vide reply dated

23.05.2012 explaining how NSEL was not in violation of any of the conditions of the Exemption,,,,,,,,,,,,,

Notification. As per the said reply, contracts having settlement period of more than 11 days were not in violation of the FCRA because NSEL was altogether exempted from all the",,,,,,,,,,,,,

provisions of the FCRA by virtue of the Exemption Notification - which by itself did not prescribe any time limit for delivery and settlement of the trades. It was further submitted that,,,,,,,,,,,,,

NSEL was not allowing short-sale as alleged in the show cause notice in as much as the sellers are required to deposit the commodities sold on T day in exchange-designated,,,,,,,,,,,,,

warehouses on T+1 day. If they do not do so then they are not entitled to receive the sale-consideration on T+2 day or say T+25 day. It is further submitted that the said Show Cause,,,,,,,,,,,,,

Notice has not been adjudicated till date. No Court of law has held till date that NSEL was in violation of the Exemption Notification dated 05.06.2007,,,,,,,,,,,,,

j) The Adjudicating Authority failed to appreciate that in terms of Section 2(c) of the FCRA, a Forward Contract is a contract for delivery of goods which is not a Ready Delivery",,,,,,,,,,,,,

Contract. A Ready Delivery (or a Spot) Contract is defined under Section 2(i) of the FCRA as a contract which provides for delivery of goods and payment of price within 11 days,,,,,,,,,,,,,

after the date of the contract. However, the proviso to Section 2(i) of the FCRA clearly states that if a contract for buying or selling of commodities is performed by tendering of",,,,,,,,,,,,,

document of title to goods; or by the realisation of difference between the contract rate and the settlement rate i.e. by netting-off, then it shall not be deemed to be a Ready Delivery",,,,,,,,,,,,,

Con- tract. In other words, if a contract for buying or selling of commodities is performed by tendering of document of title to goods; or by the realisation of difference between the",,,,,,,,,,,,,

contract rate and the settlement rate i.e. by netting-off, then it shall ipso facto become a Forward Contract irrespective of the fact whether it is settled within 11 days or more. Since",,,,,,,,,,,,,

NSEL offered an online platform for trading of commodities, its very business model envisaged trading in commodities by way of tendering of document of title (i.e. warehouse",,,,,,,,,,,,,

receipt) and netting-off. As a result, the contracts traded on NSEL's exchange

platform were deemed to be forward contracts. In fact, this was the reason why even the Exemption" ,,,,,,,,,,

Notification dated 05.06.2007 also provided that all forwards contracts of one day's duration for the sale and purchase of commodities in NSEL are exempted from the provisions of ,,,,,,,,,,

the FCRA. Hence, it is incorrect to suggest that NSEL was not allowed or meant to have forward contracts. It may be noted that the said Exemption Notification did not specify the" ,,,,,,,,,,

period within which NSEL was required to complete the delivery and payment, or lay down any condition that the delivery and payment should be completed within 11 days. The only" ,,,,,,,,,,

condition which was laid down by the Notification was that all outstanding positions of trade at the end of the day must result into delivery. In the instant case, all the contracts traded" ,,,,,,,,,,

on NSEL provided that all the outstanding positions of trade at the end of the day at NSEL would compulsorily result into delivery. Accordingly, all contracts traded on NSEL whether" ,,,,,,,,,,

having a short or long settlement cycle (T+2 to T+36 days) were well within the four corners of the FCRA as well as the Exemption Notification dated 05.06.2007, and there was" ,,,,,,,,,,

nothing circuitous about it as alleged. ,,,,,,,,,,

k) The Adjudicating Authority failed to appreciate that NSEL was promoted by MCX (and not by FTIL) on 18.05.2005. In or around September, 2005 entire shareholding of MCX in" ,,,,,,,,,,

NSEL was transferred to FTIL. Mr. Jignesh Shah was only occupying the position of a Non-executive Vice Chairman in NSEL. Further, it is evident from the material available with" ,,,,,,,,,,

the Complainant that the policy decisions concerning the running of NSEL, including the launching of the contracts traded on the NSEL platform, were taken by the then MD and" ,,,,,,,,,,

CEO of NSEL, Mr. Anjani Sinha and the same has been asserted by Mr. Anjani Sinha on several occasions. Further, the statement of Mr. Amit Mukherjee dated 10.04.2014 (Sr. No." ,,,,,,,,,,

7 of relied upon documents) clearly establishes that the role of business development and finding new members for NSEL was performed by him and he used to take instructions from ,,,,,,,,,,

Mr. Anjani Sinha. Mr. Jignesh Shah had no role whatsoever in the same and was never involved in making any presentations or assurances about the business

model or products of,,,,,,,,,,,,,

NSEL. Further, NSEL never promoted pairing of contracts for fixed returns. On the contrary, NSEL - vide its Circulars dated 07.02.2012 and 06.08.2012- had prohibited its members",,,,,,,,,,,,,

from issuing any advertisement which promised fixed return. Further the findings of the Ld. Adjudicating Authority are also contradictory to the Complaint dated 30.03.2015 filed by,,,,,,,,,,,,,

the Complainant under Section 45 of the PMLA before the Special Court (which is part of the RUD) wherein Mr. Jignesh Shah has been accused only of negligence in his basic,,,,,,,,,,,,,

function as a Board member of checks and balance and allowing a free hand to Mr. Anjani Sinha. In the said complaint filed by the Complainant ED before the PMLA Court, there",,,,,,,,,,,,,

are no allegations of Mr Jignesh Shah being involved in the day to day affairs of NSEL,,,,,,,,,,,,,

l) The Adjudicating Authority failed to appreciate that the circulars launching the various contracts for trading on NSEL's exchange platform were never discussed, ratified and",,,,,,,,,,,,,

approved by the Board of NSEL. The correct factual position is that the circulars launching the various con- tracts for trading on NSEL's exchange platform were drafted, approved",,,,,,,,,,,,,

and launched by the executive management of NSEL without any prior approval of the Board of NSEL. It is only after these contracts were launched, that they were put up only for",,,,,,,,,,,,,

post-facto information in the next board meeting wherein the factum of the launch of the said contracts was noted by the Board of NSEL and such noting was accordingly recorded in,,,,,,,,,,,,,

the minutes of the board meeting. A sample copy of Board minutes of NSEL showing such post-facto noting and a Table showing date of launch of each circular and the date of,,,,,,,,,,,,,

NSEL's board meeting in which the same was noted on post-facto basis were annexed to NSEL's reply to the Complaint. However, the same were not considered by the Ld.",,,,,,,,,,,,,

Adjudicating Authority,,,,,,,,,,,,,

m) The Adjudicating Authority failed to appreciate that even as a 99.99% shareholder of NSEL, FTIL's right to appoint/remove the directors does not give it the power to",,,,,,,,,,,,,

control/run the day to day affairs/management of the company. This is because once a person is appointed as a director, he has the fiduciary obligation to act in the best interests of" ,,,,,,,,,

the company only. He is not supposed to follow the dictates of the shareholder appointing him. In view of this settled legal position, the finding of the Ld. Adjudicating Authority that" ,,,,,,,,,

FTIL â?" as a 99% shareholder of NSEL â?" controlled the functioning of NSEL is baseless.,,,,,,,,,

n) The Adjudicating Authority failed to appreciate that with effect from April 2011, NSEL became a â?"material subsidiaryâ?" of FTIL as per the Listing Agreement. Therefore, in" ,,,,,,,,,

compliance with the provisions of the listing agreement, 1(one) independent director from the Board of FTIL was required to be appointed on the board of its material subsidiary." ,,,,,,,,,

Accordingly, in addition to Mr Jignesh Shah, Mr Ramanathan Devarajan was appointed as a â?"non-executiveâ?" director to the Board of NSEL. Both Mr Shah and Mr Devarajan" ,,,,,,,,,

were also directors on the Board of FTIL.,,,,,,,,,

Thus, the Board of NSEL comprised of 8 (eight) directors of which there were only 2 (two) directors who were common to the Board of FTIL and both of them were non-executive" ,,,,,,,,,

directors having no role whatsoever in the day to day affairs/operations of NSEL, which were run by the professional executive management team of NSEL headed by the then MD" ,,,,,,,,,

and CEO Mr. Anjani Sinha.,,,,,,,,,

The Adjudicating Authority also failed to appreciate that FTIL did not approve the actions of NSEL in its board meetings.,,,,,,,,,

The factual position is that when NSEL became a â?"material subsidiaryâ?" of FTIL in April 2011, then as per the Listing Agreement, the already approved final minutes of the board" ,,,,,,,,,

of NSEL were started being placed on post-facto basis in the board meetings of FTIL only for the purpose of noting and not for the purpose of any approval as alleged. It is pertinent.,,,,,,,,,

to mention that the so called â?"paired contractsâ?" were launched in September 2009 i.e. much before April 2011 when NSELâ?s Board minutes started getting placed for noting.,,,,,,,,,

before the Board of FTIL. It may further be noted that in the Affidavit dated

11.09.2013 (Sr. No. 4 of the RUD) of Mr. Anjani Sinha the then MD and CEO of NSEL which has been,,,,,,,,,,,,,

confirmed by him in his statement dated 16.10.2013 before R-1 (Sr. No. 5 of the RUD), Mr. Sinha has clearly stated that the policy decisions regarding NSEL were taken by him",,,,,,,,,,,,,,

exclusively and as such the facts pertaining to the missing stocks, increasing exposure and widespread default were admittedly not within the knowledge of even the Board of NSEL.",,,,,,,,,,,,,

The fact that the Board of NSEL was not in knowledge about the inadequacy of stock is also corroborated by the statement of Mr Shreekant Javalgekar, who was also a Non-",,,,,,,,,,,,,

Executive Director on the Board of NSEL at the relevant time, which has been relied upon by R-1 in Para 7.3(ii) of the Complaint. Thus, the Adjudicating Authority failed to",,,,,,,,,,,,,

appreciate that the Complainant failed to bring on record any material showing that the Board of NSEL was in the knowledge of the missing stock in various warehouses across India.,,,,,,,,,,,,,,

o) The Adjudicating Authority failed to appreciate that at the policy level, the Board of NSEL had put in place proper rules, regulations and risk management systems based on checks",,,,,,,,,,,,,,

and balances. No red-flags were ever raised to the Board of NSEL, by the then Executive Management team, the employees, the statutory auditors (i.e. S.V. Ghatalia & Associates",,,,,,,,,,,,,

for 3 (three) years and M/s Mukesh P. Shah for 1 (one) year), brokers and their auditors (who had inspected the warehouses on more than 50 occasions) or the so called",,,,,,,,,,,,,,

â??investorsâ??. Further, when the PSU, MMTC started trading on NSELâ??s trading platform, its auditors conducted test audits of the warehouses and the stocks and no",,,,,,,,,,,,,,

discrepancies were found. NSEL was audited independently and its then MD & CEO Mr Anjani Sinha certified the financial statements of NSEL confirming compliance with all the,,,,,,,,,,,,,

laws. Additional- ly, since November 2011, every 15 (fifteen) days, a detailed data-sheet from NSELâ??s executive management used to go to the regulator FMC detailing the name,",,,,,,,,,,,,,

location and stock position of each of the ware- houses. However, no questions were ever raised by the FMC. Thus, as so many checks and filters were in place and yet the same did",,,,,,,,,,,,,

not raise any "red flags" or notice any irregularity, there was no reason/occasion for the Board of NSEL to imagine that there were any irregularities or other untoward actions",,,,,,,,,

taking place on NSEL's exchange platform.,,,,,,,,,

p) The Adjudicating Authority failed to appreciate the following documentary evidence submitted to it by the Appellant along with its Reply demonstrates that the Board of NSEL was,,,,,,,,

not in knowledge of the missing commodities until mid-August 2013 because the then executive management team of NSEL headed by the then MD&CEO of NSEL Mr Anjani Sinha,,,,,,,,

never informed the Board of NSEL about the same:,,,,,,,,

(i) Minutes of NSEL's Board meeting dated July 30, 2013, wherein Mr. Sinha - when questioned by the Board - confirmed to the entire Board that commodities worth more than Rs.",,,,,,,,

6,000 Crores are lying in various warehouses and there is no cause to worry.",,,,,,,,

(ii) Email dated August 4, 2013 sent by Mr. Sinha in his capacity as the MD&CEO of NSEL to the regulator FMC, wherein he had sent an excel sheet to FMC confirming that stock",,,,,,,,

worth more than Rs. 6,000 Crores were there in various warehouses. The excel sheet contained warehouse-wise stock position.",,,,,,,,

(iii) Mr. Sinha maintained that there was sufficient stock even in his interviews to the print and electronic media (live TV interview) in the first week of August 2013.,,,,,,,,,

(iv) However, when reports of missing stock started coming in, the Board of NSEL appointed an internationally reputed firm SGS to conduct physical verification of stock at all the",,,,,,,,,

warehouses across India. The Board of NSEL came to know about the shortage of stocks only when SGS's audit report of physical verification of stock position in various,,,,,,,,

warehouses started to come out in mid-August 2013. This is also corroborated by the statement of Mr Shreekant Javalgekar to the Complainant (Sr. No. 10 of the RUD),,,,,,,,,

(v) On getting to know that there was considerable stock shortage, the Board of NSEL constituted an Internal Inquiry Committee headed by an Ex-SEBI officer to investigate the",,,,,,,,

matter. When the Committee examined Mr. Sinha, he stated that he and his

senior employees (such as the AVP-Warehousing Mr. Jai Bahukhandi, AVP-Business Development Mr." ,,,,,,,,,

Amit Mukherjee etc.) were responsible for the payment defaults. He gave complete clean chit to the entire Board of NSEL and confirmed that the Board had no knowledge about the,,,,,,,,

missing stocks.,,,,,,,,,

(vi) Mr. Sinha continued to maintain the above stand in his Affidavit dated September 11, 2013 submitted to NSEL, a copy of which is at Sr. No. 4 of the RUD." ,,,,,,,,,

(vii) Based on the above, the Board of NSEL even filed a police complaint against the then MD&CEO Mr. Anjani Sinha, the then AVP-Warehousing Mr Jai Bahukhandi, the then" ,,,,,,,,,

AVP-Business Development Mr Amit Mukherjee and other employees of NSEL on September 21, 2013 to the Addl. Commissioner of Police, EOW, Mumbai." ,,,,,,,,,

(viii) Further, the Board of NSEL also suspended the above- named senior employees." ,,,,,,,,,

(ix) These employees were later on arrested by EOW-Mumbai and have been charge-sheeted by EOW-Mumbai vide the Charge-sheet dated 06.01.2014, wherein they have been" ,,,,,,,,,

found to have received monetary kickbacks from certain defaulters for colluding with them in defrauding and abusing the Exchange's trading platform.,,,,,,,,,

(x) Thus, the Board of NSEL was not aware of the missing commodities. As soon as it received complaints about the same, it took all reasonable steps such as appointment of" ,,,,,,,,,

reputed stock verification firm SGS, constitution of Internal Inquiry Committee on getting to know from SGS's reports from mid-August 2013 that there was considerable stock" ,,,,,,,,,

shortage, filing of police complaint against the errant employees etc." ,,,,,,,,,

q) The Adjudicating Authority failed to appreciate that the withdrawal of Rs. 236 Crores by the Appellant from its own Settlement Guarantee Fund (â??SGFâ?) does not amount to,,,,,,,,

â??proceeds of crimeâ? in the hands of the Appellant as per the PMLA. A bare perusal of the definition of â??proceeds of crimeâ? under Section 2(1)(u) of the PMLA reveals that,,,,,,,,

it must be derived from and out of a Scheduled Offence. In the instant case, in terms of Bye-law 12 of the Appellant's exchange, the exchange was required to

maintain SGF, which" ,,,,,,,,,

comprised of contributions made by the members of the exchange. On 28.03.2013, Rs. 236.5 Crores was withdrawn by the Appellant out of the SGF to repay the overdraft facility" ,,,,,,,,,

provided by HDFC Bank to the Appellant. The said overdraft facility was used by the Appellant for making payment for purchase of cotton from farmers as part of the procurement,,,,,,,,,

services provided by the Appellant to NAFED which is a Govt. of India undertaking. In fact, the entire amount of Rs. 236 Crores was replenished by the Appellant back into the SGF" ,,,,,,,,,

by 25.04.2013, as is evident from the Chartered Accountant's Certificate dated 08.12.2016 annexed with the Reply filed by the Appellant before the Ld. Adjudicating Authority." ,,,,,,,,,

Thus, it is clear that the withdrawal of Rs. 236.5 Crores by the Appellant from its SGF was "temporary" and was for a legitimate business purpose. The Appellant never intended" ,,,,,,,,,

to siphon off the said amount of Rs. 236.5 Crores from the SGF which is evident from the fact that the said amount was replenished in the SGF by the Appellant within 1 (one) month,,,,,,,,

i.e. by 25.04.2013. Thereafter, the entire SGF was utilised for payout to members against their unsettled trades in July 2013 - which was the purpose for which the SGF was meant as" ,,,,,,,,,

per the bye laws of the exchange. It is submitted that even assuming for the sake of argument without admitting that the Appellant unauthorisedly took Rs. 236.5 Crores out of its own,,,,,,,,

SGF to repay its loan to HDFC bank, the act of such un-authorised removal of funds from the SGF does not constitute a Scheduled Offence as defined under Section 2(1)(y) of the" ,,,,,,,,,

PMLA. Therefore, the said amount of Rs. 236.5 Crores cannot be said to be "proceeds of crime" by any stretch of imagination. Thus, the . Authority erred in characterising the" ,,,,,,,,,

said withdrawal of funds by the Appellant from the SGF as "proceeds of crime".,,,,,,,,

The Adjudicating Authority failed to appreciate that despite the information that the amount of Rs. 236 Crores of SGF was replenished by NSEL being available with the Complainant,,,,,,,,

vide NSEL's letter dated 04.08.2016, R-1 does not even make a whisper about such an important fact. Deliberate non-consideration of such a vital fact vitiates

the satisfaction",,,,,,,,,,

arrived at by R-1 to pass the PAO and file the present Complaint.,,,,,,,,,,

r) The Adjudicating Authority failed to appreciate that NSEL did not fraudulently obtain huge funds on account of trading on the exchange platform against non-existent/fictitious stock,,,,,,,,,

of various commodities. As submitted hereinabove, the IT Report as well as the SGS Report â?" both of which have been relied upon by the Complainant and form part of the RUD",,,,,,,,,

â?" do not support such sweeping conclusion of the Complainant. In fact, the following facts and material on record forming part of the RUD clearly demonstrate that the business",,,,,,,,,

model of NSELâ??s exchange platform was not intended to permit trading against non-existent/fictitious stock:,,,,,,,,

(i) As per both the IT Report and the SGS Report, adequate stock of commodities was found in case of 3 (three) defaulters namely Sankhya Investments, Metcore Alloys &",,,,,,,,,

Industries Ltd. and Topworth Steels & Power Ltd.;,,,,,,,,

(ii) As per both the IT Report and the SGS Report, less than adequate stock of commodities was found in some cases. Nevertheless, stock was existent;" ,,,,,,,,,

(iii) As per both the IT Report and the SGS Report, only in few cases, no underlying stock of commodities was found;" ,,,,,,,,,

(iv) The Statements of some of the defaulting members relied upon by the Complainant in Para 7.4 of the Complaint (such as Shri Mohit Agarwal of Aastha group, Shri Kailash",,,,,,,,,

Agarwal of Ark group, Shri Inder Singh and Shri Jai Singh of Namdhari group, Shri Ranjeev Agarwal of PD Agro group etc.) also confirm that initially these defaulting members used" ,,,,,,,,,

to deliver the goods to NSEL-designated warehouses. It is only subsequently on being told by some staff members of NSEL not to bother about keeping the stock that they stopped,,,,,,,,

depositing the goods in NSELâ??s designated warehouses. Had the very business model of NSEL required only â??paper transactionsâ? as alleged in the Complaint then where was,,,,,,,,

the need for these defaulting members to even deliver the commodities to NSELâ??s designated warehouses even initially. Thus, the sweeping generalization by the Complainant that",,,,,,,,,

the entire trading on NSEL's exchange platform was merely "paper transactions" based on "non-existent/fictitious stock" is contrary to the material on record and hence,,,,,,,,,,,,,

liable to be rejected.,,,,,,,,,,,,,,

s) The Adjudicating Authority failed to appreciate that the theory of the Complainant that there was never any stock of commodities and NSEL's business model was only "paper,,,,,,,,,,,,,

transactions" is also belied by the following Court Orders directing sale of stock of commodities found in various warehouses of the defaulters:,,,,,,,,,,,,,

(i) Vide Order dated 19.05.2015, the Hon'ble Bombay High Court has directed sale of 18,000 bags of Paddy found in the warehouses of one of the defaulters Namdhari Food",,,,,,,,,,,,,,

International Ltd.,,,,,,,,,,,,,,

(ii) Vide Order dated 15.07.2015, the Hon'ble Bombay High Court has directed sale of 686.95 Metric Tonne of TMT bars found in the warehouses of the defaulter Aastha group.",,,,,,,,,,,,,,

(iii) The Designated Court under the MPID Act has also directed the sale of stock of raw wool found in the warehouses of Ark group, vide its Order dated 02.07.2015.",,,,,,,,,,,,,,

63. It is stated on behalf of both set of appellants that the impugned Order is also not sustainable in view of the standard of satisfaction adopted by the Adjudicating Authority in,,,,,,,,,,,,,

confirming the PAO. It is stated that the satisfaction required to be reached by the Deputy Director while attaching a property under Section 5(1) of PMLA and the satisfaction which,,,,,,,,,,,,,

the Adjudicating Authority is required to reach while confirming such attachment are on different footings. While the Deputy Director attaching a property under Section 5(1) is,,,,,,,,,,,,,

required to have a reason to believe the existence of proceeds of crime, the scope of adjudication contemplated under Section 8(2) involves a determination as to whether the property",,,,,,,,,,,,,,

attached is "involved in money laundering". Therefore, the sufficiency of material, and the degree of satisfaction that the Adjudicating Authority is required to meet, are much",,,,,,,,,,,,,,

higher than that of the Deputy Director exercising its power under Section 5, since the Adjudicating Authority is not only required to determine the true colour of the property attached,",,,,,,,,,,,,,

but even has to adjudicate upon the fact of its involvement in money laundering. Therefore, a mere prima facie satisfaction or the existence of a reasonably probable case cannot be" ,,,,,,,,,

the basis for passing an order under Section 8(2).The Adjudicating Authority ought to have reached a material satisfaction as to the existence of the circumstances warranting the,,,,,,,,,

issuance of the PAO under Section 5 and duly adjudicated upon the involvement of the property attached in money laundering. Further, Section 8(2) mandates the Adjudicating" ,,,,,,,,,

Authority to â??consider the reply of the aggrieved personâ? and â??take into account all the documentsâ? and then â??record a findingâ? whether the all or any of the properties,,,,,,,,,

attached are involved in money laundering. The Authority under the garb of taking only a prima facie view, has failed to appreciate a number of documents brought on record by the" ,,,,,,,,,

Appellant and has gone against the mandate of Section 8(2). The Adjudicating Authority has instead only reiterated the prima facie view taken by R-1 while issuing the PAO and,,,,,,,,

simply omitted to determine if the attached properties were involved in money laundering as mandated under Section 8 of the PMLA.,,,,,,,,,

64. It is submitted that it is wrongly recorded and given its findings in the Impugned Order about the involvement of the Appellants in the defaults that took place on its trading,,,,,,,,,

platform, without any authority, to conclude that the Appellants were fully responsible for the said default. It is submitted that the aforesaid findings are beyond the scope of" ,,,,,,,,,

adjudication under Section 8(2) wherein the Adjudicating Authority is only required to determine the validity of the attachment order passed under Section 5(1) and the involvement of,,,,,,,,

the property attached under Section 5 in money laundering. Contrary to the aforesaid mandate the Adjudicating Authority under the Impugned Order has transgressed its jurisdiction to,,,,,,,,

usurp the jurisdiction vested with the Special Court under Section 44 and made findings on the involvement of the Appellant in the crime of money laundering.,,,,,,,,,

Case of ED,,,,,,,,

65. Mr. Rajiv Awasthi, learned counsel appearing on behalf of respondent no.1 has read the reason to belief recorded in the provisional attachment order and

mainly relied upon the" ,,,,,,,,,

impugned orders. He submits that all six appeals filed by the two groups are liable to be dismissed.,,,,,,,,,

66. He has submitted that it is admitted fact that the FTIL and Shri Jignesh Shah are arraigned as the accused in FIR registered in the scheduled offence case. As per Section 2(1),,,,,,,,,

(u), which defines "proceeds of crime", value equivalent can also be treated as proceeds of crime. In this case, the NSEL in connivance with defaulting members has generated" ,,,,,,,,,

proceeds of crime and being ultimate holder of NSEL, FTIL was the ultimate beneficiary of the said proceeds of crime. Investigation conducted so far under the provisions of PMLA" ,,,,,,,,,

2002 revealed that the trades executed on its portal were rarely backed by the equivalent quantity of goods which was in the knowledge of the NSEL executives. It has rather come ,,,,,,,,,

on record that NSEL executives had turned a blind eye towards non-existence of the stocks. All submissions made by Key Management Personals that MD & CEO was the final ,,,,,,,,,

authority to launch the contracts are contrary to the actual facts. From the facts, it was apparent that all circulars launched were discussed in the board meeting comprising key" ,,,,,,,,,

Management Personals of FTIL in the Board of NSEL and the board used to ratify and approve the same. By virtue of its shareholding of 99.99 % in NSEL, FTIL was the complete" ,,,,,,,,,

authority over all the affairs of NSEL enabling it to appoint all the Directors on the board of NSEL, through them effective control over the functioning of NSEL. The NSEL board" ,,,,,,,,,

comprising Key Management Personals of FTIL (as S/Shri Jignesh Shah, Joseph Messy) has all the authority to frame the bye-laws, rules and regulations of the company. FTIL" ,,,,,,,,,

regularly approved the actions of NSEL in its Board meetings. Shri Jignesh Shah is holding 27% shares of FTIL through companies controlled by him apart from personal holding of ,,,,,,,,,

18% of FTIL. In this way, Jignesh Shah holds 45% shareholding in FTIL. FTIL has total assets of Rs 2800 Cr. If we consider for interest of other public shareholders of FTIL, it is" ,,,,,,,,,

clear that Directorate has attached assets only to the extent of shareholding of Mr Jignesh Shah i.e 45% i.e equivalent to attachment of this directorate. This

Directorate has not,,,,,,,,,,,,,

attached complete assets of FTIL of 2800 Crores. It may be noted here that Jignesh Shah has complete control over affairs of FTIL. Further, he was on board of FTIL which" ,,,,,,,,,,,,,,

approved new paired contract launched at NSEL platform; these contracts were contrary to the approvals given to NSEL by the Government. From the facts above, it is clear that" ,,,,,,,,,,,,,,

FTIL is fully responsible for the functioning of NSEL and Board of Directors of NSEL was aware about the situation at NSEL. Board of NSEL consisting Key Management,,,,,,,,,,,,,

Personnel of FTIL allowed to continue to trade in spite of repeated defaults and turned a blind eye towards non-existence of the stock. As such, FTIL also connived with NSEL and" ,,,,,,,,,,,,,,

as such, FTIL was in possession of the said proceeds of crime. Therefore, properties only worth Rs 1254 crores of FTIL, not complete investment in the accounts of FTIL i.e more" ,,,,,,,,,,,,,,

than 2500 Crores were attached under section 5(1) of the PMLA and were confirmed by the Adjudicating Authority. Further, the conduct of the defendant in siphoning off the" ,,,,,,,,,,,,,,

properties, even after attachment, made it clear that the said properties were needed to be attached immediately." ,,,,,,,,,,,,,,

67. It is submitted by Mr. Awasthi, learned counsel that it is found that the NSEL was acting as a platform for defaulters, which in turn, was totally controlled by the FTIL. The NSEL" ,,,,,,,,,,,,,,

was earning in the process of charging various fees, charges & penalties viz. Application Processing Fees, Annual Subscription Fees, Delivery Fees Warehouse receipt Transfer" ,,,,,,,,,,,,,,

Charges, Procurement commission, Penalties on shortages Penalty for trade cancellation, Loading & Unloading Charges, Penalty on UCC code, Penalty on withheld demat units," ,,,,,,,,,,,,,,

Recurring Charges etc.,,,,,,,,,,,,,,

68. It is stated by him that, his client has rightly attached the properties of MTL in lieu of value thereof as Mr. Jignesh Shah is the main accused who was/is director of the" ,,,,,,,,,,,,,,

company. He was/is central character of all the disputes and is involved in money laundering.,,,,,,,,,,,,,,

69. He has referred Section 2(1)(u) in order to show that the entire fraud

committed by NESL amount was proceed of crime along with other 24 traders. Since the said company,,,,,,,,,,,,,

NESL has no assets, the respondent no. 1 is entitled to attach the same from â?? 63 MTLâ?? which is the another company of Jignesh Shah. Proceeds of crime is defined under",,,,,,,,,,,,,

section 2(1) (u) of the PMLA as under:-,,,,,,,,,,,,,

â??proceeds of crimeâ?? means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or",,,,,,,,,,,,,

the value of any such property or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held",,,,,,,,,,,,,

within the country.â??,,,,,,,,,,,,,

As such, equivalent value of any such property is defined as proceeds of crime and accordingly, properties of the FTIL were attached under section 5 of the PMLA. By virtue of the",,,,,,,,,,,,,

said definition of the proceeds of crime, the subject properties to be termed as involved in the money laundering as defined under section 3 of the PMLA. The said argument of",,,,,,,,,,,,,

Awasthi that the bonds were attached equivalent value and not from direct proceed of crime.,,,,,,,,,,,,,,

70. It is also stated by him on behalf of his client that the NSEL, subsidiary and holding of FTIL, was acting as agent of the FTIL and there was no genuine transaction on the platform",,,,,,,,,,,,,

of the NSEL. The FTIL has used the NSEL for purpose of sham transactions under the guise of paired contract. All circulars launched on the NSEL were discussed in the board,,,,,,,,,,,,,

meeting comprising key Management Personals of FTIL in the Board of NSEL and the board used to ratify and approve the same. By virtue of its shareholding of 99.99% in NSEL,",,,,,,,,,,,,,

FTIL has complete authority over all the affairs of NSEL enabling it to appoint all the Directors on the board of NSEL, through them effective control over the functioning of NSEL.",,,,,,,,,,,,,

The NSEL board comprising Key Management Personals of FTIL (as S/Shri Jignesh Shah, Joseph Messy) has all the authority to frame the bye-laws, rules and regulations of the",,,,,,,,,,,,,

company. FTIL regularly approved the actions of NSEL in its Board meetings.

From the facts above, it is clear that FTIL is fully responsible for the functioning of NSEL & Board of" ,,,,,,,,,

Directors of NSEL was aware about the situation at NSEL. Board of NSEL consisting Key Management Personnel of FTIL allowed to continue to trade in spite of repeated defaults,,,,,,,,,

and turned a blind eye towards non-existence of the stock. In these circumstances where the parent company (FTIL) was using its subsidiary (NSEL) as its agent for sham and illegal,,,,,,,,,

transactions, the attachment of the properties of the parent company is permissible under the respective laws." ,,,,,,,,,

71. Mr. Awasthi in his written submissions has referred the the Judgement dated 02.04.2019 of the Honâ?ble Delhi High Court in the case of Deputy Director, Directorate of" ,,,,,,,,,

Enforcement Vs. Axis Bank & Ors. (CRL.A. 143/2018 & Crl.M.A. 2262/2018) is relevant. The said judgement has been passed by the Honâ?ble Delhi High Court in the appeals,,,,,,,,

filed by this Directorate against the Order of this Appellate Tribunal wherein the Appellate Tribunal had set aside the order of the PAO and Adjudicating Authority. The relevant para,,,,,,,,

of the said judgement is as under:- ,,,,,,,,,

â??106. Among the three kinds of attachable properties mentioned above, the first may be referred to, for sake of convenience, as ""tainted property"" in as much as there" ,,,,,,,,,

would assumably be evidence to prima facie show that the source of (or consideration for) its acquisition is the product of specified crime, the essence of ""money-" ,,,,,,,,,

laundering"" being its projection as ""untainted property"" (Section 3). This would include such property as may have been obtained or acquired by using the tainted" ,,,,,,,,,

property as the consideration (directly or indirectly). To illustrate, bribe or illegal gratification received by a public servant in form of money (cash) being undue" ,,,,,,,,,

advantage and dishonestly gained, is tainted property acquired ""directly"" by a scheduled offence and consequently ""proceeds of crime"". Any other property acquired" ,,,,,,,,,

using such bribe as consideration is also ""proceeds of crime"", it having been obtained ""indirectly"" from a prohibited criminal activity within the meaning of first limb of" ,,,,,,,,,

the definition.,,,,,,,,,,

107. In contrast, the second and third kinds of properties mentioned above would ordinarily be ""untainted property"" that may have been acquired by the suspect",,,,,,,,,

legitimately without any connection with criminal activity or its result. The same, however, are intended to fall in the net because their owner is involved in the proscribed",,,,,,,,,

criminality and the tainted assets held by him are not traceable, or cannot be reached, or those found are not sufficient to fully account for the pecuniary advantage",,,,,,,,,

thereby gained. This is why for such untainted properties (held in India or abroad) to be taken away, the rider put by law insists on equivalence in value. From this",,,,,,,,,

perspective, it is essential that, before the order of attachment is confirmed, there must be some assessment (even if tentative one) as to the value of wrongful gain made by",,,,,,,,,

the specified criminal activity unless it be not possible to do so by such stage, given the peculiar features or complexities of the case. The confiscation to be eventually",,,,,,,,,

ordered, however, must be restricted to the value of illicit gains from the crime. For the sake of convenience, the properties covered by the second and third categories",,,,,,,,,

may be referred to as ""the alternative attachable property"" or ""deemed tainted property"".",,,,,,,,,

108. Generally, there would be no difficulty in proceeding with the attachment or confiscation of a tainted property respecting which there is material available to show",,,,,,,,,

that the same was derived or obtained as a result of criminal activity of specified nature, so long as such property is found held by the person who had indulged in such",,,,,,,,,

criminal activity, it amounting to money-laundering, as indeed those who may have aided or abetted such acts. Dispute, however, is likely to arise in relation to attachment",,,,,,,,,

or confiscation upon questions being raised at the instance of the person suspected of money-laundering (or his abettor) as to sufficiency of the material or reasons to,,,,,,,,

believe for such action, as indeed of the fairness or propriety of the procedure followed. Dispute may also arise in such context if the property has been

transferred to" ,,,,,,,,,,

another person, after it had been acquired by the transaction relatable to money-laundering and before its attachment under PMLA. The third party may have a claim to" ,,,,,,,,,,

agitate that it had been acquired by it bonafide and for lawful and adequate consideration.,,,,,,,,,,

109. The inclusive definition of ""proceeds of crime"" respecting property of the second above-mentioned nature - i.e. ""the value of any such property"" - gives rise (as it" ,,,,,,,,,,

has done so in these five appeals) to potential multi-layered conflicts between the person suspected of money-laundering (the accused), a third party (with whom such" ,,,,,,,,,,

accused may have entered into some transaction vis-a-vis the property in question) and the enforcement authority (the State). Since the second of the above species of ,,,,,,,,,,

proceeds of crime"" uses the expression ""such property"", the qualifying word being ""such"", it is vivid that the ""property"" referred to here is equivalent to the one" ,,,,,,,,,,

indicated by the first kind. The only difference is that it is not the same property as of the first kind, it having been picked up from among other properties of the accused," ,,,,,,,,,,

the intent of the legislature being that it must be of the same ""value"" as the former. The third kind does use the qualifying words ""equivalent in value"". Though these" ,,,,,,,,,,

words are not used in the second category, it is clear that the said kind also has to be understood in the same sense." ,,,,,,,,,,

110. Thus, it must be observed that, in the opinion of this court, if the enforcement authority under PMLA has not been able to trace the ""tainted property"" which was" ,,,,,,,,,,

acquired or obtained by criminal activity relating to the scheduled offence for money-laundering, it can legitimately proceed to attach some other property of the accused," ,,,,,,,,,,

by tapping the second (or third) above-mentioned kind provided that it is of value near or equivalent to the proceeds of crime. But, for this to be a fair exercise, the" ,,,,,,,,,,

empowered enforcement officer must assess (even if tentatively), and re-evaluate, as the investigation into the case progresses, the quantum of ""proceeds of crime"" ,,,,,,,,,,

nexus or link between",,,,,,,,,,

such property on one hand and the person accused of or charged with the offence of money laundering on the other hand. In this case, FTIL itself is accused in scheduled offence and",,,,,,,,,

this Directorate has also filed prosecution complaint against them for the offence of money laundering as defined u/s 3 of the PMLA before the Honâ?ble Special Court. The same,,,,,,,,

has been taken cognizance by the Special Court after applying its mind.,,,,,,,,,

73. It is submitted on behalf of respondent that in view of said judgement, the property of a person, who is not even an accused in the case, if the property is having nexus with the",,,,,,,,,

accused charged with the offence of money laundering. The same has been confirmed by the above mentioned judgement of the Honâ??ble Delhi High Court also.,,,,,,,,,

74. It is stated that in this case, FTIL is charged with the offence of money laundering and also NSEL is fully and wholly owned by FTIL.",,,,,,,,,

Therefore, the attachment on the properties of FTIL is legal. The properties of FTIL canâ?t be released just on the ground that FTIL and NSEL are separate legal entity. The",,,,,,,,,

Honâ?ble Supreme Court has rejected the amalgamation of both the entities in totally separate case and separate legal provisions and context. This Tribunal has to decide the matter.,,,,,,,,,

considering the overall case, role of the FTIL and NSEL and provisions of the Prevention of Money Laundering Act, 2002.",,,,,,,,,

75. Mr. Awasthi has referred Section 71 of the Act -,,,,,,,,,

Section 71 of the PMLA reads as under:-,,,,,,,,

â??Act to have overriding effect:- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time,,,,,,,,

being in force.â??,,,,,,,,

He submits that it is clear that the provisions of the PMLA override the provisions of any other law being in force. In this case, the other law like Companies Act, the provisions of the",,,,,,,,,

PMLA will have overriding effect.,,,,,,,,,

76. It is stated by him that the proceeding initiated by MCA against FTIL are civil in nature whereas the proceedings under PMLA are of criminal nature. It is

settled law that the,,,,,,,,,,,,,

criminal proceedings will override the civil proceedings, if any conflict arises during the implementation of the law. The PMLA is a special law and substantially a penal Act enacted in" ,,,,,,,,,,

consonance with international conventions to curb the menace of money laundering. As such, proceedings initiated by MCA have no bearing on the proceedings under any criminal" ,,,,,,,,,,

law like PMLA.,,,,,,,,,,

77. It is the case of respondent no. 1 that the Respondent No.1 has traced alleged "proceeds of crime" to a tune of Rs. 1254.6 crores to National Spot Exchange Ltd.,,,,,,,,,,

("NSEL"). However, since NSEL does not have equivalent assets available for attachment, the Respondent No.1 has, therefore, correctly attached assets of its holding company," ,,,,,,,,,,

the "63 MTL". This, despite admittedly that no proceeds of crime have been traced from NSEL to the "63 MTL"." ,,,,,,,,,,

78. The alleged "proceeds of crime" of Rs. 1,254.60 traced to NSEL admittedly arise as per case of respondent no. 1. a. NSEL's gross income earnings from 2008-09 to 2013-" ,,,,,,,,,,

14 to a tune of Rs. 1112.03 crores;,,,,,,,,,

b. Rs. 236.50 crores that NSEL has used of the Settlement Guarantee Fund to repay an overdraft facility with HDFC Bank];,,,,,,,,,

c. The said amount does not include Rs. 84 crores that NSEL has deposited with the Hon'ble Bombay High Court by order dated 12.06.2015. The said amount deposited with the,,,,,,,,,

Hon'ble Bombay High Court represents rent, software and other shared services, etc. To the extent of Rs. 84 crore, there is no doctrine of tracing from NSEL to the Appellant." ,,,,,,,,,,

Therefore the alleged "proceeds of crime" traced to NSEL by Respondent No.1 is: 1112.03 crores + 236.5 crores " 84 crores = Rs. 1,254.6 crores." ,,,,,,,,,,

79. It is stated on behalf of appellants that the aforesaid alleged "proceeds of crime" traced to NSEL are in relation to NSEL's earnings and repayment of overdraft facility and,,,,,,,,,

are in no way connected to the default of Rs. 5,600 crores on NSEL's exchange. It is stated on behalf of "63 MTL" that the entire money trail of Rs. 5,600 crores has been" ,,,,,,,,,,

traced to the 24 defaulters on NSEL's exchange, and not a single rupee has been traced to NSEL or the 63 MTL herein. In this regard, reference is made to the following:" ,,,,,,,,,

a. The EOW, Mumbai Police, has commissioned a forensic audit report to establish a money trail of the default amount to the 24 Defaulters. The Report establishes that the entire" ,,,,,,,,,

default amount is traced to the Defaulters. Details of the same are herein below: ,,,,,,,,,

Liability of defaulter as per EOW Forensic Audit Report ,,,,,,,,,

Sl.

No.",Defaulter,Value of Attachments (Crores),,,,,"Total Value of Attachments" ,,,,,,

,,,"Prosecution

Complaint in

PMLA Spl

Case. 4

of 2015 dt.

30th March

2015", "Prosecution

Complaint in

PMLA

Special Case. 4

of 2016 dt. 21st

November

2016", "Prosecution

Complaint in

Supplement

ary PMLA

Special Case

22 of 2018

dt. 16th July

2018", "POA
03/2017
dt. 15th
March
2017",,,,,,,,,
1., "P D Agro
Processors", 54.76,, 177.34,, 232.1,,,,,,,,
2., "Aastha
Minmet
India
Pvt Ltd", 48.88,,, 48.88,,,,,,,,
3., "Mohan India
Pvt Ltd", 183.33,, 201.50,, 384.83,,,,,,,,
4., "Spincot
Textiles Pvt
Ltd", 83.71,,, 83.71,,,,,,,,
5., "Whitewater
Foods", 42.46,,, 42.46,,,,,,,,
6., "N K
Proteins", 313.8,,, 313.8,,,,,,,,
7., "Yathuri
Associates", 95.11,,, 95.11,,,,,,,,
8., "Namdhari
Foods", 23.65,,, 23.65,,,,,,,,
9., "Lotus
Refineries", 17.98,,, 17.98,,,,,,,,
10., "Swastik
Overseas", 1.68,,, 1.68,,,,,,,,
11., Ark Imports,, 68.57,,, 68.57,,,,,,,,
12., "Shree

Radhey

Trading",,,13.20,,13.20,,,,,,,,

13.,Loil Group,,,,414.62,414.62,,,,,,,,

Grand Total,,,,,,,,1740.59,,,,,,,,

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Admissi after and by HCC ized by

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Sr. (A) Order ation of Order tion Order award accepted by Order and Report

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N K

1 PROTEINS

LTD

MOHAN

2 INDIA PVT 922.00 11.Jan.2018 922.00 - -

LTD

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3 ENTER-

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4 LOIL CONTI- 26-04-18 &

NENTAL 320.02 30-07-18

FOOD LTD

LOIL

5 HEALTH 265.87 26.Apr.2018

FOODS LTD

LOIL

6 OVERSEAS 77.24 26.Apr.2018

FOODS LTD

ARK

7 IMPORTS 719.37 20.Jul.2015 719.37 - -

PVT LTD

8 P D 633.75 16.Aug.2018 633.75 -

AGROPROC

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ESSORS

PVT. LTD

YATHURI

9 ASSOCIATE 264.96 18.Dec.2014 134.64 30.Jul.2018 - 399.60 - -

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10 LOTUS 21.Sep.2018 252.47 -

REFINERIES 252.47 -

PVT LTD

11 JUGGERNA 23.Dec.2014 145.00 -

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145.00 - -

PROJECTS

LTD.

12 AASTHA 23.Dec.2014 12.50 - 26.Dec.2018

MINMET

12.50 - 75.57

INDIA PVT

LTD

13 METKORE - 14.Sep.2018

ALLOYS &

83.46

INDUSRIES

LTD.

14 SWASTIK 18.Dec.2014 91.19 - -

OVERSEAS

91.19 -

CORPORAT

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15 WHITE 84.82 23.Jul.2018 84.82 - -

WATER

-

FOODS PVT

LTD

NAMDHARI

16 FOOD INT. 51.02 27.Feb.2017 -

PVT LTD

17 NAMDHARI 10.39 27.Feb.2017 -

RICE &

- -

GENERAL

MILLS

NCS

18 SUGARS - 58.85 26.Mar.2018 58.85 - -

LIMITED

SPIN COT

19 TEXTILES - 36.63 26.Mar.2018 36.63 - -

PVT LTD

20 SHREE - -

RADHEY

- -

TRADING

CO

21 VIMLADEVI - 10.Aug.2018

AGROTECH - - 13.72

LIMITED

22 MSR FOOD 8.82 30.Jul.2018 8.82 - -

- -

PROCESSING

Total 1,233.02 862.03 3,365.00 61.41

1,269.95 835.88

(4262.29)", "Sr.

No.", "Defaulter", "Decree

on

Admissi

on

(A)", "Order

Date", "Decree

obtained

after

determin

ation of

liability

by HCC

(B)", "Order

Date", "Arbitra-

tion

Award

(C)", "Order

Date", "Total of

Decree

and

Arbitration
award
(A+B+C)","Amount
Crystallized
by HCC
and
accepted by
Hon'ble
BHC","Order
Date","Amount
Crystall-
ized by
HCC
and
pending
accep-
tance by
Hon'ble
BHC","Report
Date of HCC
,1,"N K
PROTEINS
LTD",,,,,,,,,,
,2,"MOHAN
INDIA PVT
LTD",,,,,,922.00,11.Jan.2018,922.00,-,-,
,3,"TAVISHI
ENTER-
PRISES",,,,,,,,,,
,4,"LOIL CONTI-

NENTAL

FOOD LTD",,,,,,,,,,320.02,"26-04-18 &

30-07-18

,5,"LOIL

HEALTH

FOODS LTD",,,,,,,,,,265.87,26.Apr.2018

,6,"LOIL

OVERSEAS

FOODS LTD",,,,,,,,,,77.24,26.Apr.2018

,7,"ARK

IMPORTS

PVT LTD",719.37,20.Jul.2015,,,,,719.37,-,-,

,8,"P D

AGROPROC

ESSORS

PVT. LTD",-,,633.75,16.Aug.2018,-,,633.75,-,-,

,9,"YATHURI

ASSOCIATE

S",264.96,18.Dec.2014,134.64,30.Jul.2018,-,,399.60,-,-,

,10,"LOTUS

REFINERIES

PVT LTD",,,,,,252.47,21.Sep.2018,252.47,-,-,

,11,"JUGGERNA

UT

PROJECTS

LTD.",145.00,23.Dec.2014,,,,-,,145.00,-,-,

,12,"AASTHA

MINMET

INDIA PVT

LTD",12.50,23.Dec.2014,,,,-,,12.50,-,,75.57,26.Dec.2018

,13,"METKORE
ALLOYS &
INDUSRIES
LTD.",,,,,,,,,-,83.46,14.Sep.2018
,14,"SWASTIK
OVERSEAS
CORPORAT
ION",91.19,18.Dec.2014,,-,91.19,-,-,
,15,"WHITE
WATER
FOODS PVT
LTD",,,84.82,23.Jul.2018,-,,84.82,-,-,
,16,"NAMDHARI
FOOD INT.
PVT LTD",,,,,,,,,51.02,27.Feb.2017,-,
,17,"NAMDHARI
RICE &
GENERAL
MILLS",-,,,,-,10.39,27.Feb.2017,-,
,18,"NCS
SUGARS
LIMITED",-,,,,58.85,26.Mar.2018,58.85,-,-,
,19,"SPIN COT
TEXTILES
PVT LTD",-,,,,36.63,26.Mar.2018,36.63,-,-,
,20,"SHREE
RADHEY
TRADING
CO",-,,,,-,
,21,"VIMLADEVI

AGROTECH

LIMITED",-,-,-,-,13.72,10.Aug.2018

,22,"MSR FOOD

PROCESSING",-,-,8.82,30.Jul.2018,-,-,8.82,-,-,-,

,-,"Total

(4262.29)","1,233.02",-,-,862.03,-,-,1,269.95",-,-,3,365.00",61.41,-,-,835.88,

In addition to the aforesaid mentioned Defaulters, two (2) other Members with outstanding liability have cleared their liability." ,,,,,,,,,

The details are stated hereunder: ,,,,,,,,,

1. TOPWORTH STEELS & POWER PVT. LTD. Rs. 175.25 Crs. ,,,,,,,,,

2. SANKHYA INVESTMENTS Rs. 7.23 Crs. ,,,,,,,,,

These defaulters were members of NSEL and defaulted on their payment obligations on the NSEL-Exchange platform. ,,,,,,,,,

81. It is submitted that from the aforesaid, it is clear that the money trail of the default of Rs. 5,600 crores, has been traced to the defaulters on NSEL's exchange and not NSEL." ,,,,,,,,,

82. It is submitted on behalf of MTL that the amount of Rs.1,254.60 crores traced to NSEL are not proceeds of crime under Sec. 2(1)(u) of the PMLA as the said" ,,,,,,,,,

property is not derived, either directly or indirectly by NSEL as a result of any alleged criminal activity, on NSEL's exchange, i.e. the default of Rs.5,600 crores, as seen above." ,,,,,,,,,

Therefore, if the aforesaid amount is not proceeds of crime under the PMLA, then any provisional attachment of assets of equivalent value of the MTL/ Appellant by Respondent No.1 by way of the PAOs, is illegal and ultra vires the scheme of the Act." ,,,,,,,,,

MTL/ Appellant by Respondent No.1 by way of the PAOs, is illegal and ultra vires the scheme of the Act." ,,,,,,,,,

83. The said arguments of Mr. Awasthi have no force. On the one side, he says that proceed of crime traced to NSEL as per the case of respondent no. 1, on the other hand the" ,,,,,,,,,

respondent no. 1 has attached the property of 25 traders worth sum of Rs.3973.83 crores and investigation is still on against them. It is stated by him that so far, 84 crores have been" ,,,,,,,,,

deposited by MTL as per order of Bombay High Court and respondent no. 1 is investigating for remaining amount, if any, transferred." ,,,,,,,,,

84. It is pertinent to mention here that the Honâ?ble Supreme Court vide its Order dated 30.04.2019 has also dealt with various aspects of the matter though on the issue of,,,,,,,,,,,,,

amalgamation of all companies by the Central Government Order who says it becomes essential in the public interest. The relevant paras 1-9, 55.3,56.1,56.2, 59, 59.5 and 72 are",,,,,,,,,,,,,

reproduced below:-,,,,,,,,,,,,,

1. Leave granted.,,,,,,,,,,,,,,

2. This batch of appeals and writ petition raises questions as to the applicability and construction of Section 396 of the Companies Act, 1956, which deals with",,,,,,,,,,,,,

compulsory amalgamation of companies by a Central Government order when this becomes essential in the public interest. The appellant, 63 Moons Technologies Ltd.",,,,,,,,,,,,,

(hereinafter referred to as â??FTILâ?, which name was changed to 63 Moons Technologies Ltd. on 27.05.2016), is a 99.99% shareholder of the National Spot Exchange",,,,,,,,,,,,,

Ltd. (hereinafter referred to as â??NSELâ?), and is a listed company. About 45% of the shareholding of FTIL is held by Shri Jignesh Shah and family, and about 43% of",,,,,,,,,,,,,

the shareholding is held by members of the Indian public. Approximately 5% of the shareholding is held by institutional investors. FTIL is a profitable company, having a",,,,,,,,,,,,,

positive net worth of over INR 2500 crore, and is in the business of providing software which is used for trading by brokers and exchanges across the country. FTIL has",,,,,,,,,,,,,

about 900 employees, and a Board of Directors which is different from the Board of Directors of its wholly owned subsidiary, i.e., NSEL. On the other hand, NSEL 2 was",,,,,,,,,,,,,

incorporated in 2005 by Multi Commodities Exchanges [â??MCXâ?] and its nominees. NSEL provided an electronic platform for trading of commodities between willing,,,,,,,,,,,,,

buyers and sellers through brokers representing them. On 05.06.2007, the Union of India issued an exemption notification under Section 27 of the Forward Contracts",,,,,,,,,,,,,

(Regulation) Act, 1952 [â??FCRAâ?] exempting forward contracts of oneday duration for sale and purchase of commodities traded on NSEL from operation of the",,,,,,,,,,,,,

provisions of the FCRA. NSEL commenced operations in October 2008. On 27.04.2012, the Department of Consumer Affairs [â??DCAâ?] issued a show cause notice to" ,,,,,,,,,

NSEL as to why action should not be initiated against it for permitting transactions in alleged violation of the exemption granted to it under the FCRA. NSEL replied to the,,,,,,,,

show cause notice on 29.05.2012 stating that it had not violated the exemption granted to it. Without adjudicating upon the show cause notice, on 12.07.2013, the DCA" ,,,,,,,,,

directed NSEL to give an undertaking that no further contracts shall be launched until further instructions, and that all existing contracts will be settled on due dates. This" ,,,,,,,,,

was effectively a â??freezingâ?? order. On 22.07.2013, NSEL gave an undertaking to the DCA." ,,,,,,,,,

3. Earlier, in January 2013, representatives of MMTC Ltd., a Government of India undertaking, which was one of the trading 3 members of NSEL, visited some of the" ,,,,,,,,,

warehouses which were at different locations in order to verify stocks therein and reported existence of full commodity stock in the said warehouses. Sometime in July,,,,,,,,

2013, 13,000 persons who traded on the platform of NSEL claimed to have been duped by other trading members (being 24 in number), who defaulted in payment of" ,,,,,,,,,

obligations amounting to approximately INR 5600 crore. Due to the sudden and abrupt stoppage of fresh contracts, and media reports about the same, market" ,,,,,,,,,

participation on NSELâ??s platform reduced considerably, forcing NSEL to suspend trading and close its spot exchange operations w.e.f. 31.07.2013. The Forward" ,,,,,,,,,

Markets Commission [â??FMCâ?] recommended to the DCA on 12.08.2013 that steps be taken to verify quantity and quality of commodities at various warehouses;,,,,,,,,

financial status of buyers and trading members be ascertained, and the liability be fixed on promoters of NSEL, i.e., FTIL. On 14.08.2013, NSEL issued a press release in" ,,,,,,,,,

which Shri Sinha, its CEO/MD, made a statement that he and his management team were responsible for all operations at NSEL. On 27.08.2013, the FMC directed a" ,,,,,,,,,

forensic audit of NSEL by Grant Thornton LLP, and the Union of India, on 30.09.2013, ordered inspection of the books of accounts of NSEL and FTIL under Section" ,,,,,,,,,

209A of the Companies Act. On the same day, the Economic Offences 4 Wing [â?? EOWâ??] registered cases against Directors and key management personnel of the" ,,,,,,,,,

NSEL and FTIL, trading members of NSEL, and brokers of NSEL under various provisions of the Indian Penal Code and the Maharashtra Protection of Interest of" ,,,,,,,,,

Depositors Act, 1999 [â??MPID Actâ?]. Several suits were filed by the traders who allegedly have been duped, the most important of which is Suit No.173 of 2014" ,,,,,,,,,

pending in the Bombay High Court, which is a representative suit filed under Order I Rule 8 of the Code of Civil Procedure, 1908 [â??CPCâ?]. NSEL also filed third-" ,,,,,,,,,

party notices in the said suit for recovery of INR 5600 crore against 24 defaulter traders. It has also filed various arbitration proceedings against them, and is in the" ,,,,,,,,,

process of recovery of INR 3365 crore out of INR 5600 crore, which are in the form of court decrees and arbitration awards." ,,,,,,,,,

4. On 17.12.2013, based on the Grant Thornton report dated 21.09.2013, the FMC passed an order declaring that FTIL was not â??fit and properâ? to hold equity in" ,,,,,,,,,

any commodity exchanges, and must dilute its shareholding to not more than 2% of the paid-up equity capital of MCX. The said order is under challenge in Writ Petition" ,,,,,,,,,

No. 337 of 2014 before the Bombay High Court. On 28.02.2014, the Division Bench of the Bombay High Court refused a prayer for stay of the aforesaid order, stating" ,,,,,,,,,

that findings of fact of a serious nature 5 have been recorded against the appellant, and the fraud perpetrated is to the tune of INR 5500 crore." ,,,,,,,,,

5. On 06.01.2014, the Economic Offences Wing, Mumbai, filed chargesheets against the Managing Director and CEO of NSEL, Shri Sinha, the Head of Warehousing of" ,,,,,,,,,

NSEL, Shri Babu Kanvi, and two other defaulters. In the chargesheet, it was revealed that the aforesaid three employees of NSEL, in exchange for monetary kickbacks," ,,,,,,,,,

had colluded with the defaulters to enable them to trade on NSELâ??s platform

without depositing adequate goods in the warehouses, in breach of rules and byelaws of" ,,,,,,,,,

NSEL,,,,,,,,,

6. On 18.08.2014, the FMC, vide a letter to the Union of India, suggested that FTIL and NSEL be merged. Meanwhile, in the representative Suit No. 173 of 2014, vide" ,,,,,,,,,

order dated 02.09.2014, the Bombay High Court appointed a three-member committee consisting of Mr. Justice V.C. Daga, Mr. J. Solomon, and Mr. Yogesh Thar for" ,,,,,,,,,

ascertaining and crystallising the liability of the defaulters and to assist in recovery of debts from the defaulters. This committee continues to function even on date. Thus," ,,,,,,,,,

in addition to INR 3365 crore, i.e., the total of decrees and arbitration awards against the defaulters, this high-level committee has also crystallised a further sum of INR" ,,,,,,,,,

835.88 6 crore to be recovered from the defaulters, which is pending before the Bombay High Court." ,,,,,,,,,

7. On 19.09.2014, the Ministry of Finance, Government of India, issued a notification withdrawing the exemption granted to NSEL vide notification dated 05.06.2007." ,,,,,,,,,

Exemptions granted to the National Commodity and Derivatives Exchange Ltd. (NCDEX) Spot Exchange and the National Agricultural Produce Market Committee,,,,,,,,

(APMC) were also withdrawn as the Government was of the view that ready delivery or spot delivery contracts in commodities ought not to be traded on commodities,,,,,,,,

exchanges at all. On 15.10.2014, Dr. K.P Krishnan, Additional Secretary, Department of Economic Affairs, wrote a letter to the Ministry of Corporate Affairs stating that" ,,,,,,,,,

FTIL and NSEL appear to be maintaining separate identities for a fraudulent purpose, i.e., to deprive investors of their money. As a result, there is a need to lift the" ,,,,,,,,,

corporate veil in order to unearth the fraud, as a result of which, amalgamation of two companies, where one has defrauded market participants and the other company" ,,,,,,,,,

is cash-rich and capable of addressing the payment crisis more effectively. It was therefore proposed to merge FTIL and NSEL under Section 396 of the Companies Act. ,,,,,,,,,

On 21.10.2014, a draft order of amalgamation, made in accordance with Section 396(3) of the Companies Act, was 7 circulated to the relevant stakeholders. As a result," ,,,,,,,,,

FTIL filed Writ Petition No. 2743 of 2014 on 10.11.2014, in which it challenged the impugned draft order. On 27.11.2014, the Bombay High Court directed the parties to" ,,,,,,,,,

maintain status quo. On 16.12.2014, the Union of India filed an affidavit in reply, categorically confirming that the impugned draft order has been made by the Central" ,,,,,,,,,

Government on the basis of the FMC's proposal dated 18.08.2014. On 04.02.2015, the Bombay High Court vacated the status quo order, and passed an order allowing" ,,,,,,,,,

FTIL, NSEL, and their shareholders to file their objections to the draft amalgamation order. Meanwhile, under Section 396(3), a compensation order was made on" ,,,,,,,,,

01.04.2015, which involved compensation only to a particular shareholder of NSEL. On 28.08.2015, the Central Government issued a notification to merge the functions" ,,,,,,,,,

of the FMC with the Securities and Exchange Board of India [SEBI] w.e.f. 28.09.2015. On the same day, the FCRA was also repealed. Thus, SEBI was now vested" ,,,,,,,,,

with the powers of the FMC which is to be governed by the Securities and Exchange Board of India Act, 1992 [SEBI Act]." ,,,,,,,,,

8. FTIL and NSEL were granted a hearing on their objections to the impugned draft amalgamation order by a committee consisting of Shri Pritam Singh, Additional" ,,,,,,,,,

Secretary to the Government of India, and 8 Shri H.P. Chaturvedi, Joint Secretary and Legal Advisor, Ministry of Law and Justice in October 2015, pursuant to a" ,,,,,,,,,

Bombay High Court order in the Writ Petition 2743 of 2014 pending before it.,,,,,,,,,

9. On 12.02.2016, a final amalgamation order was passed in terms of Section 396(3), thereby merging FTIL and NSEL, wherein all assets and liabilities of NSEL would" ,,,,,,,,,

become assets and liabilities of FTIL. The writ petition already filed was amended on 28.03.2016 to include a challenge to this order. On 04.12.2017, the impugned" ,,,,,,,,,

judgment of the Bombay High Court was passed in which the said writ petition

was dismissed.,,,,,,,,,,

55.3. We have seen that neither FTIL nor NSEL has denied the fact that paired contracts in commodities were going on, and by April to July, 2013, 99% (and excluding E-",,,,,,,,,,

series contracts), at least 46% of the turnover of NSEL was made up of such paired contracts. There is no doubt that such paired contracts were, in fact, financing",,,,,,,,,,

transactions which were distinct from sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL, and the FCRA.",,,,,,,,,,

We have also seen that NSEL throughout kept representing that it was, in fact, a commodity exchange dealing with spot deliveries. Apart from the Grant Thornton report",,,,,,,,,,

and the FMC order, we have also seen that Shri Jignesh Shah, on 10.07.2013, made representations to the DCA and the FMC, in which he stated that NSEL had full stock",,,,,,,,,,

as collateral; 10-20% of open position as margin money; and that the stock currently held in NSEL's 120 warehouses was valued at INR 6000 crore, all of which turned",,,,,,,,,,

out to be incorrect. 87 Further, there is no doubt whatsoever that in July, 2013, as a result of NSEL stopping trading on its exchange, a payment crisis of approximately",,,,,,,,,,

INR 5600 crore arose. The further question that remains is whether, given these facts, the conditions precedent for the applicability of Section 396 were followed.",,,,,,,,,,

56.1. What is important to note is that by the time the final order of amalgamation was passed, i.e., on 12.02.2016, the final order itself records:",,,,,,,,,,

8.1.Economic Offences Wing, Mumbai:",,,,,,,,,,

~ Total amount due and recoverable from 24 defaulters is Rs. 5689.95 crores.,,,,,,,,,,

~ Injunctions against assets of defaulters worth Rs. 4400.10 crore have been obtained.,,,,,,,,,,

~ Decrees worth Rs. 1233.02 crore have been obtained against 5 defaulters.,,,,,,,,,,

~ Assets worth Rs. 5444.31 crore belonging to the defaulters have been attached of which assets worth Rs. 4654.62 crore have been published in Gazette under

the,,,,,,,,,,,,,

MPID Act for liquidation under the supervision of MPID Court and balance assets worth Rs. 789.69 crore have been attached/secured for attachment by the EOW:,,,,,,,,,,,,,

~ Assets worth Rs. 885.32 crore belonging to the directors and employees of NSEL have been attached out of which assets worth Rs. 882.32 crores have already been,,,,,,,,,,,,,

published in Gazette under MPID Act for liquidation under the supervision of MPID Court and balance assets worth Rs. 3 crore have been attached/secured for,,,,,,,,,,,,,

attachment by the EOW:,,,,,,,,,,,,,

~ MPID Court has already issued notices u/s 4 & 5 of the MPID Act to the persons whose assets have been attached as above. Thus, the process of liquidation of the",,,,,,,,,,,,,

attached assets has started,,,,,,,,,,,,,

Bombay High Court has appointed a 3- 95 member committee headed by Mr. Justice (Retd.) V.C. Daga and 2 experts in finance and law to recover and monetize the,,,,,,,,,,,,,

assets of the defaulters,,,,,,,,,,,,,

Rs.558.83 crores have been recovered so far, out of which Rs. 379.83 crore have been received/recovered from the defaulters and Rs. 179 crore were disbursed by",,,,,,,,,,,,,

NSEL to small traders/investors,,,,,,,,,,,,,

8.2. Enforcement Directorate:,,,,,,,,,,,,,

~ ED has traced proceeds of crime amounting to Rs. 3973.83 crore to the 25 defaulters;,,,,,,,,,,,,,

~ ED has attached assets worth Rs. 837.01 crore belonging to 12 defaulters;,,,,,,,,,,,,,

~ As per the recent amendment in the PMLA, the assets attached by ED can be used for restitution to the victims.",,,,,,,,,,,,,

8.3. The above status indicates that the said enforcement agencies are working as per their mandate?|â?|.â??,,,,,,,,,,,,,,

56.2. What concerned the FMC in August 2014 has, by the date of the final amalgamation order, been largely redressed without amalgamation. The â?? emergency",,,,,,,,,,,,,

situationâ? of 2013 which, even according to the Central Government, required

the emergent step of compulsory amalgamation has, by the time of the passing of the" ,,,,,,,,,

Central Government order, disappeared. Thus, the *raison d'être* for applying Section 396 of the Companies Act has, by the passage of time, itself disappeared. In fact," ,,,,,,,,,

as on today, decrees/awards worth INR 3365 crore have been obtained against the defaulters, with INR 835.88 crore crystallised by the committee set up by the High" ,,,,,,,,,

Court, 96 pending acceptance by the High Court, even without using the financial resources of FTIL as an amalgamated company. What is, therefore, important to note is" ,,,,,,,,,

that what was emergent, and therefore, essential, even according to the FMC and the Government in 2013- 2014, has been largely redressed in 2016, by the time the" ,,,,,,,,,

amalgamation order was made. Also, the Central Government order does not apply its mind to the essentiality aspect of Section 396 at all. In fact, in several places, it" ,,,,,,,,,

refers to "essential public interest" as if "essential" goes with "public interest" instead of being a separate and distinct condition precedent to the exercise of,,,,,,,,

power under Section 396. On facts, therefore, it is clear that the essentiality test, which is the condition precedent to the applicable to Section 396, cannot be said to have" ,,,,,,,,,

been satisfied.,,,,,,,,,

59. When it comes to "public interest" as opposed to the "private interest" of investors/traders, who have not been paid, the amalgamation order dated" ,,,,,,,,,

12.02.2016 makes interesting reading. The satisfaction as to public interest is stated in the very beginning of the order as follows:,,,,,,,,

"Whereas the Central Government is satisfied that to leverage combined assets, capital and reserves, achieve economy of scale, efficient administration, gainful" ,,,,,,,,,

settlement of rights and liabilities of stakeholders and creditors and to consolidate businesses, ensure coordination in policy, it is essential in the public interest" ,,,,,,,,,

99,,,,,,,,

What is stated in the opening is repeated in paragraph 2.14.2 as

follows:,,,,,,,,,,,,,

2.14.2 The Central Government also carefully considered the proposal received from FMC and DEA and was of the considered opinion that to leverage combined,,,,,,,,,,,,,

assets, capital and reserves for efficient administration and satisfactory settlement of rights and liabilities of stakeholders and creditors of NSEL, it would be in essential",,,,,,,,,,,,,,

public interest to amalgamate NSEL with FTIL.â??,,,,,,,,,,,,,

It will be seen that all the expressions used in relation to â??public interestâ? have relation only to the businesses of the two companies that are sought to be,,,,,,,,,,,,,

amalgamated. What is important to note is that there is no interest of the general public as opposed to the businesses of the two companies that are referred to. It is,,,,,,,,,,,,,

important to notice that the leveraging of combined assets, capital, and reserves is only to settle liabilities of certain stakeholders and creditors when the order is read as" ,,,,,,,,,,,,,,

a whole, and given the fact that the businesses of the two companies were completely different. So far as achieving economy of scale and efficient administration is" ,,,,,,,,,,,,,,

concerned, it is difficult to see how this would apply to the fact situation in this case where NSEL is admittedly a company which has stopped functioning as a commodities" ,,,,,,,,,,,,,,

exchange at least with effect from July, 2013 with no hope of any revival. Thus, the consolidation of businesses spoken 100 about does not exist as a matter of fact, as" ,,,,,,,,,,,,,,

NSEL's business has come to a grinding halt, as has been observed by the FMC and the Central Government itself. Each one of these expressions, when read with the" ,,,,,,,,,,,,,,

rest of the order, therefore, only shows that the sole object of the amalgamation order is very far from the high-sounding phrases used in the opening, and is really only" ,,,,,,,,,,,,,,

to effect speedy recovery of dues of INR 5600 crore, which has been referred to in the letter of the FMC to the Secretary, Ministry of Corporate Affairs, dated" ,,,,,,,,,,,,,,

18.08.2014. This would be clear from a reading, in particular, of two paragraphs of the order, namely, paragraphs 2.13.2 and 2.13.3, which read as follows: â?? 2.13.2." ,,,,,,,,,,,,,,

Thus, it would be observed from above that NSEL is not having the resources, financial or human, or the organizational capability to successfully recover the dues to the",,,,,,,,,

investors pending for over a year. Further, NSEL is not left with any viable, sustainable business while FTIL has the necessary resources to facilitate speedy recovery of",,,,,,,,,

dues. 2.13.3. In the above background, a proposal had been received from FMC, vide letter dated 18-08- 2014, proposing the merger of NSEL with FTIL by the Central",,,,,,,,,

Government under the provisions of Section 396 of the Companies Act, 1956. The proposal has been supported by the Department of Economic Affairs (DEA), Ministry of",,,,,,,,,

Finance, FMC has proposed the merger/amalgamation of NSEL with FTIL in essential public interest so that the human/financial resources of FTIL are also directed",,,,,,,,,

towards facilitating speedy recovery of dues from the defaulters at NSEL and the FTIL takes responsibility to resolve the payment crisis at NSEL at the earliest.,,,,,,,,,

59.5. So far, we have gone by the Central Government order as it stands. The Bombay High Court, in stating reasons (a), (b), and (c) as grounds of public interest, has",,,,,,,,,

gone much further than even the answer given to the objections that are contained in the order itself. â??Restoring/safeguarding public confidence in forward contracts,,,,,,,,

and exchanges, which are an integral and essential part of the Indian economy and financial system, by consolidating the businesses of NSEL and FTIL,â? is not",,,,,,,,,

contained in the answer given to objections in the order. First and foremost, restoring public confidence is no part of the order. What is mentioned is only the fact that",,,,,,,,,

public confidence has been shattered, as is reflected by the FMC order dated 17.12.2013. Secondly, the entire expression, â??which are an integral and essential part of",,,,,,,,,

Indian economy and financial system, by consolidating the businesses of NSEL and FTILâ? is no part even of this answer given, but a gloss given by the High Court itself",,,,,,,,,

relatable to this answer. Similarly, when it comes to reason (b), â??giving effect to business realities of the caseâ? contained in the answer to objections does not contain",,,,,,,,,

â??by consolidating the businesses of FTIL and NSELâ?, nor does it contain â??and preventing FTIL from distancing itself from NSEL, which is, even otherwise, its alter" ,,,,,,,,,

egoâ?. On the contrary, the High Court itself mentions, in paragraph 355, that â??this is also not a case where the Central Government has, in fact, lifted the corporate" ,,,,,,,,,

veil, despite the alleged non-existence of the circumstances justifying lifting of such corporate veilâ?, and further, â??this is not a case where the Central Government" ,,,,,,,,,

has lifted the corporate veil and sought to apportion any liability upon either NSEL or FTILâ??. For all these reasons, we find that no reasonable body of persons properly" ,,,,,,,,,

instructed in law could possibly arrive at the conclusion that the impugned order has been made in public interest.,,,,,,,,,

59.5. So far, we have gone by the Central Government order as it stands. The Bombay High Court, in stating reasons (a), (b), and (c) as grounds of public interest, has" ,,,,,,,,,

gone much further than even the answer given to the objections that are contained in the order itself. â??Restoring/safeguarding public confidence in forward contracts,,,,,,,,,

and exchanges, which are an integral and essential part of the Indian economy and financial system, by consolidating the businesses of NSEL and FTIL,â? is not" ,,,,,,,,,

contained in the answer given to objections in the order. First and foremost, restoring public confidence is no part of the order. What is mentioned is only the fact that" ,,,,,,,,,

public confidence has been shattered, as is reflected by the FMC order dated 17.12.2013. Secondly, the entire expression, â??which are an integral and essential part of" ,,,,,,,,,

Indian economy and financial system, by consolidating the businesses of NSEL and FTILâ? is no part even of this answer given, but a gloss given by the High Court itself" ,,,,,,,,,

relatable to this answer. 109 Similarly, when it comes to reason (b), â??giving effect to business realities of the caseâ? contained in the answer to objections does not" ,,,,,,,,,

contain â??by consolidating the businesses of FTIL and NSELâ?, nor does it contain â??and preventing FTIL from distancing itself from NSEL, which is, even otherwise," ,,,,,,,,,

its alter ego. On the contrary, the High Court itself mentions, in paragraph 355, that "this is also not a case where the Central Government has, in fact, lifted the", ,,,,,,

corporate veil, despite the alleged non-existence of the circumstances justifying lifting of such corporate veil, and further, "this is not a case where the Central", ,,,,,,

Government has lifted the corporate veil and sought to apportion any liability upon either NSEL or FTIL. For all these reasons, we find that no reasonable body of", ,,,,,,

persons properly instructed in law could possibly arrive at the conclusion that the impugned order has been made in public interest.,,,,,,

72. In fact, the Government order dated 12.02.2016 itself reflects the net worth of NSEL as INR 8.86 crore from its balance sheet dated 31.03.2015, despite its capital", ,,,,,,

being INR 60 crore, inasmuch as the total reserve and surplus is a negative figure of INR 51.54 crore. As against this, FTIL's balance sheet, as on 31.03.2015, discloses", ,,,,,,

that for the same year, FTIL's net worth is INR 2779.94 crore. Also, FTIL has been paying dividends to its shareholders ranging from 1000% to 250% for the years", ,,,,,,

2007-2008 till 2015-2016. On the other hand, NSEL has never paid a single dividend ever since its inception. Post amalgamation, therefore, dividend payable to the", ,,,,,,

shareholders of FTIL is bound to come down. Correspondingly, the "marketable value" of such shares will also fall.", ,,,,,,

85. In reply, it is submitted on behalf of respondent no. 1 that the Hon'ble Supreme Court vide order dated 30.04.2019 has set aside the Order of the Hon'ble Bombay High Court", ,,,,,,

and rejected the merger of M/s National Spot Exchange Limited (NSEL) with M/s 63 Moons Technologies Ltd. (Formerly known as Financial Technologies India Ltd - FTIL). In this, ,,,,,,

regard, the question, which was raised in bunch of appeals and Writ Petitions before the Hon'ble Supreme Court, as to the applicability and construction of Section 396 of the", ,,,,,,

Companies Act, 1956, which deals with compulsory amalgamation of companies by a Central Government Order when this becomes essential in the public interest.", ,,,,,,

86. It is also submitted by the respondent no. 1 that the issue regarding

involvement of NSEL or FTIL in money laundering was not even raised or discussed before the Honâ?ble,,,,,,,,,,,,,

Supreme Court. Further, criminal aspect of involvement of NSEL, FTIL and Shri Jignesh Shah in the offence of money laundering was also not discussed at all. On the contrary, the",,,,,,,,,,,,,

Honâ?ble Supreme Court has observed as under:-,,,,,,,,,,,,,

â?55.3. We have seen that neither FTIL nor NSEL has denied the fact that paired contracts in commodities were going on, and by April to July, 2013, 99% (and",,,,,,,,,,,,,

excluding E-series contracts), at least 46% of the turnover of NSEL was made up of such paired contracts. There is no doubt that such paired contracts were, in fact,",,,,,,,,,,,,,

financing transactions which were distinct from sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL, and the",,,,,,,,,,,,,

FCRA. We have also seen that NSEL throughout kept representing that it was, in fact, a commodity exchange dealing with spot deliveries. Apart from the Grant Thornton",,,,,,,,,,,,,

report and the FMC order, we have also seen that Shri Jignesh Shah, on 10.07.2013, made representations to the DCA and the FMC, in which he stated that NSEL had",,,,,,,,,,,,,

full stock as collateral; 10-20% of open position as margin money; and that the stock currently held in NSELâ?s120 warehouses was valued at INR 6000 crores, all of",,,,,,,,,,,,,

which turned out to be incorrect. Further, there is no doubt whatsoever that in July, 2013, as a result of NSEL stopping trading on its exchange, a payment crisis of",,,,,,,,,,,,,

approximately INR 5600 crore arose. The further question that remains is whether, given these facts, the conditions precedent for the applicability of Section 396 were",,,,,,,,,,,,,

followed.â?,,,,,,,,,,,,,

87. It is alleged that the Honâ?ble Court has clearly observed that paired contracts were, in fact, financing transactions which were distinct from sale and purchase transactions in",,,,,,,,,,,,,

commodities and were, thus, in breach of both the exemptions granted to NSEL, and the FCRA. Further, the Honâ?ble Court also observed that Shri Jignesh Shah, on 10.07.2013,",,,,,,,,,,,,,

made representations to the DCA and the FMC, in which he stated that NSEL had full stock as collateral; 10-20% of open position as margin money; and that the stock currently held",,,,,,,,,

in NSEL's 120 warehouses was valued at INR 6000 crores, all of which turned out to be incorrect.",,,,,,,,

88. On behalf of the respondent no.1, it is alleged that the Hon'ble Supreme Court itself is making observations with regard to involvement of NSEL, FTIL and Shri Jignesh Shah in",,,,,,,,,

the predicate offence as well as money laundering offence. Based on these facts revealed during the course of investigation, which has now been established after the above",,,,,,,,,

mentioned observations of the Hon'ble Supreme Court in its Order dated 30.04.2019, attachment of the properties of FTIL has been made and the same has been confirmed by the",,,,,,,,,

Adjudicating Authority.,,,,,,,,,

89. It is difficult to hold that the attachment of assets of 63 Moons Technologies Ltd. (erstwhile Financial Technologies (India) Ltd.) is illegal and ultra vires the statutory definition of,,,,,,,,

Proceeds of crime. Proceeds of Crime in the hands of NSEL if dissipated can only be substituted by other properties of National Spot Exchange Ltd. (NSEL) itself. There,,,,,,,,

is no concept of equivalent attachment in the hands of another legal entity. The said legal entity (63 Moons Technologies Ltd.) conducts its own independent business and earns,,,,,,,,

therefrom.,,,,,,,,,

90. Para 56.1 of Supreme Court Judgement reads as under:-,,,,,,,,

56.1. What is important to note is that by the time the final order of amalgamation was passed, i.e., on 12.02.2016, the final order itself records:",,,,,,,,,

8.1.Economic Offences Wing, Mumbai:",,,,,,,,,

- Total amount due and recoverable from 24 defaulters is Rs. 5689.95 crores.,,,,,,,,,

- Injunctions against assets of defaulters worth Rs. 4400.10 crore have been obtained.,,,,,,,,,

- Decrees worth Rs. 1233.02 crore have been obtained against 5 defaulters.,,,,,,,,,

- Assets worth Rs. 5444.31 crore belonging to the defaulters have been attached of which assets worth Rs. 4654.62 crore have been published in Gazette under the,,,,,,,,,,,,,

MPID Act for liquidation under the supervision of MPID Court and balance assets worth Rs. 789.69 crore have been attached/secured for attachment by the EOW:,,,,,,,,,,,,,

- Assets worth Rs. 885.32 crore belonging to the directors and employees of NSEL have been attached out of which assets worth Rs. 882.32 crores have already been,,,,,,,,,,,,,

published in Gazette under MPID Act for liquidation under the supervision of MPID Court and balance assets worth Rs. 3 crore have been attached/secured for,,,,,,,,,,,,,

attachment by the EOW;,,,,,,,,,,,,,

- MPID Court has already issued notices u/s 4 & 5 of the MPID Act to the persons whose assets have been attached as above. Thus, the process of liquidation of the" ,,,,,,,,,,,,,,

attached assets has started.,,,,,,,,,,,,,,

- Bombay High Court has appointed a 3- 95 member committee headed by Mr. Justice (Retd.) V.C. Daga and 2 experts in finance and law to recover and monetize the,,,,,,,,,,,,,

assets of the defaulters.,,,,,,,,,,,,,,

- Rs.558.83 crores have been recovered so far, out of which Rs. 379.83 crore have been received/recovered from the defaulters and Rs. 179 crore were disbursed by" ,,,,,,,,,,,,,,

NSEL to small traders/investors.,,,,,,,,,,,,,,

8.2. Enforcement Directorate:,,,,,,,,,,,,,

- ED has traced proceeds of crime amounting to Rs. 3973.83 crore to the 25 defaulters;,,,,,,,,,,,,,

- ED has attached assets worth Rs. 837.01 crore belonging to 12 defaulters;,,,,,,,,,,,,,

- As per the recent amendment in the PMLA, the assets attached by ED can be used for restitution to the victims." ,,,,,,,,,,,,,,

8.3. The above status indicates that the said enforcement agencies are working as per their mandate?|â?|.â??. ,,,,,,,,,,,,,,

91. Admittedly, the properties attached are not proceed of crime as defined under Section 2(1)(u) of PMLA. It is submitted on behalf of â??63 MTLâ? that the

Directorate of" ,,,,,,,,,,

Enforcement/ED attempts to make out a case for attachment of properties of 63 MTL purely based on a mis-interpretation of the concept of value of such property as ,,,,,,,,,

employed in Sec. 2(1)(u). The principles of equivalent value, could apply only to a person who came into possession of the proceeds of crime. It cannot be applied to attach" ,,,,,,,,,

assets of 3rd party who is not the recipients of any proceed of crime. In the eyes of law, every public-sector company is a distinct/independent company." ,,,,,,,,,

92. It is submitted on behalf of 63 MTL that NSEL was a Separate legal entity having independent management, 63 MTL was not controlling the functioning of NSEL." ,,,,,,,,,

The position regarding a holding and a subsidiary has been adequately dealt with by the courts as under: ,,,,,,,,,

a. Balwant Rai Saluja and Anr. V. Air India & Ors. (2014) 9 SCC 407 ,,,,,,,,,

(Issue raised was as to whether the workmen engaged in the statutory canteen, through a contractor, would be treated as employees of the principal establishment, the SC examining" ,,,,,,,,,

the inter-se relationship of holding and subsidiary Company and whether the workman of the subsidiary can be termed as employees of the principal establishment held that the wholly ,,,,,,,,,

owned subsidiary is a distinct legal entity and negated the doctrine of "piercing the corporate veil")" ,,,,,,,,,

b. Electronics Corporation of India v. Secretary, Revenue Department, Government of Andhra Pradesh. (1999) 4 SCC 458 CB" ,,,,,,,,,

(Para 15-18) ,,,,,,,,,

(A company incorporated under the companies act is a distinct legal entity and has a corporate personality of its own independent of its parent company) ,,,,,,,,,

c. Vodafone Int'l Holdings B. V. v. Vol. (2012) 6 SCC 613 ,,,,,,,,,

(Para 101,103,105, 258-260)" ,,,,,,,,,

(subsidiary company has an independent existence and the directors of the subsidiary company owe their duty to the subsidiary company even if appointed by the holding company) ,,,,,,,,,

d. Anita Kaur v. Universal Weather and Aviation India Pvt. Ltd. (2014) 143 DRJ 572 ,,,,,,,,,

Para 7-8,,,,,,,,,,,,,

(A company is a distinct legal entity from its shareholder even if all the shares are held by one person),,,,,,,,,,,,,,

93. It has also come on record that in the order passed in the bail application that Jignesh Shah had no knowledge of affairs of NSEL and his role in NSEL. No doubt, it was",,,,,,,,,,,,,,

mentioned that the officials of NSEL were aware about the fraud and they may also be involved. It is stated as under:-,,,,,,,,,,,,,

a. NSEL had 8 Directors of which only 2 are common with 63MTL,,,,,,,,,,,,,

b. Those 2 common Directors were also ""Non-Executive""." ,,,,,,,,,,,,,,

c. Effective control of NSEL was with the MD & CEO of NSEL -,,,,,,,,,,,,,,

Anjani Sinha,,,,,,,,,,,,,

d. With Respect to the contracts launched, circulars etc., only post facto information was given to 63MTL & the minutes of Board meetings of NSEL were placed for noting purposes" ,,,,,,,,,,,,,,

only in terms of mandate of the listing agreements.,,,,,,,,,,,,,,

e. See:,,,,,,,,,,,,,

i. Secretarial compliance report Pg.l854/Appeal 1735/III-IV,,,,,,,,,,,,,

ii. Section 70 PMLA- ""Person Incharge"" ,,,,,,,,,,,,,,

94. The Hon'ble Supreme Court in its order has mentioned the role of non-executive Director in Pooja Ravinder Devidasani Vs. State of Maharashtra [(2014) 16 SCC 1] as under:,,,,,,,,,,,,,

17. There is no dispute that the Appellant, who was wife of the Managing Director, was appointed as a Director of the Companyâ?" M/S Elite International Pvt. Ltd. on" ,,,,,,,,,,,,,,

1st July, 2004 and had also executed a Letter of Guarantee on 19th January, 2005. The cheques in question were issued during April, 2008 to September, 2008. So far as" ,,,,,,,,,,,,,,

the dishonor of Cheques is concerned, admittedly the cheques were not signed by the Appellant. There is also no dispute that the Appellant was not the Managing" ,,,,,,,,,,,,,,

Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the,,,,,,,,,,,,,

day- to-day affairs of the running of its business and only monitors the executive

activity. To fasten vicarious liability Under Section 141 of the Act on a person, at the" ,,,,,,,,,

material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly" ,,,,,,,,,

responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I. Act. Every person connected with" ,,,,,,,,,

the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible" ,,,,,,,,,

for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was" ,,,,,,,,,

not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence Under Section 141 of the N.I. Act." ,,,,,,,,,

95. It is submitted that the Jignesh Shah had no role to play in policy decision of NSEL. In this regard, the following facts are referred:" ,,,,,,,,,

a. Affidavit of Anjani Sinha (Former CEO & MD, NSEL)" ,,,,,,,,,

(In his Affidavit Mr. Sinha has specifically stated that none of the board members, promoters, directors were involved)" ,,,,,,,,,

b. Statement of Anjani Sinha made before the R - 1 confirming his earlier Affidavit ,,,,,,,,,

c. Statement of Jai Bhaukhandi made before the R-1 (Ex. Assistant VP of NSEL).,,,,,,,,

(In response to 0.5 & 0.6 he has stated that: Anjani Sinha formulated all the policies in NSEL. Used to receive instructions from Anjani Sinha. No interaction with Jignesh Shah).,,,,,,,,

d. Statement of Srikant Javalgekar (Non-Executive Director NSEL) made before the R-1. ,,,,,,,,,

(Q.8 : Board was never informed about any infirmity, Board was also misguided and cheated â?" MS& CEO always maintained the stand there is sufficient stock.)" ,,,,,,,,,

96. Admittedly, no money (except a sum of Rs. 84 Crores) has travelled from NSEL to â??63 Moons Technologies Ltd.â? from the time NSEL was incorporated in 2005 till it" ,,,,,,,,,

became defunct in 2013 when its trading stopped and its operations were

suspended as a result of action by the Department of Consumer Affairs. Rs. 84 Crores deposited in Bombay,,,,,,,,,,,,,

High Court represents rent, software, other shared services etc. The same is an admitted position by the Respondent No.1. The Honâ?ble Bombay High Court by order dated",,,,,,,,,,,,,

12.06.2015 directed the deposit of this amount. Therefore, there would be no issue of doctrine of tracing.",,,,,,,,,,,,,

97. The Honâ??ble Delhi High Court in M/s. Himachal EMTA Power Limited Vs. UoI & Ors (W.P.(C) 5537/2018 & CM Nos. 21583/2018 & 33487/2018) has held as under:-,,,,,,,,,,,,,

16. A plain reading of Section 5(1) of the PML Act indicates that an order of provisional attachment can be passed only where the concerned officer has reasons to believe,,,,,,,,,,,,,

on the basis of material in his possession that: (a) any person is in possession of proceeds of crime; and (b) such proceeds are likely to be concealed, transferred, or dealt",,,,,,,,,,,,,

with any manner which would result in frustrating any proceedings relating to confiscation of such proceeds of crime. The expression â??proceeds of crimeâ? is defined,,,,,,,,,,,,,

under clause (u) of Section 2 (1) of the PML Act as under: â??Section 2 (u) â?" â??proceeds of crimeâ? means any property derived or obtained, directly or indirectly,",,,,,,,,,,,,,

by any person as a result of criminal activity relating to a scheduled offence or the value of any such property (or where such property is taken or held outside the country,",,,,,,,,,,,,,

then the property equivalent in value held within the country).â??,,,,,,,,,,,,,

17. It is clear from the language of Section 2(u) of the PML Act that the expression â??proceeds of crimeâ? refers to a property, which is â??derived or obtainedâ? by",,,,,,,,,,,,,

any person as a result of criminal activity. Therefore, in order to pass an order of provisional attachment, it was necessary for the ED to have reasons to believe that the",,,,,,,,,,,,,

property sought to be attached was â??derived or obtainedâ?? from any scheduled crime,,,,,,,,,,,,,

98. It is argued on behalf of â??63 MTLâ? that in the absence of even an allegation of a money trial, assets of FTIL/63 MTL cannot be attached merely because it is the holding",,,,,,,,,,,,,

company.,,,,,,,,,,

a. As per R-1's own case mentioned in the prosecution complaint, the entire money trail has been traced to defaulters." ,,,,,,,,,

b. There is admittedly no nexus between the alleged crime & property attached.,,,,,,,,,

c. The only inflow of money from NSEL to 63MTL is Rs. 84 crores (which was on account of payment towards rent, electricity, AMC & software licenses), the same has also been" ,,,,,,,,,

deposited before the Hon'ble Bombay High Court.,,,,,,,,,

d. There is in fact a negative outflow of ERs.248.43 crores from 63 MTL to NSEL
â" Letter dtd. 12.8.16.,,,,,,,,,

99. It is alleged that the properties attached are all self-acquired properties of â" 63 MTLâ". ,,,,,,,,,

a. The source of income, earning & assets out of which and / or by means of which 63MTL acquired those investments & all other documents, relevant information & particulars" ,,,,,,,,,

w.r.t. same are explained by way of Chartered Accountant's certificate u/s 65(g) Indian Evidence Act, 1872." ,,,,,,,,,

i. CA certificates - The admissibility of CA Certificate under Section 65(g) has been upheld by the Hon'ble Delhi High Court in FAO no. 406/2016: NHAI Vs. HCC.,,,,,,,,,

b. CA certificate not considered at all by the Adjudicating Authority.,,,,,,,,,

100. It is submitted on behalf of â"63 MTLâ" that Section 5(1) PMLA â" conditions are not satisfied.,,,,,,,,,

a. Twin conditions for passing an order of attachment under Sec. 5(1) are that the concerned officer has reason to believe on the basis of material in his possession that :- ,,,,,,,,,

i) any person is in possession of any proceeds of crime; and, ,,,,,,,,,

ii) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds" ,,,,,,,,,

of crime under Chapter III of the PMLA, ,,,,,,,,,

b. In the present case there is no material on record to satisfy condition (a). ,,,,,,,,,

c. No reasons to believe have been or could have been furnished in respect of the invocation of Section 5(1) or the Second proviso thereto, specially keeping in

mind the fact that the",,,,,,,,,,

entire day to day operation of 63MTL is monitored by committee appointed by the NCLT. This Tribunal may call for the file of the Investigation Officer to verify and check there,,,,,,,,,

would be no reasons to believe recorded by the Investigating Officer or ED for the invocation of Section 5 at all,,,,,,,,,

101. Admittedly, all assets & investments, in any event, secured, and all treasury operations of 63 MTL/FTIL are monitored Decision for carrying out the treasury operations which",,,,,,,,,,

included the switching of the funds from one investment to another were approved by the Committee Appointed by the NCLT comprising - one ex-judge of the Supreme Court and,,,,,,,,,

one nominee of the Central Government, both of whom enjoyed veto powers.",,,,,,,,,

i. CLB Order dated 30.6.2015,,,,,,,,,

ii. SC Order dated 18.04.2016 (confirming CLB order),,,,,,,,,,

iii. NCLT Order dated 16.06.2016 - EgJZ23/CCNCLT Committee approved Treasury operations,,,,,,,,,

102. 63 MTL/ FTIL was not an accused; either in the Scheduled Offence or in the PMLA Offence at the time of issuance of PAOs at the initial stage,,,,,,,,,

a. 63 MTL / FTIL was initially named in the FIR,,,,,,,,,

b. Therefore, role of 63 MTL / FTIL has been investigated by the Economic Offences Wing of Mumbai Police ("EOW"). However, 63 MTL has not charge sheeted yet by EOW",,,,,,,,,

despite a lapse of more than 5 years. EOW has so far filed the following chargesheets before the designated court:,,,,,,,,,

i. Chargesheetdated06.01.2014,,,,,,,,,

ii. First Supplementary Chargesheet dated 02.06.2014,,,,,,,,,

iii. Second Supplementary Chargesheet dated 04.08.2014,,,,,,,,,

c. 63 MTL/ FTIL was not even a suspect in the ECIR dated 14.10.2015,,,,,,,,,

d. Subsequently, in the Prosecution Complaint dated 30.03.2015, 63 MTL / FTIL has been left out, and no role attributed to 63 MTL.",,,,,,,,,

i. Even after investigation, no money trail has been found to 6 3MTL",,,,,,,,,

103. On the date of the confirmation of the three PAOs, namely 09.03.2017, 22.03.2017 & 14.07.2017, admittedly there was no Prosecution Complaint

against 63 MTL. It is" ,,,,,,

submitted that in reference to 2nd proviso to S.5(I), there was neither a chargesheet under Section 173 nor a prosecution Complaint against 63 MTL on the date of confirmation" ,,,,,,

of the attachments. Subsequently, as an afterthought, a Supplementary Prosecution Complaint dated 27.07.2018 was filed against 63 MTL / FTIL In this Supplementary Prosecution" ,,,,,,

Complaint also no money trial has been attributed to 63 MTL. Role attributed to 63 MTL/FTIL. - ,,,,,,

a. In this Supplementary Prosecution Complaint also no money trial has been attributed to 63 MTL. Role attributed to 63MTL/FTIL.,,,,,,

b. At the time of issuance of the PAOs there was no Prosecution Complaint against 63MTL/FTIL.,,,,,,

c. The Supplementary Prosecution Complaint has been filed against 63MTL/FTIL only on 27.07.2018 that is more than an year after the passing of the confirmation orders by the ,,,,,,

Adjudicating Authority.,,,,,,

104. It is also the case of respondent no. 1 that some trading clients were duped by other traders (24 in number) on the trading platform to the tune of about Rs 5600 crores. NSEL ,,,,,,

has obtained decrees worth Rs. 3500 crores against defaulters and is recovering the same before the Honâble Bombay High Court. The Bombay High Court vide order dated 2nd ,,,,,,

September, 2014 in Notice of Motion No. 240 of 2018 in Suit no. 173 of 2014 between Modern India Ltd. Vs Financial technologies Ltd. has appointed a committee, headed by Justice" ,,,,,,

V.C. Daga (Retd. Judge of the Honâble Bombay High Court) to overlook the same.,,,,,,

105. Counsel for 63 MTL and NSEL alleged that the case of Enforcement Directorate is flawed and it is not that NSEL is a defaulter. The Honâble Bombay High Court ,,,,,,

where the suits are pending has not given any adverse finding against NSEL or 63 Moons Technologies Ltd. It is submitted by both sets of appellants that the conditions of Section 5 ,,,,,,

of the Prevention of Money Laundering Act, 2002 (PMLA) for attachment, whether provisional or final to the assets of 63 Moons Technologies Ltd. is not possible. It is argued that" ,,,,,,

the attachment is completely outside the preview of Section 5 of PMLA, 2002 and, therefore, the attachment must be released so that 63 Moons Technologies Ltd., who has 63,000" ,,,,,,,,,

shareholders with an independent board of directors must not suffer.,,,,,,,,,

106. It is stated by them that merely the fact that 63 Moons Technologies Ltd. holds 99.99% shareholding in NSEL cannot be a ground to attach the assets of 63 Moons Technologies.,,,,,,,,,

Ltd. Para 59.3 and para 59.5 of judgement of the Honâ?ble Supreme Court in Civil Appeal no. 4476 of 2019 dated 30th April, 2019 (63 moons & ors vs UOI & ors) are reproduced" ,,,,,,,,,

hereunder:- ,,,,,,,,,

â??59.3. It is important to note that grounds (a) and (b) are both culled out in answer to objections raised by FTIL. The precise objection raised and the answer given are ,,,,,,,,,

quoted hereinbelow: ,,,,,,,,,

â??7.2.1. FTIL has challenged the background and reasons for the amalgamation as the power under section 396 of the Act has been used only in case of Government ,,,,,,,,,

companies alone. This argument does not derogate from the scope of the statutory provisions. The statutory provisions of section 396 of the Act are being invoked in ,,,,,,,,,

essential public interest to safeguard the interest of all stakeholders in the captioned company. The present status and composition of the Boards of FTIL and NSEL have ,,,,,,,,,

been noted. However, the fact that the Boards had not acted with an independent mind to collect information and put the system under a robust technology is borne out of" ,,,,,,,,,

the simple fact that the Show Cause Notice dated 27-04-2012 issued by the Department of Consumer Affairs based on analysis of trade data by the then Forward Market ,,,,,,,,,

Commission had given an alarming picture of the state of affairs of NSEL. The public interest driving the merger are set out in the business realities of the case, it is noted" ,,,,,,,,,

from the facts of the case and the recommendations of FMC as well as its order dated 17-12-2013 which throw ample light to the grave shattering of the public confidence ,,,,,,,,,

and the purpose of establishing commodity exchange has been defeated.â??

xxx,,,,,,,,,,,,,

xxx xxx 7.2.6. FTIL and NSEL have distinct and separate objects and nature of operations and completely disparate and unconnected objects, and hence there is no",,,,,,,,,,,,,

synergy, efficient administration, consolidation of business or co-ordination in policy to be gained by the forced amalgamation; the argument runs contrary to the concept",,,,,,,,,,,,,

of merger which essentially means that two or more separate entities are getting merged to achieve the objectives of amalgamation. In the instant case, amalgamation is",,,,,,,,,,,,,

targeted to achieve its stated objects, essentially in public interest. By all intents and purposes, the way both the companies were being managed, owned and controlled,",,,,,,,,,,,,,

NSEL is the alter ego of FTIL and thus, the two companies have been practically one entity. All stakeholders were also looking at them as one entity. The amalgamation",,,,,,,,,,,,,

u/s. 396 of the Act only formalizes this practical reality in essential public interest. 7.2.8. The FTIL has questioned the jurisdiction of the Central,,,,,,,,,,,,,

Government to decide on the question of fraud and claimed that it has to be proved beyond reasonable doubt by adducing necessary particulars; the Central Government,,,,,,,,,,,,,

is invoking section 396 of the Act in essential public interest for the merger of NSEL, which is an almost wholly-owned subsidiary of FTIL. The merger is not an",,,,,,,,,,,,,

adjudication on the alleged fraud. The merger is targeted to achieve its stated objectives for long term sustainability in the best interest of the stakeholders. (emphasis in,,,,,,,,,,,,,

original) It will be noticed that the objection raised in paragraph 7.2.1 is that Section 396 can be used in the case of Government companies alone, whereas the answer",,,,,,,,,,,,,

given is that this cannot be so, given the business realities of the case and the FMC order of 17.12.2013 which throw ample light to the grave shattering of public",,,,,,,,,,,,,

confidence and the purpose of establishing Commodity Exchange has been defeated.,",,,,,,,,,,,,,

First and foremost, what is important to notice is that the business realities of the case are what is contained in the recommendations of the FMC. We

have",,,,,,,,,,

seen that these recommendations are in the form of a letter dated 18.08.2014, in which the "business reality" is the fact that dues of INR 5600 crore have to be paid",,,,,,,,,

and that NSEL does not have the wherewithal to do so. Thus, its parent company's financial resources ought to be used to effect such payment. This "business",,,,,,,,,

reality", therefore, speaks only of the private interest of the investors/traders who have been allegedly duped (which fact will only be established in suits filed by them in",,,,,,,,,

2014), and nothing beyond (which would show some vestige of public interest). Equally, the grave shattering of public confidence and purpose of establishing commodity",,,,,,,,,

exchanges having been defeated, according to the Central Government, is a gloss on the FMC order dated 17.12.2013. If this were so, one would have expected a",,,,,,,,,

resuscitation or revival of the commodities exchange of NSEL, which could have been achieved by takeover of its management. It is difficult to imagine that grave",,,,,,,,,

shattering of public confidence by the permanent shutting down of the commodities exchange of the NSEL would be remedied only by facilitating the paying of dues to,,,,,,,,,

certain allegedly duped investors/traders, which fact will be proved or disproved in suits filed by them which are pending adjudication in the Bombay High Court. In any",,,,,,,,,

case, this reason is wholly irrelevant as an answer to the objection raised by FTIL which, as we have seen, is an objection stating that the Section applies to Government",,,,,,,,,

companies alone. Also, had FTIL made no such objection, no such answer would have been forthcoming. As far as paragraphs 7.2.6 and 7.2.8 of the order are",,,,,,,,,

concerned, what is admitted in the order itself, is that there is no "adjudication" on the "fraud" in the facts of the present case, and thus, not an exercise of lifting",,,,,,,,,

of the corporate veil of the pre-amalgamation companies. The amalgamation order contradicts itself by then stating that NSEL is the alter ego of FTIL, and thus, the two",,,,,,,,,

companies are practically one entity. In any event, these paragraphs do not

indicate as to how the "alter ego" argument impacts public interest. For all these reasons," ,,,,,,,,,

therefore, neither reason (a) nor reason (b) ought to detain us any further. Reason (c) is, therefore, the only reason that really remains, as is contained in the letter of" ,,,,,,,,,

18.08.2014 by the FMC to the Central Government. We have already seen that this reason, by itself, is the protection of the private interest of a group of investors/traders," ,,,,,,,,,

as distinct from public interest." ,,,,,,,,,

"59.5. So far, we have gone by the Central Government order as it stands. The Bombay High Court, in stating reasons (a), (b), and (c) as grounds of public interest," ,,,,,,,,,

has gone much further than even the answer given to the objections that are contained in the order itself. "Restoring/safeguarding public confidence in forward," ,,,,,,,,,

contracts and exchanges, which are an integral and essential part of the Indian economy and financial system, by consolidating the businesses of NSEL and FTIL," is" ,,,,,,,,,

not contained in the answer given to objections in the order. First and foremost, restoring public confidence is no part of the order. What is mentioned is only the fact that" ,,,,,,,,,

public confidence has been shattered, as is reflected by the FMC order dated 17.12.2013. Secondly, the entire expression, "which are an integral and essential part of" ,,,,,,,,,

Indian economy and financial system, by consolidating the businesses of NSEL and FTIL" is no part even of this answer given, but a gloss given by the High Court itself" ,,,,,,,,,

relatable to this answer. 109 Similarly, when it comes to reason (b), "giving effect to business realities of the case" contained in the answer to objections does not" ,,,,,,,,,

contain "by consolidating the businesses of FTIL and NSEL", nor does it contain "and preventing FTIL from distancing itself from NSEL, which is, even" ,,,,,,,,,

otherwise, its alter ego". On the contrary, the High Court itself mentions, in paragraph 355, that "this is also not a case where the Central Government has, in fact," ,,,,,,,,,

lifted the corporate veil, despite the alleged non-existence of the circumstances justifying lifting of such corporate veil", and further, "this is not a case where

the" ,,,,,,,,,

Central Government has lifted the corporate veil and sought to apportion any liability upon either NSEL or FTILâ?. For all these reasons, we find that no reasonable body" ,,,,,,,,,

of persons properly instructed in law could possibly arrive at the conclusion that the impugned order has been made in public interest.â?? ,,,,,,,,,

107. It is admitted position that On 30.06.2015, CLB granted ad-interim reliefs to the Union of India, directing the â??63 MTLâ? not to sell / alienate / create third party rights in its" ,,,,,,,,,

assets and investments till further order. On 18.04.2016, the Honâ??ble Supreme Court in Civil Appeal No.4391-4392 of 2016 confirmed CLBâ??s order dated 30.06.2015." ,,,,,,,,,

It is also a matter of fact that EOW on 18.07.2016 directed the Appellant not to dispose of, alienate, encumber, part with possession of or create any third party right, title and/or" ,,,,,,,,,

interest in, to, upon or in respect of any assets of the Appellant." ,,,,,,,,,

108. The National Company Law Tribunal (hereinafter referred to as NCLT), on 24.06.2016, which took over from CLB while modifying the order dated 30.06.15, constituted a" ,,,,,,,,,

committee (â??NCLT Committeeâ??) to, inter-alia, monitor and approve the treasury operations of the Appellant. The NCLT Committee comprises of : " ,,,,,,,,,

(i) Two Independent Directors of the Appellant; ,,,,,,,,,

(ii) Managing Director of the Appellant; ,,,,,,,,,

(iii) Retired Judge of the Honâ??ble Supreme Court and ,,,,,,,,,

(iv) A nominee of the Union of India inter-alia to monitor and approve treasury operations of the Appellant. ,,,,,,,,,

The Retired Judge of the Honâ??ble Supreme Court and nominee of the Union of India have individual veto powers in the NCLT Committee. By order dated June, 2018, NCLT" ,,,,,,,,,

disposed of the C.P. No. 1 of 2015. The said order has been challenged by â??63 MTLâ? as well as UOI and the same is pending adjudication before the NCLAT. Vide order dated ,,,,,,,,,

27.06.2018, NCLAT has stayed the order dated 04.06.2018 and continued the aforesaid interim arrangement." ,,,,,,,,,

109. Admittedly, as of today, two interim orders passed by the CLB as well as

EOW which are continuing and have not been vacated. As far as the judgement referred by Mr." ,,,,,,,,,

Awasthi in the case of Axis Bank (supra) is concerned, the said judgement does not help the case of the respondent as admittedly, under the scheme of Section 5(1) of the Act, which" ,,,,,,,,,

mandates that the property involved in the money laundering are also to be attached if any person is in possession of proceed of crime. No doubt, if the proceed of crime is parked" ,,,,,,,,,

with the â??63 MTLâ? or in the possession of â??63 MTLâ?, then said judgement will help the case of the respondent. However, in the present case, as per the investigation as well" ,,,,,,,,,

as the judgement referred by the Honâ?ble Bombay High Court, the amount of Rs.84 crores which is the license fee, has been deposited by the â??63 MTLâ?, as per the direction of" ,,,,,,,,,

the Court.,,,,,,,,,

110. We have requested Mr. Awasthi many times that in case any other amount has been diverted by the National Spot Exchange Ltd.(NSEL) to the â??63 MTLâ?, the respondent" ,,,,,,,,,

would be entitled to attach the said amount. There is no positive answer given by Mr. Awasthi, except it is stated that the investigation is still one." ,,,,,,,,,

111. It is admitted position that the Bombay HC granted bail to Jignesh Shah in Criminal Bail Application 1263/2014. In the Order, the BHC inter-alia, observed that â??though the" ,,,,,,,,,

case has been projected as a â??scam of Rs.5600 crores,â? it needs to be kept in mind that these amounts have not been received by NSELâ?!.The money invested has not come to" ,,,,,,,,,

NSEL, but has gone to the borrowers i.e. bogus sellers. It is the borrowers who have benefited by the transactions and the money of the â??investorsâ?? has gone to them.â??" ,,,,,,,,,

112. This Tribunal has also gone through the details of the investigation as well as the statements of witnesses, including officials of NSEL, under Section-50 of the PMLA, 2002. Shri" ,,,,,,,,,

Anjani Sinha, the former MD & CEO of NSEL has deposed before the ED that he and his managing staff were solely responsible for the crisis at NSEL. It is also stated by him that" ,,,,,,,,,

the 24 defaulting members were in collusion with the warehousing staff of NSEL and they manipulated the stock and duped the entire exchange mechanism. Shri Jignesh Shah who ,,,,,,,,,

was the non-executive Vice-Chairman of NSEL, has also deposed before the ED that the Board of Directors used to interact only with the Managing Director of NSEL i.e. Anjani" ,,,,,,,,,

Sinha. He blamed him as well as Shri Amit Mukherjee and their team was responsible for the growth of NSEL business; that the contracts of NSEL were launched by way of ,,,,,,,,,

circulars. ,,,,,,,,,

113. The Judgement passed by the Supreme Court as well as the investigation conducted by the ED has not given any specific finding that Shri Jignesh Shah was solely responsible or ,,,,,,,,,

he was managing the entire system. In addition, the report of Grand Thornton, a forensic Auditor, who was appointed by NSEL on 27.08.2013, has also contained allegation of wrong" ,,,,,,,,,

doing by some officers of NSEL including MD and CEO. ,,,,,,,,,

114. Thus, after having gone through the entire gamut, prima facie, we are also of the view that the former MD & CEO of NSEL and his managing staff were responsible for the" ,,,,,,,,,

crisis as well as the borrowers who have benefitted by the prosecution and the money of the investment has gone to them. In view of the above, at the same time, we do not wish to" ,,,,,,,,,

give the clean chit to Shri Jignesh Shah who was the major shareholder of NSEL as we feel that it is a matter of trial. Since the matter is under investigation, whatever money has" ,,,,,,,,,

been transferred to â??63 MTLâ?, has already been deposited as per the directions of High Court. In case, during the investigation, it is found that more money has been parked or" ,,,,,,,,,

transferred, the same may also be attached at the end of â??63 MTLâ??. Thus, the balance has to be strike at this stage in order to secure the amount." ,,,,,,,,,

115. There is also no finding by the adjudicating authority that on the basis of investigation, any other amount has been transferred by NSEL to â??63 MTLâ? or any evidence is" ,,,,,,,,,

available in this regard. Once the two authorities i.e. CLB as well as EOW have already restrained the â??63 MTLâ?, â??63 MTLâ? not to sell or alienate or to create any third" ,,,,,,,,,

party right in assets and interest, the attaching of huge money with the said knowledge by the ED amounts to civil death of the company as well as the â??63 MTLâ? 58,000" ,,,,,,,,,

shareholders with an independent Board of Directors who will suffer without their fault. Not only that, the employees of the Company will also lose their job in case the Company will",,,,,,,,,,,,,,

not be allowed to continue its business if the attachment will continue. It is also pertinent to mention that in the impugned order, all important legal issues by NSEL and â??63 MTLâ?" ,,,,,,,,,,,,,,

have neither been discussed nor decided as per law. The order appears to be non-application of mind without appreciating the law. In the impugned order, all the issues raised by" ,,,,,,,,,,,,,,

NSEL have not been legally dealt by the Adjudicating Authority.,,,,,,,,,,,,,,

116. It is always open to the ED to attach addl. amount other than Rs.84 crores which has already been deposited, if after the investigation it is found that more money has been" ,,,,,,,,,,,,,,

transferred from NSEL to â??63 MTLâ?. We are also conscious about the fact that the main allegation of the respondent is against one Mr. Jignesh Shah and his family members," ,,,,,,,,,,,,,,

who have the major shareholding in the Company â??63 MTLâ??. However, as per settled law, these are two different entities in the eyes of law." ,,,,,,,,,,,,,,

117. Having considered the entire gamut of the matter as well as the judgement passed by the Honâ?ble Supreme Court, it could be appropriate to strike the balance in the above said" ,,,,,,,,,,,,,,

matter.,,,,,,,,,,,,,,

118. The schedule of properties are DEMAT account of M/s. 63 Moons Technologies Ltd. i.e. investment in bonds, details of the quantity, Face Value and Market Value are" ,,,,,,,,,,,,,,

mentioned in the Provisional Attachment Order. The total Face Value of the schedule of properties (A+B) is Rs.1095,27,17,055/-" ,,,,,,,,,,,,,,

119. With regard to the allegations of ED, the same will be tested at the time of trial under the schedule offence and PMLA. The charges are yet to be framed. In the meanwhile," ,,,,,,,,,,,,,,

â??63 MTLâ? and Jignesh Shah & his family members are restrained not to sell, alienate or to create any third party rights in their assets till the final order is passed. Shri Jignesh" ,,,,,,,,,,,,,,

Shah and his family members who are shareholders of â??63 MTLâ? shall furnish Indemnity Bond for sum of Rs.1095,27,17,055/- along with an undertaking that if after the trial and" ,,,,,,,,,,,,,,

final order, it is found that the attached movable property was a proceed of

crime, then they shall deposit the said amount with the respondent. The same be filed within one month." ,,,,,,,,,

Subject to above two conditions, the provisional attachment orders shall be treated as quashed with regard to â??63 MTLâ? by releasing all the movable properties i.e. DEMAT" ,,,,,,,,,

account i.e. investment in bonds belonging to â??63 MTLâ?. The liberty is also granted to â??63 MTLâ? that, if after hearing, two orders passed by CLB and EOW are vacated," ,,,,,,,,,

then â??63 MTLâ? can either to move the application for review petition before this Tribunal or may approach to the Special Court for vacation or modification of the interim ,,,,,,,,,

directions issued by us. ,,,,,,,,,

120. The appeals are partly allowed. The impugned order is modified accordingly. ,,,,,,,,,

121. No costs. ,,,,,,,,,