

**SECURITIES AND EXCHANGE BOARD OF INDIA**  
**EXECUTIVE DIRECTOR, SHRI V. S. SUNDARESAN**  
**ORDER**

**Under Section 12 (3) of Securities and Exchange Board of India Act, 1992 read with regulation 27 of Securities and Exchange Board of India (Intermediaries) Regulations, 2008 in the matter of trading on National Spot Exchange Ltd.**

<b>NOTICEE</b>	<b>REGISTRATION No.</b>
<b>Smart Commodity Brokers Pvt. Ltd.</b>	<b>INZ000029932</b>

**BACKGROUND**

1. **Smart Commodity Brokers Pvt. Ltd.** (*“Noticee”*) was registered with Securities and Exchange Board of India (*“SEBI”*) as a stock broker under the SEBI (Stock Brokers) Regulations, 1992 (*“Brokers Regulations”*). *Noticee* was a member of Multi Commodity Exchange of India Ltd. (*‘MCX’*) and National Commodity and Derivatives Exchange (*‘NCDEX’*). *Noticee* was earlier a member of the National Spot Exchange Limited (*“NSEL”*).
2. In the Union Budget for the FY 2015-16, it was announced that Forward Market Commission (*“FMC”*), the then regulator of the commodity derivatives market, would be merged with SEBI. The Finance Act, 2015, provided that any person dealing in commodity derivatives prior to the aforesaid merger of FMC with SEBI may continue to do so provided they have made an application for registration with SEBI within a period of three months from the date of such merger. The merger of FMC and SEBI took effect on September 28, 2015.
3. *Noticee* was a member of NSEL and after the merger of FMC with SEBI, it applied for registration with SEBI. SEBI granted certificate of registration to

*Noticee* with registration number INZ000029932 (*inadvertently mentioned in the SCN and the Enquiry Report as INB011278232*), as a commodity derivatives broker subject to the provisions of Securities and Exchange Board of India (Intermediaries) Regulations, 2008 ('Intermediaries Regulations').

4. As the *Noticee* was a member of NSEL and had participated in / facilitated trading in paired contract(s) on the NSEL platform, SEBI initiated proceedings against the *Noticee* under Chapter V of the Intermediaries Regulations and appointed a Designated Authority ('DA') on September 24, 2018, to enquire into whether the *Noticee* was '*fit and proper*' to continue to hold the certificate of registration as a commodity derivatives broker, in view of the alleged violation of regulation 9(b), 9(f) read with Clause A(1), A(2) and A(5) of the Schedule II and 5(e) of the Brokers Regulations read with Schedule II of the Intermediaries Regulations.
5. Upon completion of the enquiry, an Enquiry Report dated March 23, 2020, was submitted by the DA to the Designated Member ('DM') observing that the *Noticee* was not a "fit and proper" person in terms of regulation 5(e) read with regulation 27(iv) of the Brokers Regulations and Schedule II of the Intermediaries Regulations. Accordingly, the DA, in terms of regulation 27 of the Intermediaries Regulations, recommended cancellation of the certificate of registration granted to the *Noticee* as a commodity derivatives broker.
6. Pursuant to the above, a post enquiry SCN dated July 10, 2020, was issued to the *Noticee*, under regulation 28(1) of the Intermediaries Regulations, to show cause as to why action, as recommended by the DA or any other action as considered appropriate by the DM, should not be taken against the *Noticee*. A copy of the DA's Report was also forwarded to the *Noticee*. The *Noticee* filed its reply vide letters dated July 27, 2020 and December 26, 2020.
7. While the extant proceedings in the present matter were ongoing, SEBI passed five separate orders during February, 2019, rejecting the applications

filed by five entities (involved therein) for registration as commodity brokers in the NSEL matter. Aggrieved by the said SEBI orders, the entities filed separate appeals before the Hon'ble Securities Appellate Tribunal ("SAT"). The Hon'ble SAT, vide its common order dated June 9, 2022, remanded the aforesaid orders to SEBI to decide these matters afresh within six months from the date of the said SAT order.

### **HEARING, SUBMISSIONS AND ADDITIONAL MATERIAL**

8. Pursuant thereto, a hearing notice dated November 11, 2022 scheduling personal hearing on January 04, 2023 was sent to the *Noticee*. In light of Hon'ble SAT's Order dated June 09, 2022 mentioned above, some additional material viz. a copy of SEBI's complaint letter dated September 24, 2018 to EOW, and a copy of FIR dated September 28, 2018 registered by EOW was also provided to the *Noticee* along with the hearing notice. Further, attention of the *Noticee* was drawn to the findings/ observation of Hon'ble Supreme Court in the matter of *State of Maharashtra v. 63 Moons Technologies Ltd* (Order dated April 22, 2022), and *63 Moons Technologies v. Union of India* (Order dated April 30, 2019).
9. The *Noticee* filed its reply to the hearing notice vide letters dated November 24, 2022 and December 28, 2022 and made the following preliminary submissions:-
  - a) *Pursuant to order dated May 16, 2019 passed by the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi, ("NCLT"), Smart Commodity Brokers Pvt. Ltd. ("SCBPL") was amalgamated with Smart Equity Brokers Pvt. Ltd.*
  - b) *The company viz. SCBPL is no longer in existence and deemed to be dissolved without the process of being wound up.*

- c) *SEBI was requested to drop any further proceeding initiated by issuance of Show Cause Notice dated July 10, 2020 r/w Notice of hearing dated November 11, 2022 since proceedings initiated against SCBPL gets abated on the ground that SCBPL ceased to exist w.e.f. May 16, 2019 .*
- d) *A copy of Company Master Data of SCBPL downloaded from the MCA website, showing the company status as “Amalgamated” was also enclosed with the reply.*

### **CONSIDERATION AND FINDINGS**

10. The records available with SEBI show that SCBPL with registration number INZ000029932, is still registered with SEBI. As the *Noticee* was registered with MCX and NCDEX, they were asked to provide the status of *Noticee*'s registration. In reply, MCX stated that SCBPL (INZ000029932) has transferred its membership to Smart Equity Brokers Pvt. Ltd. (INZ000177636), which was approved by MCX on March 27, 2018, and SCBPL ceased to be the member of MCX w.e.f June 29, 2018. The amalgamation of SCBPL with Smart Equity Brokers Pvt. Ltd. has taken place after the aforesaid transfer of membership. NCDEX, in its reply, stated that *the membership of Smart Commodity Brokers Private Ltd with NCDEX was surrendered w.e.f. September 13, 2017.*
11. It is noted that the *Noticee* ceased to be a member of NCDEX and MCX w.e.f. September 13, 2017 and June 29, 2018, respectively. I further note that the *Noticee* was amalgamated with Smart Equity Brokers Pvt. Ltd. w.e.f. May 16, 2019 i.e. date of NCLT Order. On the MCA website also, the *Noticee*'s status is shown as 'Amalgamated'.
12. As regards the effect of amalgamation, it is a settled law that upon amalgamation, the transferor company *ceases to exist* and all its rights and liabilities pass on to the transferee company. Hon'ble Supreme Court in the case of *M/s. General Radio and Appliances Co. Ltd. & Ors. v. M.A. Khader (dead) by Lrs. [Judgment dated April 17, 1986]* held that under the order of

amalgamation, the transferor company ceased to be in existence in the eye of law and it effaced itself for all practical purposes. This Hon'ble Court laid down that after the amalgamation of two companies, the transferor company ceased to have any identity and the amalgamated company acquired a new status.

13. In the case of *Saraswati Industrial Syndicate v C.I.T.* [Judgment dated September 04, 1990], it was held by the Hon'ble Supreme Court that *"the true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there cannot be any doubt that when two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights of liabilities are determined under scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective."*
14. Further, the implications of amalgamation have been outlined by the Hon'ble Supreme Court of India in the matter of *Principal Commissioner of Income Tax (Central) – 2 Vs. Mahagun Realtors (P) Ltd.* [judgment dated April 5, 2022] as under:

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

15. In light of the above observations of the Hon'ble Supreme Court, the question that needs to be considered is whether the present proceedings for determining whether SCBPL was a "fit and proper" person can be passed on to, and have to be continued against the resultant entity after the amalgamation (i.e. Smart Equity Brokers Pvt. Ltd.) In this regard, it is pertinent to mention that in terms of clause 7 of Schedule II of the Intermediaries Regulations (as amended vide the SEBI (Intermediaries) (Third Amendment) Regulations, 2021, w.e.f. November 17, 2021), the 'fit and proper person' criteria is applicable at the time of application of registration and during the continuity of registration of the intermediary. Thus, "fit and proper" criteria is an essential condition to be met for continued recognition of an entity as a SEBI registered intermediary. In other words, the intermediary has to maintain the "fit and proper" status throughout the currency of its registration. But, in my view, "fit and proper" is a "status" and cannot be treated either as an asset or a liability. Given this understanding of the "fit and proper" criteria, when a transferor company amalgamates with the transferee company, the "fit and proper" status of the transferor company does not pass on to the resultant company. Consequently, if the resultant entity is / seeking to be an intermediary, it will have to separately fulfil the "fit and proper" criteria. As a corollary to that, even when the transferor company was not a "fit and proper" person, the resultant company will have to separately ensure that it is "fit and proper" in adherence to the requirements under the Intermediaries Regulations. Considering the above, I find that determination of the "fit and proper" status of the transferor company (i.e. SCBPL), which has ceased to exist pursuant to the NCLT order dated May 16, 2019, would be infructuous.
16. In light of the above, I find that issuance of any direction under regulation 27 of the Intermediaries Regulations against the *Noticee*, in the facts and circumstances of the present proceedings, is not warranted.

## **ORDER**

17. I, in exercise of powers conferred under section 19 of the Securities and Exchange Board of India Act, 1992 read with regulation 27 of the Intermediaries Regulations, hereby dispose of the instant proceedings against the *Noticee*, namely, Smart Commodity Brokers Pvt. Ltd. (SEBI Registration No. INZ000029932) without issuing any directions.
18. This order is without prejudice to any action that may be taken against the *Noticee* by SEBI or any other authority in accordance with law.
19. A copy of this order shall be served on the *Noticee* and upon all recognized Stock Exchanges and Depositories for their record.

**Sd/-**

**Date- March 01, 2023**

**Place- Mumbai**

**V. S. SUNDARESAN**

**EXECUTIVE DIRECTOR**

**SECURITIES AND EXCHANGE BOARD OF INDIA**