The State Of Maharashtra vs 63 Moons Technologies Ltd on 22 April, 2022

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Bench: Bela M Trivedi, Surya Kant, Dhananjaya Y Chandrachud

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 2748-49 of 2022

The State of Maharashtra .…Appellant

Versus

63 Moons Technologies Ltd. …Respondent

And With Civil Appeal Nos. 2750-51 of 2022 JUDGMENT Dr Dhananjaya Y Chandrachud, J Contents A. Facts ..... 3 B. Submissions ..... 17 C. Analysis..... 25 C. 1 Framework of the MPID Act ..... 25 C. 2 Framework of NSE ..... 27 C. 3 Definitions of „Deposit and „Financial Establishment : Interpretation of Section 2(c) and 2(d) of the MPID Act ..... 40 C. 3.1 Settlement Guarantee Fund: Deposit under Section 2(c) of the MPID Act ..... 46 C. 3. 2 Receipt of commodities: Deposit under Section 2(c) of the Act . 49 C.4 Uncovering the Conspiracy ..... 55 C. 4.1 The Grant Thornton Report ..... 55 C. 4. 2 63 Moons Judgment ..... 56 C. 5 Constitutional Validity of the MPID Act ..... 65 C. 6 The High Court s Judgment ..... 71 PART A 1 The appeal arises from a judgment dated 22 August 2019 of the Bombay High Court, by which certain notifications attaching the property of the respondent under Section 4 of the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act 19991 have been quashed. The respondent holds 99.99% of the shareholding of National Spot Exchange Ltd2. At the core of the dispute is whether NSEL is a □financial establishment‘ within the meaning of Section 2(d) of the MPID Act.

A. Facts

2 NSEL is a company incorporated under the Companies Act 1956, and is a

wholly owned subsidiary of Financial Technologies (India) Limited, which is now known as 63 Moons Technologies Limited3. On 5 June 2007, the Union of India issued a notification under Section 27 of the Forward Contracts (Regulation) Act 19524 exempting forward contacts of one-day duration for sale and purchase of commodities traded on NSEL from the application of the provisions of the enactment. NSEL started operating as an exchange for spot trading in commodities. NSEL launched contracts for buying and selling of commodities on its trading platform with different settlement periods, ranging from T+0 to T+36 days. □T' indicates the trade date, that is the date on which the trade took place and +0 or +36, indicates the number of business days after the trading day when the delivery of the commodity and the payment of price is made. 3 NSEL offered □paired' contracts. Such contracts enabled traders either by themselves or through their brokers, to simultaneously enter into paired "MPID Act" "NSEL" "FCIL or 63 Moons" "FCRA" PART A contracts, such as of T+2 and T+25 duration. The seller through his broker puts the commodities on sale and the buyer through his broker looks to purchase commodities of specific requirements. NSEL then pairs the buyer and the seller if there is a match between the requirement of the buyer and the available commodities with the seller. The buyer and the seller simultaneously enter into T+2 and T+25 contracts. For example, if □A' (the buyer) wants to buy one ton of basmati rice, he would trade on NSEL's platform through his broker. The platform would identify that □B' (the seller) has an offer to sell the quantified commodity. NSEL would then match both the contracts. The date of matching of the contracts is termed as the trade date or □T'. □A' must then pay the price of the commodity to NSEL, which checks if □B' has deposited the stock in a warehouse accredited to NSEL for delivery within two days. Once NSEL has confirmed that □B' has deposited the stock in the warehouse, it transfers the money to □B'. Simultaneously, the same parties enter into a T+25 contract by which □A' (who was the buyer in the T+2 contract) would sell the same quantity of commodity purchased to □B' (who was the seller in the T+2 contract). The difference between the purchasing cost and the selling cost is the profit that the trading member acquires through the trade. A flow chart indicating a representation of the transaction is set out below:

> PART A T+2 Commodity Seller Money is transferred Deposits commodity in from NSEL's settlement NSEL accredited account to seller's warehouse settlement account NSEL Money is transferred Issues warehouse receipt from broker's and displays it on settlement account to exchange terminal NSEL's settlement account Broker Pay money to brokers Places order on behalf of investor for purchasing of commodity T+25 Investor Sells back the same commodity purchased on T+2 Commodity Seller NSEL pays the commodity seller NSEL The seller's broker pays NSEL for the sale of commodity PART A

4 A detailed step-wise trading process of the paired contracts is indicated below:

> (i) A trading member of NSEL who wishes to trade in the platform is required to place a specific quantity of the commodity in a warehouse accredited to NSEL. The warehouse would then generate a warehouse receipt;

(ii) The registered trading member or his broker who had placed his commodity in the warehouse could on the basis of the standard proforma contracts offered by NSEL place offers for sale of the commodity on the platform, stipulating the price and quantity offered;

(iii) The buying trading member or his broker would input buy orders of a particular commodity and quantity on the NSEL trading platform;

(iv) When a sale offer and a buy offer coincide, the exchange would be matched by NSEL, stipulating the commodity, the price, and the quantity;

(v) The Exchange would communicate all the trades effected at the end of the day;

(vi) On the next day, an obligation report recording the pay-in and delivery obligations would be forwarded to the trading members;

(vii) On the day after (that is, settlement date), NSEL would debit the trading member's designated settlement account for the amount of the buying member's pay in obligations and it would be credited to NSEL's exchange settlement account. NSEL's Operations Department would inform NSEL's Delivery Department of the selling member's delivery PART A obligations. Based on the intimation, NSEL's Delivery Department would confirm to the Operations Department if the requisite quantity of the particular commodity is available according to the Warehouse receipts. After such confirmation, the Operations Department would release the purchase price to the selling broker's designated bank account. Simultaneously, a Delivery Allocation Report would be issued to the buyer's broker or the buyer informing him that the commodity purchased was allotted to him; and

(viii) NSEL would then send the buyer's details to the selling trading Member and the selling trading member would arrange for the non-

member client/seller to generate a VAT paid sale invoice of the commodity. On the basis of the Delivery Allocation Report and the VAT Paid Invoice, NSEL would issue a Delivery Note authorizing the buyer to take delivery from the designated warehouse. If the buyer choses to not take delivery, he would be put in constructive possession of the commodity where he would be entitled to take possession at any time. 5 On 27 April 2012, the Department of Consumer Affairs5 issued a show cause notice to NSEL on why action should not be taken against it for permitting transactions in violation of the exemption notification. On 12 July 2012, the DCA directed NSEL to give an undertaking that no contracts shall be launched until further instructions, and that all existing contracts must be settled on the due dates. In July 2013, about 13,000 persons who traded on the platform of NSEL claimed that other trading members had defaulted in the payment of "DCA" PART A approximately Rs 5,600 crores. NSEL issued a circular on 31 July 2013 suspending its spot exchange operations. It stated that the delivery and settlement of all pending contracts would be merged and the contracts would be settled after the expiry of 15 days. NSEL published a statement

on 6 August 2013 representing that it had sufficient stocks valued at Rs 6,032 crores in its warehouses. A new pay-in schedule was announced by NSEL on 14 August 2013 by which the Exchange commenced the pay-in schedule from 16 August 2013 and pay-out schedule from 20 August 2013, in the same manner every week. It was also represented that the members would be entitled to get simple interest on their outstanding dues with effect from 16 August 2013 on a reducing balance at 8% per annum till the end of the settlement calendar. The notification is extracted below:

> National Spot Exchange Limited Circular August 14, 2013 Settlement Schedule In terms of the provisions of the rules, Bye-Laws and Business Rules of the Exchange and further to circular no. NSEL/TRD/2013/065/ dated July 31 2013, the Members of the Exchange are hereby notified that the Exchange has finalised the following revised schedule for settlement of outstanding dues payable to the members. This schedule has been prepared taking into account the exigencies emerging from sudden closure of trading operation, liquidity problem accentuated by withdrawal of buyers credit limits by the banks from the members, who are in pay in and the extensive discussion done by the members who have to complete pay in and members who have to receive the payments. Considering the challenges, the revised schedule of settlement has been prepared to ensure reduction in payment rist and meet the settlement obligation:
>
> 1. The Exchange will commence the Pay-in schedule from Friday, the 16th August, 2013 and pay-out from Tuesday, the 20th August, 2013 and thereafter in the same manner every week.

PART A

2. The Exchange shall effect pay out on a pro-rata basis every week based on the money recovered as per the settlement calendar attached herewith. These payments are subject to realization of cheques of the members, who have to complete pay-in. In case any payment is not realised, then the Exchange shall take measures as per its Rules and Bye laws.

3. All funds realized up to Friday every week starting from August 16, 2013 shall be disbursed on Tuesday of the subsequent week.

4. The schedule has taken into account all promised or expected payment from the members, who have given post-dated cheques or letters of commitment.

5. Members/clients shall be entitled to get interest on their outstanding dues with effect from 16th August 2013 on reducing balance method, based on simple interest rate of 8% per annum till end of settlement calendar. Interest amount shall be paid at end of the settlement.

6. A detailed settlement Calendar is being enclosed herewith.

For and on behalf of National Spot Exchange Ltd.

Santhosh Mansingh Asst. Vice President 6 By a Notification dated 19 September 2014, the Central Government withdrew the exemption granted on 23 July 2008. The Forward Markets Commission6 recommended to DCA that steps be taken to ascertain the quantity and quality of commodities at accredited warehouses, the financial status of buyers and trading members, and that liability be fixed on the promoters of NSEL, i.e 63 Moons. On 27 August 2013, FMC directed a forensic audit of NSEL by Grant Thornton LLP. The Union of India ordered an inspection of accounts of NSEL and 63 Moons under Section 209A of the Companies Act. The Economic Offences Wing registered cases against the directors and key management "FMC" PART A personnel of the NSEL and 63 Moons and against trading members and brokers of NSEL under the provisions of the Indian Penal Code and the MPID Act. 7 Pankaj Ramnaresh Saraf, a Director of Vostak Far East Securities Prvt. Ltd., a company involved in the business of investment, trading, and financing filed a complaint7 on 30 September 2013 against the directors and persons holding key management posts in NSEL, 25 borrowers/trading members and some brokers of NSEL for offences under Sections 120B, 409, 465, 468,471,474 and 477A of the Indian Penal Code 1860. The complainant stated that he had primarily been transacting in T+2 and T+25 contracts. He further stated that since NSEL suspended trading and deferred settlement of all one-day forward contracts by fifteen days, he had not received payment of Rs 202 lakhs that was due to him under various contracts. On 14 August 2013, he was informed by his broker that NSEL had issued a settlement schedule for the payment of outstanding dues after seven months. He alleged that the commodities were traded by providing □false' warehouse receipts of □non - existent commodities'. It was also alleged in the complaint that NSEL held the commodities in warehouses accredited to it as a □trustee' on behalf of the depositors (buyers) and that the misappropriation is a criminal breach of trust. In addition to the above, he also alleged that the Settlement Guarantee Fund8 had been misused by NSEL. 8 The FIR was later transferred to the Economic Offences Wing9 of Mumbai Police. The case was registered and Sections 3 and 4 of the MPID Act were added to the FIR. The case was transferred to the Special Court constituted FIR No 216 of 2013 "SGF" "EOW" PART A under the MPID Act.10 NSEL filed a writ petition challenging the invocation of the MPID Act on the ground that the exchange is not a □financial establishment' under the provisions of the Act. By an order dated 1 October 2015, the petition was dismissed by a Division Bench of the High Court on the following grounds:

> (i) The material collected by EOW during the course of the investigation revealed that NSEL did not carry out its exchange operations according to the bye-laws. It was prima facie evident that NSEL represented to the traders that they would be provided security free loans and that they would receive fixed returns of 14% to 16% pa;
>
> (ii) The record indicates that the transactions were not accompanied by physical delivery of goods. In many cases, the accounts of NSEL and the suppliers of the goods did not tally. The record also indicates that there were multiple accommodation entries due to collusion between NSEL and the trading members;
>
> (iii) Section 2(d) of the MPID Act defines □financial establishment' as any person accepting any deposit under a scheme. Section 2 (c) of the MPID Act provides an

> inclusive definition of the term □deposit'. Since NSEL assured the traders that their investments in paired contracts would secure them a return of 14 to 16% pa, the receipt of the returns would prima facie fall within the definition of □deposit'; and
>
> (iv) A charge-sheet and supplementary charge-sheets have been filed.

NSEL has an alternative remedy of applying for discharge before the trial Court.

The case was registered as MPID Case 1 of 2014 PART A 9 The State of Maharashtra issued a notification on 21 September 2016 under Section 4 of the MPID Act by which the properties of the respondent were attached. The relevant extract of the notification is reproduced below:

> □No. MPI 2016/C.R.541/B/Pol II:- Whereas complaints have been received from number of depositors against M/s La-Fin Financial Services Pvt. Ltd. and M/s La-Financial Services Pvt. Ltd. (hereinafter referred to as □the said Financial Establishment) complaining that they had collected the Fund and have defaulted to return the said deposits made by the depositors , on demand;
>
> And whereas, the State Government is satisfied that the said Financial Establishment and its Chairman/Directors are not likely to return the deposits to the depositors and hence the Government has to protect the interests of the depositors;
>
> And whereas the properties in the Scheduled appended hereto are alleged to have been acquired by the said Financial Establishment and its Chairman/Directors from and out of the deposits collected by the Financial Establishment;
>
> Now, therefore, in exercise of the powers conferred by sub-Section (1) of Section 4, Section 5 and Section 8 of the Maharashtra Protection of Interest of Deposits (in Financial Establishment) Act, 1000 (Mah. XVI of 2000) (hereinafter referred to as □the said Act) the Government of Maharashtra hereby attaches the properties of the said financial Establishment and in the name of its Chairman/Directors as specified in the Schedule.

10 The Supreme Court on 26 October 2016 dismissed as withdrawn, the Special Leave Petition filed against the order of the Bombay High Court. The appellants filed a Writ Petition before the Bombay High Court challenging the notification dated 21 September 2016 issued under Section 4 of the MPID Act attaching the properties of the respondent. The validity of Sections 4 and 5 of the MPID Act was challenged on the ground that they are violative of Articles 14, 19 PART A and 300-A of the Constitution. The reliefs sought in the writ petition are extracted below:

> □a. The Hon'ble Court may declare that Sections 4 and 5 of the MPID Act are violative of Articles 14 and 19 of the Constitution and Article 300-A of the Constitution and consequently issue a Writ of Mandamus and/or any other appropriate Writ, Order or Direction restraining the Respondent Writ, Order or

> Direction restraining the Respondent, its servants and/or agents from acting in pursuance of those provisions;
>
> b. In view of Prayer A above, issue a Writ, Order or Direction under Article 226 of the Constitution quashing and setting aside the Impugned Notification dated 21.09.2016 (being Exhibit-S herein) issued by the Respondent exercising the power under Section 4 of the MPID Act;

c. In the alternative, issue a Writ, Order or Direction in the nature of Certiorari or any other appropriate Writ, Order or Direction under Article 226 of the Constitution quashing and setting aside the Notification dated 21.09.2016 as being ultra-vires Section 4 and 5 of the MPID Act.

11 The State of Maharashtra issued further notifications dated 4 April 2018 11, 7 April 201812, 11 April 201813, 19 April 201814, 15 May 201815 and 19 October 201816 under Sections 4 and 5 of the MPID Act, attaching the properties of the respondent to recover the defaulted money. The Writ Petitions were heard together and disposed of by a Division Bench of the Bombay High Court by a judgment dated 22 August 2019. The petition was allowed on the following grounds:

> Notification No. MPI/1118/C.R-394/Pol-11 Notification No. MPI-1118/C.R. 329/Pol-11 Notification No. MPI-1118/C.R. 434/Pol 11 read with corrigendum bearing MPI No. 1118/C.R.-434/Pol 11 dated 19 April 2018.

PART A

(i) The pay-in amount received from the buyer was only for the purpose of passing it over to the seller on the same date. This amount would not fall within the purview of Section 2(c) of the MPID Act in terms of which a □deposit‘ must be the receipt or acceptance of a valuable commodity which would be □repaid‘ by the financial establishment after a specified period;

(ii) NSEL only performed the role of a facilitator, in a manner similar to the Bombay Stock Exchange. NSEL did not receive money with the obligation to return it on maturity. The fact that VAT is collected by the selling members from the buying members and that TDS is not deducted by NSEL indicates that NSEL is a mere pass through platform;

(iii) The contract notes do not disclose that NSEL received any money or commodity with an assured return. Rather, the difference between the buy contract and the sell contract is the profit that the member receives. The profit from the transaction is determined by totalling the two amounts by taking into consideration the number of days when the commodity was sold and the pay-out was scheduled. It varies with different products based on the period when the sell contract (that is the second contract) is scheduled;

(iv) The entries in the ledger of the traders reflect the delivery obligation and record the credit/debit pursuant to the trade. The entries of NSEL‘s settlement bank account show the amount received from a particular PART A trader. The entries of pay-in and pay-out match with the ledger accounts

of individual traders;

(v) Mr. Pankaj Saraf in his FIR has not stated that he has deposited money with NSEL. He has stated that trading on the platform was successful until the cessation of further trades ;

(vi) The transactions had gone wrong since as depicted in the show cause notice to NSEL, the outstanding positions of trade did not result in delivery by the end of the day. After 31 July 2013, 24 sellers failed to honour their part of the agreement by purchasing back the commodities on T+25 days. This was noted as a violation of the exemption granted. However, this does not change the fact that NSEL did not receive any □deposits' within the meaning of Section 2 (c) of the MPID Act since NSEL did not receive the commodities or money to be retained. NSEL only received transaction and warehouse charges which cannot be considered as a □deposit';

(vii) EOW filed a charge sheet on 4 August 2014 in which it was stated that the important feature of the exchange is that it guarantees that both the parties would comply with their contractual obligations and if the trading member is unable to pay, the Exchange would sell the goods and recover the money. The charge sheet also notes that NSEL encouraged the investors to enter into contracts without depositing commodities in the warehouses. However, the charge sheet makes it evident that even the EOW was of the opinion that the Exchange was PART A only acting as a transaction agent. Further by a letter dated 16 August 2013 from FMC, information on defaulters was sought by NSEL;

(viii) Merely because one of the brochures refers to an assured yield of 14 to 16% pa, it cannot be held that a □deposit' was made;

(ix) In the event that accounts of NSEL and the suppliers do not tally and delivery of commodities has not been provided, this may constitute an offence under Sections 465 and 467 of the IPC. NSEL is not absolved of any of these liabilities;

(x) At the highest, since the members had to pay back the amounts due on T+25 , they could be construed as a □financial establishment';

(xi) The warehouse receipts do not establish the nature of the transaction nor can it be held that the deposit of commodities would fall within the purview of the definition of □deposit' since the commodity that was to be deposited in a warehouse was to be sold by the seller;

(xii) The judgment of the Supreme Court in 63 Moons Technologies v.

Union of India17 does not have any bearing on whether the attachment of properties initiated under Section 4 of the MPID Act is valid;

(xiii) The forensic report of the 17 defaulter companies reveals that the defaulters have utilized the funds and have transferred them to their sister companies;

(xiv) In another case of one of the defaulting trading members that is pending before the Gujarat High Court, the Deputy Secretary, Home Department, Government of Maharashtra had referred to the trading (2019) 18 SCC 401 PART B member as a □defaulter' who had committed offences under Sections 409,465, 467,468, 471 and 474 of the IPC;

(xv) The contention that Section 4 of the MPID Act must be read down in view of the □wide ambit' of the provisions which could be misused is left open since the Supreme Court in KK Bhaskaran v. State and Sonal Hemant Joshi v. State of Maharashtra has upheld the constitutional validity of the Depositors Acts in Tamil Nadu and Pondicherry, specifically noting that the decision would also apply to the MPID Act since the provisions are pari materia;

(xvi) By an interim order on 24 October 2018, the impugned notifications attaching the properties were stayed on the ground that the attachment was in excess of the defaulted amount. It was noted in the interim order that the defaulted amount is Rs. 4822.53 Crores whereas the authorities have attached properties worth Rs. 8547 Crores, including Rs. 2200 Crores from NSEL. This order was challenged before the Supreme Court and it has refused to interfere; and (xvii) The audit report submitted US Gandhi and Co. has traced trade obligations of the trading members who are defaulters. NSEL has also instituted recovery suits against the defaulters.

B. Submissions

12 Mr. Jayant Mehta, Senior Counsel appearing for the appellant submitted:

(i) The definition of □deposit' in Section 2(c) of the MPID Act is broad

inclusive. The provision must be interpreted widely keeping in view the statement of objects and reasons for the enactment of the law; PART B

(ii) NSEL received money from the seller and returned it in kind (through commodities). NSEL received commodities from the seller and returned an equivalent amount after a specified period in cash. Therefore, NSEL accepted deposits from both the seller and the buyer;

(iii) Through a paired contract, the buying member would buy a purchasing contract and simultaneously sell a sale contract paired by NSEL. The sale price was pre-designated by NSEL to offer an annualised return of 14-16% to the buying member;

(iv) NSEL is both the bailee of cash (at the buyer's end) and of valuable commodities (at the seller's end);

(v) The writ petition filed by the respondent before the High Court was not maintainable since there was an alternative remedy of raising an objection against the attachment of property before the Designated Court under Section 7 of the MPID Act. Further, any person who is aggrieved by the order of the Designated Court under Section 10 can appeal to the High Court within 60 days from the date of the order in terms of Section 11 of the MPID Act; and

(vi) The settlement cycle broke because:

(a) NSEL, contrary to its bye-laws and rules, did not warehouse the commodities. The buying member did not have knowledge of whether the commodities were warehoused; and

(b) The buying member was lured into a paired contract on the assurance that the commodity in the warehouse would constitute a security and NSEL would be the counter-guarantor.

PART B However, NSEL colluded with the selling members and facilitated trades without ensuring that the commodities were deposited in the warehouses.

13 Mr. Vikramjit Banerjee, ASG appearing for the State of Maharashtra made the following submissions:

(i) NSEL is a financial establishment under Section 2(d) of the MPID Act since it has accepted deposits as defined under Section 2(c).

NSEL has been trading in different types of commodities through ‘farmer‘ contracts, paired contracts, e-series contracts, among others. NSEL guaranteed assured returns to investors;

(ii) The provision of warehouse receipts along with the assurance of returns indicates that NSEL was accepting deposits;

(iii) This Court in New Horizon Sugar Mills Ltd. v. Government of Pondicherry18 has held that the state legislature is competent to legislate upon financial establishments with an object to protect investors. The Court also held that the expression ‘financial establishment‘ includes a natural and a juristic person such as a company incorporated under the Companies Act. This Court has held in KK Bhaskaran v. State19, State v. KS Palanichamy,20 and PGF v. Union of India21 that the object of a law regulating financial establishments is to protect the investors. Therefore, the provisions (2012) 10 SCC 575 (2011) 3 SCC 793 (2017) 16 SCC 384 (2015) 13 SCC 50 PART B of the statute must be interpreted keeping this salient purpose in mind;

(iv) This Court in 63 Moons Technologies (supra) held that NSEL carried out trade in paired contracts in commodities and this created financial transactions distinct from sale and purchase transactions; and

(v) The respondent has an alternate statutory remedy available to it under Section 10 of the MPID Act.

14 Dr Abhishek Manu Singhvi, Senior Counsel appearing for the respondent submitted that:

(i) The commodity sellers received money from the buyers on T+2 with an obligation to repay the money on T+25. NSEL obtained decrees against the defaulters. Therefore, at the highest, the appellants can only argue that the defaulting trade members (not NSEL) are □financial establishments';

(ii) The State has characterised the member defaulters of the exchange as □defaulter companies' and as □financial establishment' in notifications issued by the Home Department on 31 March 2017 and 24 March 2018 which indicates that NSEL is not a defaulter;

(iii) According to the forensic report submitted by the EOW, the full money trail has been traced to the defaulting members. NSEL did not receive any money as □deposit';

(iv) The State of Maharashtra in a case which is pending before the Gujarat High Court relating to one of the members (buyers) PART B submitted on affidavit that the defaulting members have defrauded the investors;

(v) Even if the impugned judgment is upheld, NSEL will not be absolved of its criminal liability under the IPC but no criminal liability arises under the MPID Act. . NSEL and 63 Moons are being prosecuted in various other criminal proceedings. They will face civil suits as well;

(vi) As against the current outstanding claim of Rs. 4,676 Crores, properties in excess of Rs. 6000 Crores are attached;

(vii) NSEL is only obligated to recover the money from the defaulters. It has secured decrees/arbitral awards to the tune of Rs. 3,397 Crores from the members. The Bombay High Court has accepted the determination of liability of Rs. 136.98 Crores against defaulters by the Committee appointed by it. The Committee has crystallised a further liability of Rs. 760 Crores from the defaulters which is pending acceptance by the Bombay High Court;

(viii) NSEL has filed proceedings for execution of the decrees and awards against the defaulters across five States. Since the process is taking time, NSEL instituted a petition22 before this Court under Article 32 seeking a consolidation of all execution proceedings;

(ix) NSEL did not receive any □deposit', as defined under Section 2(c) of the MPID Act since:

(a) The impugned notifications by which the property of the respondent was attached under Section 4 of the MPID Act PART B proceed only on the basis that NSEL accepted money which it failed to return and there is no reference to a deposit founded on the acceptance of commodities;

(b) The Government cannot improve on the reasons by a subsequent affidavit (Relied on Mohinder Singh Gill v. CEC23);

and

(c) According to the definition of □deposit‘ under Section 2(c) of the MPID Act, only the deposit of □valuable‘ commodity is covered. In common parlance, valuable commodities would be restricted to gold, silver, or other precious metals. NSEL only traded in agricultural commodities and steel. Agricultural commodities are not covered by the definition.

(x) The traders who participated on NSEL‘s platform are corporate traders. The statement of objects and reasons of the MPID Act states that the Act is for the protection of □small‘ depositors;

(xi) The proceeding under the MPID Act would short-circuit the trials in the pending civil suits against both NSEL and 63 Moons. 63 Moons is a public listed company with more than 50,000 shareholders, 800 employees and 2 million users. If the property of 63 Moons is attached, the interest of stakeholders will be prejudiced; and

(xii) NSEL did not have control over any monies received from the traders. NSEL is a pass through platform, where the money was sent to the counter party brokers on the same day. (1978) 1 SCC 405 PART B 15 Mr. Mukul Rohatgi, Senior Counsel, appearing for the respondent made the following submissions:

(i) NSEL runs a commodity exchange, similar to a stock exchange.

NSEL is only a transacting medium and neither collects □deposits‘ nor does it assure returns;

(ii) NSEL receives a commission of Rs. 100 per one lakh of the trade value (0.1%) from the traders;

(iii) In Bhaskaran, (supra) this Court held that the Tamil Nadu Protection of Interests of Depositors (in Financial Establishments) Act 199724 is constitutionally valid. In paragraph 15 of the judgment, the court observed that though the Tamil Nadu Act and MPID have minor differences, the view taken in the judgment would equally apply to the validity of the MPID Act. This Court rejected the challenge on the ground of Articles 14, 19 and 21 without examining the provisions of the statute. Therefore, the Court in the present case is not precluded from examining the constitutional validity of the provisions of the MPID Act;

(iv) Section 4 of the MPID Act is arbitrary and constitutionally invalid and it suffers from over-breadth since:

(a) Sub-section (1) of Section 4 mandates the attachment of property of the □promoter, director, partner, manager or member of the said Financial Establishment.‘;

□Tamil Nadu Act” PART B

(b) Sub-section (2) of Section 4 divests the title of the attached properties without due process of law; and

(c) Section 7 states that the Designated Court shall issue a notice to the financial establishment or any other person whose property is attached. An objection shall be raised by all persons who are likely to have a claim. The objection shall be decided by a summary procedure under Order 37 of CPC 1908. The divestment of title of a property by a summary procedure is arbitrary.

(v) Though the transaction by NSEL in its platform seems to be an exchange of commodities on paper, it was an agreement between a lender and borrower. A borrower who has defaulted in paying the loan can be held liable to repay it;

(vi) The forensic audit traces back the money trail to the borrowing-

traders and not to NSEL;

(vii) Five of the six attachment notifications were □omnibus notifications issued by an incompetent authority; and

(viii) NSEL did not make a blanket assurance of 16% returns. The representations only meant that investors making □wise investments' would get an annualised return of 16%.

PART

C. Analysis

C. 1 Framework of the MPID Act

16 The MPID Act was enacted by the legislature in Maharashtra and received the assent of the President on 21 January 2000. The Statement of Objects and Reasons accompanying the introduction of the Bill states that the statute is enacted to protect the public from the increasing menace of financial establishments grabbing money from the public in the form of deposits:

> □There is a mushroom growth of Financial Establishments in the State of Maharashtra in the recent past. The sole object of these Establishments is of grabbing money received as deposits from public, mostly middle class and poor on the promises of unprecedented high attractive interest rates of interest or rewards and without any obligation to refund the deposit to the investors on maturity or without

any provision for ensuring rendering of the services in kind in return, as assured. Many of these Financial Establishments have defaulted to return the deposits to public. As such deposits run into crores of rupees, it has resulted in great public resentment and uproar, creating law and order problem in the State of Maharashtra, especially in the city like Mumbai which is treated as the financial capital of India. It is, therefore, expedient to a make a suitable legislation in the public interest to curb the unscrupulous activities of such Financial Establishments in the State of Maharashtra. 17 Section 3 of the MPID Act envisages punishment upon conviction of every person including a promotor, partner, director, manager or employee responsible for the management of or the conduct of the business or affairs of the financial establishment which has fraudulently defaulted in the repayment of deposits on maturity. Section 3 is in the following terms:

"Any Financial Establishment, which fraudulently defaults any repayment of deposit on maturity along with any benefit in the form of interest, bonus, profit or in any other from as promised or fraudulently fails to render service as assured against the deposit, every person including the PART C promoter, partner, director, manager or any other person or an employee responsible for the management of or conducting of the business or affairs of such Financial Establishment shall, on conviction, be punished with imprisonment for a term which may extend to six years and with fine which may extend to one lac of rupees and such Financial Establishment also shall be liable for a fine which may extend to six years and with fine which may extend to one lac of rupees and such Financial Establishment also shall be liable for a fine which may extend to one lac of rupees.

Explanation- For the purpose of this section, a Financial Establishment, which commits default in repayment of such deposit with such benefits in the form of interest, bonus, profit or in any other form as promised or fails to render any specified service promised against such deposit with an intention of causing wrongful gain to one person or wrongful loss to another person or commits such default due to its inability arising out of impracticable or commercially not viable promises made while accepting such deposit or arising out of deployment of money or assets acquired out of the deposits in such a manner as it involves inherent risk in recovering the same when needed shall, be deemed to have committed a default or failed to render the specific service, fraudulently. Section 4 contemplates the levy of attachment on properties of a financial establishment on default of return of payment. Section 4 provides that if on a complaint received from the depositors or otherwise, the Government is satisfied that any financial establishment has failed to return the deposit on maturity or demand, or to pay interest or an assured benefit, or has failed to provide a service that was assured against the deposit, or if the Government has reason to believe that any financial establishment is acting in a manner detrimental to the interest of the depositors with the intention to defraud them, it may attach the money or property acquired by the financial establishment out of the deposit. The provision states that if such money or property is not available

to be attached, the PART C property of the financial establishment or the promoter, director, partner, manager or member may be attached.

18 Section 5 provides for the appointment of a Competent Authority while Section 6 contains a provision for a Designated Court. Section 7 enunciates the powers of the Designated Court regarding attachment. Under Section 7, upon receipt of an application under Section 5, the Designated Court shall issue a show cause notice to the financial establishment or any person whose property is attached on why the order of attachment should not be made. A notice shall also be issued to all persons who are likely to have an interest in the property, calling them to submit objections to the attachment of the property on the ground that they have an interest in the property or a portion of it. If no cause is shown, then the attachment shall be made absolute and directions can be issued for the realisation and equitable distribution of assets. If cause is shown, the Designated Court shall investigate into it by following a summary procedure as contemplated under Order 37 of the Civil Procedure Code 1908. An appeal against an order of the Designated Court is envisaged by the provisions of Section 11.

19 Since NSEL did not have sufficient money or property for attachment under Section 4 on default of payment of the outstanding amounts, the State of Maharashtra attached the properties of the respondent which owns 99.9% of the shares of NSEL.

C. 2 Framework of NSE 20 It is necessary to refer to the bye-laws of NSEL to ascertain the structure of NSEL‘s operation and functioning. Bye-law 2.17 defines □certified warehouse receipt in the following terms:

PART C □Certified Warehouse receipt means a receipt issued under the authority of the Exchange or any agency approved by the exchange as a certified warehouse, evidencing proof of ownership of a standard quantity of commodities of a stated grade and quality by the beneficial owner or holder of the certified warehouse receipt. Certified warehouse receipt may either be in physical form or in dematerialised/electronic form as may be permitted by law. The expression □certified warehouse‘ is defined in Bye-law 2.18 as a □warehouse approved and designated by the Exchange for making deliveries to and taking deliveries for fulfilling contractual obligations resulting from transaction in commodities. Bye-law 2.51 defines □Margin‘ as follows:

□Margin means a deposit or payment of cash/other specified assets/documents to establish or maintain a position in a commodity and include initial margin, special margin, ordinary margin, delivery period margin, additional margin and variation margin or any other type of margin as may be determined by the Exchange from time to time. (emphasis supplied)

21 The expression ‘warehouse receipt‘ is defined in Bye-law 2.96 to mean a document evidencing that a commodity is being held in the approved warehouse. Bye-law 3.7 provides for limitation of liability:

> ‘The Exchange shall not be liable for any activities of its members or of any other person, authorised or unauthorised, acting in the name of any member, and any act of commission or omission by any one of them, either singly or jointly, at any time shall not be in any way construed to be an act of commission or omission by any one of them, as an agent of the Exchange. Save as otherwise specifically provided in these Bye-Laws and in the Business Rules and Regulations of the Exchange, the Exchange shall not incur or shall not be deemed to have incurred any liability and accordingly, no claim or recourse shall lie against the Exchange, any member of the Board of Directors/or committee duly appointed by it or any other authorised person acting for an on behalf of the Exchange, in respect of or in relation to any transaction entered into through the exchange made by PART C its members and any other matters connected therewith o related thereto, which are undertaken for promoting, facilitating, assisting, regulating, or otherwise managing the affairs of the Exchange to achieve its objects as defined in the Memorandum and Articles of Association of the Exchange.

22 Bye-law 4.20(a) states that all outstanding transactions in commodities shall be compulsorily delivered at one or more delivery points or in warehouses accredited to the Exchange. Clause (b) of the bye-law states that if the outstanding transactions have not been settled by giving or receiving deliveries, then it shall be auctioned by buying-in or selling-out as per the Business Rules of the Exchange:

> (a) All outstanding transactions in commodities shall in general be for compulsory delivery at any one or more delivery points and/or warehouses approved, certified and designated by the Exchange.
>
> (b) All outstanding positions not settled by giving or receiving deliveries shall be auctioned by way of buying-in or selling-out as per the Business Rules of the Exchange, together with a penalty as prescribed by a Managing Director or such committee for those failing to give or receive delivery.

Bye-Law 7.10.2 states that the Exchange shall be responsible for its commitments to each clearing member unless the cause for default was under

> improper trades not covered by the Settlement Guarantee Fund:
>
> ‘The Exchange shall be responsible for its commitments to each clearing member whether the remaining clearing members with whom it has dealings have defaulted except under circumstances where improper trades not covered under the Settlement Guarantee Fund (SGF) are the cause for default... PART C Bye-law 7.11 states that

the Clearing House of the Exchange shall, among other things, have the responsibility of receiving margin payments, certification of warehouse receipts, and transmission of documents. Bye-law 7.11 reads as follows:

> "The Clearing House of the Exchange shall, in the manner specified by the Relevant Committee or the relevant authority, have the responsibility of receiving and maintaining margin payments, monitoring open positions and margins, and transmission of documents, payments and certified warehouse receipts amongst the trading-cum- clearing members and institutional clearing members of the Exchange. (emphasis supplied) Bye-law 9 provides for clearing and settlement. Bye-laws 9.5, 9.6 and 9.7 provide as follows:
>
> "9.5 An order to buy or sell will become a matched transaction only when it is matched in the Trading system and the Clearing House does not find the order to be invalid on any other consideration and further after verifying that the following are in agreement and/or in order:
>
> (i) Commodity,
>
> (ii) price indices,
>
> (iii) Quantity,
>
> (iv) Transaction quote, (emphasis supplied) 9.6 Once a trade is matched and marked to market by the Clearing House, the Exchange shall be substituted as counter party for all net financial liabilities of the clearing members in specified commodities in which the Exchange has decided to accept the responsibility of guaranteeing the financial obligations.

(emphasis supplied) 9.7 All outstanding transactions shall be binding upon the original contracting parties, that is, the members of the Exchange until issue of delivery notice or delivery order or payment for delivery, as the case may be. PART C 23 Bye-law 10 contains provisions with regard to delivery:

> "10.1 For the fulfilment of outstanding position, commodity shall be tendered by Delivery Orders through the respective Clearing Members to the Clearing House in such manner as may be prescribed in the Business Rules or Regulations.
>
> 10.2 The Exchange shall prescribe tender days and delivery period for each commodity during which sellers having outstanding sale position must issue Delivery Orders through their respective Clearing Members to the Clearing House.
>
> 10.3 The Clearing House shall allocate the delivery orders received by it amongst one or more buyers having outstanding long open positions in a manner as considered

appropriate by the Relevant Authority.

10.4 The Relevant Authority may specify in advance before commencement of trading in a commodity various grades of a commodity that may be tendered and the discounts and premiums for such grades.

10.5 All positions outstanding at the end · of the day shall result into compulsory delivery obligation at the closing rate of the date of transaction as fixed by the Relevant Authority. The differences arising out of the actual transaction price and closing price shall be received from and disbursed to amongst the members on the next day of trading, pending actual delivery. The Relevant Authority may prescribe penalty on sellers with outstanding positions who fail to issue delivery orders and the Exchange may conduct auction to ensure delivery to the buyers who hold outstanding buy positions and intended to lift delivery and could not receive Delivery Orders against such positions due to failure on the part of the seller. In case of non availability of commodities during the auction process, close-out process as defined in the business rule shall be applicable. The Relevant Authority may prescribe penalty on buyers with outstanding positions who fail to pay against his purchase obligation and the Exchange may conduct sale out auction to ensure that the sellers gets the price for the commodities delivered against their sale obligation and could not receive payment due to failure on the part of the buyers.

In case of non availability of suitable buyers during the auction process, close-out process as defined in the business rule shall be applicable. Failure to pay the dues and penalties relating to such closing out within the stipulated period shall cause the member to be declared as defaulter and render him liable for disciplinary action. PART C 24 Bye-law 10.7 envisages that a seller issuing the delivery order shall receive from the Clearing House the full price of the commodity delivered as per the delivery order rate, subject to additions or deductions on account of premium or discounts prescribed under the bye-laws. Under bye-law 10.8, a buyer has to pay to the Clearing House, the value of delivery allocated on his account by the Exchange within the time specified. However, the money will be passed by the Clearing House to the seller only on the completion of the delivery process to the satisfaction of the Exchange. The bye-law reads as follows:

□10.8 A buyer shall pay to the Clearing House the value of delivery allocated on his account by the Exchange within such time as may be specified, by the Exchange. After getting full price of delivery from the buyer as per delivery order allocated to him, the Exchange will endorse the delivery order to him. Thereafter, till completion of the delivery process, the money will be retained by the Clearing House and will be passed on to the seller only on completion of the delivery process to the satisfaction of the Exchange. The Clearing House will pass on the proceeds to the seller after making adjustments relating to quality, quantity and freight factors, as the case may be. The balance amount, if any, remaining after such adjustments, will be passed on to or recovered from the buyer by the Clearing House. (emphasis supplied) Bye-law 10.11 provides that at the time of issuing the delivery order, the seller of the

commodity must satisfy the clearing member that he owns and holds in his possession or his agent‘s possession adequate stocks of the required quantity and quality of the commodity. Bye-law 10.12 prescribes that:

> ☐A seller member is entitled to offer delivery only at the delivery centers specified by the Exchange in advance for the respective commodity. Delivery can be tendered at such specified centers strictly as per the delivery procedure specified by the Exchange. Before tendering delivery, the seller is also required to obtain a certificate from a surveyor empanelled by the Exchange PART C and such certificate shall be accompanied with the delivery order being tendered by him to the Clearing House. The surveyor's certificate shall clearly specify the quality of the goods tendered and shall also confirm that such quality is tenderable as per the contract specification of the Exchange. In case of non-compliance of any of these conditions, the delivery order is rejected ab initio.” (emphasis supplied)

25 Thus, under the above bye-law, the selling member is entitled to offer delivery only at the delivery centre which is specified in the Exchange strictly in accordance with the delivery procedure provided before tendering delivery. The seller has to obtain a surveyor‘s certificate which is to be accompanied with the delivery order being tendered by him to the Clearing House. Bye-laws 10.14, 10.15 and 10.16 contain the following stipulations:

> ☐10.14 Members of the Exchange and the clients/ constituents dealing through them shall strictly abide by the delivery procedure, methods of sampling, survey, transportation, storage, packing, weighing and final settlement procedures, as may be specified by the Relevant Authority from time to time. Any violation of such method will be dealt with by the Relevant Authority in the manner, as may be specified from time to time.
>
> 10.15 A seller of commodity shall deliver the quantity as per his net sale position in the commodity during the period specified · in the Rules, Business Rules and Regulations of the Exchange and notices and orders issued thereunder from time to time for the specified commodity, which should confirm to the quality specified by the Exchange in the contract specification. In case of any failure to do so, such net sale position shall be closed out by buying in auction and the seller shall be required to pay the difference, as determined by the Clearing House and penalty in addition thereto.
>
> 10.16 A buyer shall be required to lift delivery from the specified warehouse within the period prescribed by the Relevant Authority, as per the delivery order assigned to him. In case of his failure to do so, he shall be required to pay the warehouse charges, insurance charges and other expenses relating to storage for the incremental period and also a penalty in addition thereto. PART C 26 Bye-law 12 contains provisions for a Settlement Guarantee Fund. The Settlement Guarantee Fund is constituted by deposits made by the members of the Exchange and is utilised for paying in the event

of a default in payments by the trading members, paying insurance covers and covering the losses of the Exchange, among other uses. Bye-law 12.1.1 is in the following terms:

☐12.1 The Exchange to maintain Settlement Guarantee Fund 12.1.1 The Exchange shall maintain Settlement Guarantee Fund in respect of different commodity segments of the Exchange for such purposes, as may be prescribed by the Relevant Authority from time to time. 27 Bye-Law 12.1.2 states that the relevant authority may prescribe from time to time, the norms and conditions governing Settlement Guarantee which may among other things specify the amount of deposit or contribution to be made by each trading member to the Settlement Guarantee Fund. The bye-law also states that rules are to be made on contributions, conditions of repayment and withdrawal of contribution from the fund among other stipulations. Bye law 12.1.3 states that the minimum amount in the fund before starting the trading must be Rs 1 Crore, which can be suitably increased. Bye Law 12.2 stipulates the contribution and deposit with the Settlement Guarantee Fund:

☐12.2 Contribution to and Deposits with Settlement Guarantee Fund 12.2.1 Each member shall be required to contribute to and provide a minimum security deposit, as may be determined by the Relevant Authority from time to time, to the relevant Settlement Guarantee Fund. The Settlement Guarantee Fund shall be held by the Exchange. The money in the Settlement Guarantee Fund shall be applied in the manner, as may be provided in these Bye-laws, Rules, Business Rules and Regulations of the Exchange and notices and orders issued thereunder from time to time.

PART C 12.2.2 The Relevant Authority may specify the amount of additional contribution or deposit to be made by each member and/or category of clearing members, which may, inter alia, include the minimum amount to be provided by each clearing member.

12.2.3 The Exchange shall, as a result of multi-lateral netting followed by it in respect of settlement of transactions, guarantee financial settlement of such transactions to the extent it has acted as a legal counter party, as may be provided in the relevant Bye-laws from time to time.

12.2.4. The total amount of security deposit and additional deposit, maintained by a clearing member with the Clearing House of the exchange, in any form as specified herein, shall form part of the Settlement Guarantee Fund.

12.2.5 The amount deposited by a clearing member towards the security deposit shall be refundable, subject to such terms and conditions as may be specified by the Relevant Authority from time to time. Any amount deposited or paid by the clearing member may be refunded provided further that such amount is in surplus and there is no actual/crytallized or contingent liability or a claim from any client or clearing bank to be discharged by the clearing member.

(emphasis supplied) 28 Bye-law 12.3 stipulates that a member may provide a deposit in the form of cash, fixed deposit receipts, bank guarantees or in such other form.

12.3 Form of Contribution or Deposit The Relevant Authority may, in its discretion, permit a member to contribute to or provide the deposit to be maintained with the Settlement Guarantee Fund, in the form of either cash, fixed deposit receipts, bank Guarantees or in such other form or method and subject to such terms and conditions, as may be specified by the relevant Authority from time to time.

PART C Bye-law 12.4 states that the deposit may be replaced by fresh deposits. Bye-law 12.5 states that the Settlement Guarantee Fund may be invested in securities or other avenues of investment:

> 12.4 Replacement of Deposit By giving a suitable notice to the Exchange and subject to such conditions, as may be specified by the Relevant Authority from time to time, a member may withdraw fixed deposit receipts or bank Guarantees given to the Exchange, representing the member's contribution or deposit towards the Settlement Guarantee Fund, provided that the member has, simultaneously with such withdrawal, deposited cash, fixed deposit receipts, or bank Guarantees with the Clearing House or the Exchange or made contribution through such other mode, as may be approved by the Clearing House or the Exchange from time to time, to meet his required contribution or deposit, except as provided in these Bye-

Laws.

12.5 Investment of Settlement Guarantee Fund Funds in the Settlement Guarantee Fund may be invested in such approved securities and/or other avenues of investments, as may be provided for by the Board in the relevant Business Rules and Regulations in force from time to time.

(emphasis supplied) Bye-law 12.6 states that the Settlement Guarantee Fund may be used for the purpose of (i) maintenance of the fund; (ii) using the fund temporarily to fulfil the shortfalls and deficiencies arising from clearing and settlement obligations; (iii) payment of insurance cover; (iv) covering the loss arising from clearing and settlement obligations; and (v) repaying to the members, the balance amount available after utilization.

❑12.6 Administration and Utilization of Settlement Guarantee Fund 12.6.1 The Settlement Guarantee Fund may be utilised for such purposes as may be provided in these Bye-Laws and Regulations and subject to such conditions as the PART C relevant Authority may prescribe from time to time, which may include a. defraying the expenses of creation and maintenance of Settlement Guarantee Fund;

b. temporary application of Settlement Guarantee Fund to meet shortfalls and deficiencies arising out of the clearing and settlement obligations of clearing members in respect of such transactions, as may be provided in these Bye-Laws, Rules, Business Rules and Regulations of the Exchange in force from time to time;

c. payment of premium on insurance cover(s) which the Relevant Authority may take from time to time, and/or for creating a Default Reserve Fund by transferring a specified amount every year, as may be decided by the Relevant Authority from time to time;

d. Meeting any loss or liability of the Exchange arising out of clearing and settlement operations of such transaction, as may be provided in these Bye-Laws, Rules, Business Rules and Regulations of the Exchange in force from time to time;

e. repayment of the balance amount to the member pursuant to the provisions regarding the repayment of deposit after meeting all obligations under Bye-Laws, Rules, Business Rules and Regulations of the Exchange, when such member ceases to be member, and f. any other purpose, as may be specified by the Relevant Authority, from time to time. 29 Bye-laws 12.7 and 12.8 specifically provide for utilization of the fund for the failure of the trading member to meet his settlement obligations or when he is declared as a defaulter:

> "12.7 Utilization for failure to Meet Obligations Whenever a member fails to meet his settlement obligations to the Exchange arising out of his clearing and settlement operations in respect of his transaction, as may be provided in these Bye-Laws, Rules and Regulations of the Exchange, the Relevant Authority may utilise the Settlement Guarantee fund and other moneys lying to the credit of the said member to the extent necessary to fulfil his obligations under such terms and PART C conditions, as the Relevant Authority may specify from time to time;
>
> 12.8 Utilisation in Case of Failure to Meet Settlement Obligations or on Declaration of Defaulter Whenever a member fails to meet his settlement obligation to the Exchange arising out of the transactions, as may be provided in these Bye-laws, Rules, Business Rules and Regulations of the Exchange in force from time to time, or whenever a member is declared a defaulter, the Relevant Authority may utilise the Settlement Guarantee Fund and other moneys of the member to the extent necessary to fulfil his obligations in the following order:
>
> [...] 12.9.2 If the cumulative amount under all the above heads is not sufficient, the balance obligations shall be assessed against all the clearing members in the same proportion as their total contribution and deposit towards security deposit, and the clearing members shall be required to contribute or deposit the deficient amount in the Settlement Guarantee Fund within such time, as the Relevant Authority may specify in this behalf from time to time. [...] Bye-law 12.11 states that the deposit shall be allocated by the Exchange among various segments of trading:
>
> 12.11 Allocation of the Contribution or Deposit Each clearing member's contribution and deposit towards the Settlement Guarantee Fund shall be allocated by the Exchange among the various segments of trading, which are designated as such by the exchange and in which the member may participate, in such proportion as the Exchange may decide from time to time. The Exchange shall retain the rights to

> utilise the fund allocated to a particular segment of trading to match the losses or liabilities of the Exchange, incidental to the operation for that segment or for any other segment, as may be decided by the Exchange at his discretion.

PART C Bye-law 12.12 states that the clearing member shall be repaid his deposit after making deductions:

> 12.12 Repayment to the Clearing Member on His Cessation 12.12.1 A members hall be entitled to repayment of the actual amount of deposit, if any, made by him to the Settlement Guarantee Fund provided it is not part of the admission fee after a. the member ceases to be an exchange member on account of any reason whatsoever, b. all pending transactions at the time the member ceases to be an exchange member, which may result in a charge to the settlement Guarantee Fund, have been closed and settled, c. all obligations to the Exchange for which the member was responsible while he was an exchange member have been satisfied, or at the discretion of the Relevant Authority, have been deducted by the Exchange from the member's actual deposit; provided, the member has presented to the Exchange such indemnified or guarantees as the Relevant Authority may deem necessary or another clearing member has been substituted owning liability for all the transaction and obligations of the clearing member, who had ceased to be a member.

d. a suitable amount, as may be determined by the Relevant Authority at his discretion, has been set aside for taking care of any loss/liability/obligation arising out of his past transactions and e. a suitable amount, as may be determined by the Relevant Authority at its discretion, has been set aside by the Exchange towards such other obligations, as may be perceived by the Exchange to exist or be perceived by the Exchange to arise in future.

12.12.2 The Relevant Authority may specify norms for repayment of deposit including the manner, amount and period within which it may be paid. The repayment amount, at no point of time, will exceed the actual deposit available to the credit of the clearing member after deducting the necessary dues or charges payable by such clearing member from time to time, including the initial deposit.

PART C C. 3 Definitions of „Deposit and „Financial Establishment : Interpretation of Sections 2(c) and 2(d) of the MPID Act 30 The notifications attaching the properties of the respondent were issued under Section 4 of the MPID Act. Section 4 covers only those situations where a □financial establishment' is a defaulting entity. Section 4 is reproduced below:

> "4. (1) Notwithstanding anything contained in any other law for the time being in force,-
>
> (i) where upon complaints received from the depositors or otherwise, the Government is satisfied that any Financial Establishment has failed,-

(a) to return the deposit after maturity or on demand by the depositor; or

(b) to pay interest or other assured benefit; or

(c) to provide the service promised against such deposit; or

(ii) where the Government has reason to believe that any Financial Establishment is acting in a calculated manner detrimental to the interest of the depositors with an intention to defraud them;

[...] (emphasis supplied) 31 The primary issue is whether NSEL is a □financial establishment' within the meaning of Section 2(d). Section 2(d) reads as follows:

□(d) □Financial Establishment means any person accepting deposit under any scheme or arrangement or in any other manner but does not include a corporation or a co-operative society owned or controlled by any State Government or the Central Government or a banking company as defined under clause (c) of section 5 of the Banking Regulation Act, 1949;

Financial Establishment is defined as any person accepting a □deposit'. The definition excludes from its purview (a) a corporation or cooperative society controlled or owned either by the State or the Central Government; and (b) a Banking Company as defined under Section 5(c) of the Banking Regulation Act PART C 1949. Since NSEL does not fall within any of the exceptions, it would be a □financial establishment' for the purposes of the Act if it is a □person accepting deposit'. Section 3(42) of the General Clauses Act 1897 provides an inclusive definition of □person to include both incorporated and unincorporated companies25 as:

□□person' shall include any company or association or body of individuals, whether incorporated or not. The expression deposit is defined in Section 2(c) of the MPID Act in the following terms:

□(c) □deposit includes and shall be deemed always to have included any receipt of money or acceptance of any valuable commodity by any Financial Establishment to be returned after a specified period or otherwise, either in cash or in kind or in the form of a specified service with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include–

(i) amount raised by way of share capital or by way of debenture, bond or any other instrument covered under the guidelines given, and regulations made, by the SEBI, established under the Securities and Exchange Board of India Act, 1992;

(ii) amounts contributed as capital by partners of a firm;

(iii) amounts received from a scheduled bank r a co-

operative bank or any other banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949;

(iv) any amount received from, -

(a) the Industrial Development Bank of India,

(b) a State Financial Corporation,

(c) any financial institution specified in or under section 6A of the Industrial Development Bank of India Act, 1964, or

(d) any other institution that may be specified by the Government in this behalf;

(v) amounts received in the ordinary course of business by way of, -

(a) security deposit,

(b) dealership deposit,

(c) earnest money,

(d) advance against order for goods or services; New Horizon Sugar Mills Limited v. Government of Pondicherry, (2912) 10 SCC 575 (para 58) PART C

(vi) any amount received from an individual or a firm or an association of individuals not being a body corporate, registered under any enactment relating to money lending which is for the time being force in the State; and

(vii) any amount received by way of subscriptions in respect of a Chit.

Explanation I. – □Chit has the meaning as assigned to it in clause (b) of section 2 of the Chit Funds Act, 1982; Explanation II. – Any credit given by a seller to a buyer on the sale of any property (whether movable or immovable) shall not be deemed to be deposit for the purposes of this clause;

The statutory definition of the expression □deposit' comprises of the following ingredients:

(i) Any receipt of money or the acceptance of a valuable commodity by a financial establishment;

(ii) Such acceptance ought to be subject to the money or commodity being required to be returned after a specified period or otherwise; and

(iii) The return of the money or commodity may be in cash, kind or in the form of a specified service, with or without any benefit in the form of interest, bonus, profit or in any other form.

These elements of the definition are followed by specific exclusions contemplated in clauses (i) to (vii). Clause (i) of the exceptions covers an amount which is raised by way of share capital or by debenture, bond or other instrument governed by the guidelines and regulations of SEBI. Clause (v) states that money received in the ordinary course of business by way of security deposit, dealership deposit, earnest money or advance against an order of goods or services shall be excluded. The exclusions in clause (i) to (vii) indicate that transactions which would otherwise fall within the broad sweep of the definition are excluded. PART C 32 The legislature may define a word artificially by restricting or expanding its natural meaning. When the legislature employs the phrase □means', the definition is intended to be exhaustive. In Indra Sarma v. VKV Sarma,26 this Court observed that the definition of the expression □domestic relationship' in Section 2(f) of the Protection of Women from Domestic Violence Act 2005 is restrictive since it is defined by the use of the term □means'. On the other hand, the Court has taken a consistent view that where the definition of a word is inclusive, as presaged by the adoption of the expression □includes, it is prima facie extensive27. The definition of □deposit' uses the phrase □includes and shall be deemed to have always included'. The import of this is to create a legal fiction by which actions which though not included within the natural meaning of the expression are intended to be included. The combined use of □includes' and □deemed to have always included' while defining the term □deposit' makes the term inclusive and not restrictive.

33 The expression □deposit' is conspicuously broad in its width and ambit for it includes, not only any receipt of money but also the acceptance of any valuable commodity by a financial establishment under any scheme or arrangement. As a matter of interest, we may note at this stage that the expression □any is used in the substantive part of the definition of the expression □deposit' on five occasions namely;

(i) Any receipt of money;

(ii) Any valuable commodities;

(iii) By any financial establishment;

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Karnataka Power Transmission Corporation v. Ashok Iron Work Pvt. Ltd., (2009) 3 SCC 240; Ramanlal Bhailal Patel v. State of Gujarat, (2008) 5 SCC 449 PART C

(iv) With or without any benefit; and

(v) In any other form.

34 Likewise, the definition of financial establishment refers to the acceptance of deposits:

(i) Under any scheme or arrangement; or

(ii)In any other manner.

35 The repeated use of the expression □any' by the statute while defining both the above expressions is a clear reflection of the legislative intent to cast the net of the regulatory provisions of the law in a broad and comprehensive manner. Unlike many other state enactments which govern the field, clause (c) of Section 2 of the MPID Act comprehends within the meaning of a deposit not only the receipt of money but of any valuable commodity as well. For example, in contrast, Section 2(2) of the Tamil Nadu Act defines □deposit' only in terms of money and not commodity. Section 2(2) reads as follows:

> □(2) □deposit means the deposit of money either in one lump sum or by instalments made with the Financial Establishments for a fixed period, for interest or for return in any kind or for any service;
>
> Similarly, statutes protecting the interest of depositors in Orissa 28, Kerala29, Himachal Pradesh30, Goa31, Telangana32, Andhra Pradesh33 and Sikkim34 define the phrase □deposit' only in terms of money and not the acceptance of a commodity.
>
> The Odisha Protection of Interests of Depositors (in Financial Establishments) Act 2011 The Kerala Protection of Interests of Depositors in Financial Establishment Act 2013 The Himachal Pradesh [Protection of interests of depositors (in Financial Establishments)] Act 1999 The Goa Protection of Interests of Depositors (in financial Establishments) Act 1999 The Telangana Protection of Depositors of Financial Establishments Act 1999 The Andhra Pradesh Protection of Depositors of Financial Establishments Act 1999 The Sikkim Protection of interests of Depositors (in Financial Establishments) Act 2000 PART C 36 According to the second ingredient of Section 2(c), the money or commodity must be liable to be returned. However, such return need not necessarily be in the form of cash or kind but also in the form of a service, with or without any benefit such as interest. It needs to be recalled that clause (v) of Section 2(c) states that a deposit of money or commodity made as a security deposit, dealership deposit or an advance amount is excluded from the definition of the phrase □deposit'. To illustrate, if a member of a financial establishment deposits Rs. 25,000, and that money is returned on cessation of membership by making deductions, the issue of whether the deposit is a security deposit or of the nature covered under Section 2(c) should be determined with reference to the structure of operation and functioning of the financial establishment. It is to be noted that the definition also states that the return may be with or without interest or any benefit. Therefore, the submissions made by both the sides on whether NSEL had through its representations assured a 16% return on trading in the platform is immaterial for the purpose of determining if NSEL accepted deposits.

37 Having referred to the relevant bye-laws, we shall determine if NSEL receives □deposits‘ as defined by Section 2(c) of the MPID Act. The bye-laws elucidate that NSEL receives both money and commodities from trading members. In order to decide if these receipts by NSEL could be regarded as □deposits‘, the test of □return‘ will have to be satisfied. The test is that the return be in cash, kind or service. It is not necessary that the return should be with the benefit of interest, bonus or profit. Therefore, if the financial establishment is obligated to return the deposit without any increments, it shall still fall within the purview of Section 2(c) of the MPID Act, provided that the deposit does not fall PART C within any of the exceptions. The exception of relevance to our case is clause (v) which states that □amounts received in the ordinary course of business by way of

(a) security deposit; (b) dealership deposit; (c) earnest money; and (d) advance against order for goods or services shall be excluded from the purview of the term □deposit‘.

C. 3.1 Settlement Guarantee Fund: Deposit under Section 2(c) of the MPID Act 38 The trading members pay NSEL a margin deposit and NSEL maintains a Settlement Guarantee Fund. Regulation 4.12 states that only transactions of those members who have paid the margin deposit and security deposit shall be considered as valid. Therefore, the payment of margin deposit and security deposit is □mandatory‘ for a person to trade on NSEL‘s platform. Regulation 4.12 refers to the SGF as a □security deposit‘. Similarly, bye-law 12.2.1 stipulates that each member shall contribute a □minimum security deposit‘. However, merely because the SGF is referred to as a □security deposit‘, the exception would not automatically be applicable. The meaning of the phrase □security deposit‘ takes colour from the surrounding phrases. Clause (v) to sub-Section 2(c) excludes security deposit, dealership deposit, earnest money, and an advance against an order for goods and services from the ambit of the phrase □deposit‘. The concepts used in sub-Section 2(c) (v) fall in two categories: (i) token amounts paid to indicate the earnest to purchase (earnest money and advance money), and (ii) payments required to meet exigent situations of default by a party (dealership deposit and security deposit).

PART C 39 Black‘s Law dictionary35 defines security deposit as □money deposited by a tenant with a landlord as security for full and faithful performance by the tenant of terms of leases, including damages to premises. It is refundable unless the tenant has caused damage or injury to the property or has breached the terms of tenancy or the laws governing the tenancy. Certain states also require the landlord to make a security deposit to cover essential repairs required on rental property. A similar phrase, □Client Security Fund is defined as a fund set up by many State Bar Associations to cover losses incurred by persons as a result of dishonest conduct of member-attorneys. The meanings of both these phrases suggest the necessary ingredients of a security deposit, which are:

(i) An advance to ensure faithful performance of the contract;

(ii) A payment to cover essential □functions‘ for performance; and

(iii) The entitlement to refund being dependent upon whether damage, injury and default are occasioned.

40 Chapter 12 of the bye-laws provides the features of the SGF:

(i) SGF is utilized for:

(a) defraying the expenses for its creation and maintenance ;

(b) temporary use of the fund to meet efficiencies arising out of the performance of obligations;

(c) payment of premia on insurance covers;

(d) payments for the loss or liability of the Exchange arising out of □clearing and settlement operations‘;

(e) repayment of the balance deposit to a member; Bryan A Garner, Black’s Law Dictionary (11 ed. Thomson Reuters). PART C

(f) payment towards the member‘s obligations where the member fails to meet his settlement obligations; and

(g) payment of the member‘s obligation on being declared as a defaulter;

(ii) The members‘ contribution is allocated among various segments of trading, in which they can participate. The Exchange also retains the right to utilise the fund allotted to a particular segment of trading to match the losses or the liabilities of the Exchange; and

(iii) The settlement fund may be invested in approved securities or other avenues of investments.

41 The features of the SGF indicate that the fund is used to cover those expenses, which are beyond the utilization which is made out of a regular security fund. Unlike a security deposit between a landlord and a tenant where the fund is used to meet the □essential obligations‘ of the landlord such as repair work and deductions are made when the tenant has outstanding payments, NSEL uses the deposit to cover the payment obligations of the trading member (buyer) to another trading member (seller) since NSEL is a counter party to the transactions. However, NSEL uses the fund to cover functions beyond its role as a counter-party. For example, the fund is used to cover loses faced by the NSEL in the settlement operations, investments are made in securities, and the fund is allotted in various segments of trading, where the funds are also utilised to cover loses, if any, in the segment. Therefore, these three features of the SGF indicate that though the SGF is termed as a □security deposit‘ in nomenclature, its features do not represent a security deposit. Since NSEL receives □money‘ in the form of PART C SGF that is returned in money and services, and is not covered by the exceptions, it would fall within the expression □deposit‘ as defined in Section 2(c) of the Act.

C. 3. 2 Receipt of commodities: Deposit under Section 2(c) of the Act 42 A person who wishes to trade in the platform of NSEL is required to place the commodities in the accredited warehouse of NSEL. NSEL would then provide the trader with a warehouse receipt. When the buyer‘s offer and the seller‘s offer is matched, NSEL would debit the amount from the buyer member‘s pay in obligations and it would be credited to NSEL‘s exchange settlement account. The Operations Department would confirm with the Delivery Department if the requisite quantity of a particular commodity of the seller is available. After such confirmation, the Operations Department would release the purchase price to the selling broker‘s designated bank account. Simultaneously, a Delivery Allocation Report would be issued to the buyer‘s broker or the buyer. Once the VAT invoice is paid, NSEL would issue a Delivery Note authorizing the Buyer to take delivery from the designated warehouse or if the buyer chooses, he can take constructive possession of the commodity. There is nothing in the definition of the term □deposit‘ to mean that the acceptance of the commodity should be accompanied by a transfer of title to the commodity. Even if the financial establishment is only in □custody‘ of the commodity, it would still fall within the purview of the phrase □acceptance of commodity‘. On the acceptance of custody of the commodity, NSEL has to provide various services such as an obligation to keep the commodity safe and without any damages. Additionally, the Operations Department and the Delivery Department will have to coordinate while matching PART C the contracts. Similarly, after the delivery note is sent to the buyer, the commodity is either delivered to the buyer or the buyer is put in constructive possession of the commodity. The phrase □warehouse receipt‘ is defined in Bye-law 2.96 as a document evidencing that the commodity is being held by NSEL in the approved warehouse. Clause (b) to Bye law 4.20 states that if the outstanding transactions have not been settled by giving or receiving deliveries, then it (the commodity) shall be auctioned by buying-in or selling-out as per the Business Rules of the Exchange. Bye-law 10.11 states that the commodities shall be delivered to and delivery taken from only the designated warehouses. Therefore, NSEL offers a multitude of □services‘ in return for receiving the commodity. The receipt of the commodities and holding the commodities (when the members are put in constructive possession) in the accredited warehouses is a □deposit‘ under Section 2(c) of the Act.

43 The counsel for the respondent argued that the expression □valuable commodity‘ used in Section 2(c) would only include precious metals such as gold and silver. The expression □valuable commodity is not defined by the statute. There is no valid basis to accept the submission of the respondent that the expression should only comprehend within it precious metals such as gold and silver. If the legislature intended to so restrict the definition of the expression valuable commodity, it could have used an explanation importing an artificial meaning to the expression. However, the legislature has desisted from doing so. A valuable commodity is a commodity which has significant value. This does not refer only to the intrinsic value of the commodity. Whether or not a commodity is valuable has to be determined bearing in mind the salutary object and purpose of PART C the Act which is to protect the interest of depositors. It is in this context that it becomes necessary to adopt a purposive construction which would give effect to the meaning and content of the law. Any attempt to read the definition in a restrictive sense would be contrary to legislative intent. The intent of the legislature is to define the expression □deposit‘ as well as the expression □financial establishment‘ in a comprehensive and all-encompassing manner. Therefore, the phrase □valuable commodity‘ cannot be restricted to only mean precious metals. Agricultural commodities which NSEL trades in

will fall within the purview of the term.

44 Though it has been observed earlier that it is not necessary that there must be interest or an assured benefit from the deposit for the purposes of Section 2(c) of the MPID Act, it is still necessary that we refer to the representations made by NSEL. NSEL in the course of its brochures has held out representations about the trading and investment opportunities available for:

(a) corporate clients;

(b) high net worth individuals; and

(c) retail investors.

45 Under the head of □contract specifications', the following representation has been held out:

> Commodity Duration Investment (lacs.) Yield Castor Seed T+3 & T+36 7.5 -9 Lacs 16% Castor Oil T+5 & T+30 7-9 16% Cotton Wash Oil T+2 & T+25 10 16% Paddy T+2 & T+25 3.5-4.5 16% PART C Steel T+2 & T+25 4.5-5 16% Raw Wool T+2 & T+25 3.5-4 16% Wool Top T+2 & T+25 1.8-2 16% Crude Soybean T+2 & T+25 3.3.-3.5 16% Oil Soya DOC T+2 & T+25 1.7-2.0 16% Refined Mustard T+2 & T+25 6.5 16% Oil Refined Soybean T+2 & T+25 6.5 16% Oil Refined T+2 & T+25 6.5 16% Sunflower Oil RBD Palmolein T+2 & T+25 6.5 16% Oil Sugar T+2 & T+25 3.0 16% Maize T+2 & T+25 3.0 16% The above representation specifies:
>
> (i) Commodities;
>
> (ii) Duration of trades;
>
> (iii) Investment; and
>
> (iv) Yield.

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> For example, in the case of castor seeds, NSEL held out a buy contract (T+3) and sale contract (T+36), in which the yield is stated to be 16%. Moreover, NSEL represented that:
>
> □Opportunities Traders can trade and lock their return Trader has to buy in near settlement contract and sell in far settlement contract simultaneously Price for both settlement available Exchange provides counterparty guarantee risk No basis risk, No link with future contracts While describing the features of □trading

opportunity , NSEL represented that:

"Features of Trading Opportunity:

T+2 and T+25contract offers unique trading opportunity to traders Trader purchases T+2 contract and simultaneously sells T+25 contract Pay-in obligation is on T+2 while Pay-out of the funds will be on T+25. Entire settlement cycle is of 35-37 days Price differential between the two settlement dates i.e premium if annualized offers interest rate of about 16% Income arising out of such trades are treated as Business Income While comparing the investment opportunities of bank fixed deposits with trading opportunities at NSEL, NSEL represented that:

Comparison Bank FD 9.25% for 390 days; NSEL Trading Opportunity 16%;

Bank FD minimum duration 390 days; NSEL Trade duration 35-55 days, depending on the contract Traders have an option of rolling over their position as per their convenience PART C Under the caption of risk management', the following representation has been held out by NSEL:

"Risk Management Trades are backed by collaterals in the form of stock Cash margin of 10-15% is levied on the open position of seller in T+2/T+3 contracts In case of adverse price movement, Exchange collects additional margin from the seller in T+2/T+3 contracts The exchange has defined guidelines for auction/closeout (circular: 029/2008) Warehouse Management includes Selection, Accreditation, Quality Resting, Fumigation and Insurance The above representation indicates that paired contracts were designed as a unique trading opportunity by NSEL under which a trader would, for instance, purchase a T+2 contract (with a pay-in obligation on T+2) and would simultaneously sell a T+25 contract (with a pay-out of funds on T+25). The price differential between the two settlement dates was represented to offer an annualized return of about 16%. NSEL categorically represented that all trades were backed by collaterals in the form of stocks and its management activities included selection, accreditation, quality testing, fumigation and insurance.

Therefore, NSEL represented that on receiving money and commodities, the members would receive assured returns' and a service'. Though NSEL has been receiving deposits', it has failed to provide services as promised against the deposits and has failed return the deposits on demand. Therefore, the State of Maharashtra was justified in issuing the attachment notifications under Section 4 of the MPID Act.

PART C C.4 Uncovering the Conspiracy C. 4.1 The Grant Thornton Report

46 FMC engaged Grant Thornton LLP to conduct a forensic audit of the practices and records of NSEL. The report found several instances where NSEL had repeatedly contravened the rules:

(a) NSEL allowed members who had repeatedly defaulted to continue trading though under NSEL's exchange rules, a member who does not have sufficient collateral to discharge his obligations would not be allowed to trade further;

(b) Members who were in default or those who had exhausted their margin limits, were granted an exemption from margin requirements;

(c) There was an insufficient collateral of commodities in the warehouses and NSEL did not diligently conduct the exercise;

(d) The Bye-laws and rules of the Exchange mandate the formation of various committees for the effective management of operations. However, the Board failed to constitute nine out of ten such committees. There is also no documentary evidence to demonstrate whether any committee formed was ever convened;

(e) Client margin deposits and the settlement fund were used for fulfilling the obligations of the defaulting members. NSEL also used the deposits made by the members for its own business purposes on a regular basis. For example, on 28 March 2013, Rs. 236.5 Crore was withdrawn from the settlement fund to fund NSEL's business overdraft account. There is a PART C running deficit in the client settlement fund balance from 2012 to June 2013. The financial team had raised the issue on multiple occasions;

(f) Mr. Jignesh Shah, in his presentation dated 10 July 2013 to FMA had stated that 120 NSEL accredited warehouses held commodities valued at Rs. 6,000 crores. However, there was no documentation relating to warehouse activities for long term trades indicating that the contracts were not secured by stocks. The collateral of the members was not in custody and NSEL did not have any control over it;

(g) Though the Warehouse Development and Regulatory Authority had rejected NSEL's application for registration of its warehouse in May 2011, the website of the establishment still represented that the warehouses were registered with the authority;

(h) Though the warehouse receipts are to evidence that a commodity is held in an approved warehouse, receipts were issued without deposit of the commodities. NSEL did not insist on commodities being deposited in the warehouses prior to executing the sale transactions. NSEL issued Delivery Allocation Reports misrepresenting that every transaction was delivery based and backed with commodities;

C. 4. 2 63 Moons Judgment 47 NSEL filed third party representations in a suit filed by the allegedly duped traders for the recovery of Rs 5,600 Crores from the 24 defaulters. Arbitration proceedings were also initiated for the recovery of dues. An amount of Rs. 3,365 Crores out of Rs 5,000 crores has been covered through Court decrees and arbitral awards. On 6 January 2014, the EOW, Mumbai

filed a charge sheet PART C against the Managing Director and CEO of NSEL, the head of warehousing, and two other defaulters. It was mentioned in the charge sheet that these employees of NSEL had colluded with the defaulters to enable them to trade on the platform without depositing the goods in the accredited warehouses. FMC wrote to the Union of India on 18 August 2014 that NSEL and 63 Moons be merged. In the representative suit which was instituted, the Bombay High Court appointed a three-member committee consisting of Mr Justice VC Daga, Mr J Solomon, and Mr Yogesh Thar for determining the liability of the defaulters and assisting in the process of recovery. In addition to Rs. 3,365 Crores covered through court decrees and arbitral awards, the high level committee had crystallised a further sum of Rs. 835.88 to be recovered from the defaulters. 48 On 15 October 2014, the Additional Secretary, Department of Economic Affairs wrote a letter to the Ministry of Corporate Affairs stating that 63 Moons and NSEL are maintaining separate identities to deprive the investors of money. It was stated that the corporate veil ought to be lifted and both the companies must be amalgamated to recover the pending dues. On 12 February 2016, an amalgamation order under Section 396(3) was passed, merging the assets and liabilities of 63 Moons and NSEL. A writ petition filed under Article 226 for challenging the amalgamation was dismissed by the Bombay High Court. A Special Leave Petition before this court challenged the judgment of the Bombay High Court. The two-Judge Bench in the course of determining the validity of the amalgamation order, referred to the Grant Thornton report, where the features and representations made regarding the twin contracts (short term and long term), and the role of NSEL in the default of payments were discussed:

> PART C □1.3. These long-term contracts (e.g. T+25) were first traded on the NSEL exchange in September 2009. The Board of NSEL ratified the circulars introducing such long-term contracts over a period beginning November 2009.
>
> 1.4. Further evidence was obtained with regard to the existence of a financing business, such as presentations which stated that a fixed rate of return was guaranteed on investing in certain products on the NSEL exchange.

Several internal (NSEL) presentations were found, upon a review of email databases, setting out a yield (e.g. 16%) as an opportunity for investors for trading in certain products on the NSEL exchange.

An external presentation was also obtained which had been made by a brokerage house (Geojit Comtrade Ltd.) for their clients claiming a fixed return on investments made on the NSEL exchange. Further, this presentation, declared that actual delivery of stocks in such transactions would not be required.

1.5. Grant Thornton also obtained evidence of repeated contraventions of NSEL exchange rules and bye-laws which facilitated such financing transactions to continue and grow in size as below:

> Repeated defaults : As per the NSEL exchange rules a member who does not have sufficient collateral/monies, etc. to discharge his obligations would not be allowed to trade further. This rule was overridden on a recurring basis. Further despite repeated

defaults members were allowed to trade and increase their expenses. For example, Lotus Refineries had defaulted, as per the Rules of the Exchange, on 198 days between the fifteen- month period of 1-4-2012 and 30-7-2013.

Exemptions from margin requirements : Members who were in a default position or who had exhausted their margin limits on trading were granted an exemption from margin requirements and thus allowed them to increase their exposure by engaging in new trades. More than 1800 margin limit exemptions were granted between 2009 through to 2013.

Inadequate monitoring of member collateral : NSEL did not carry out any diligence to establish the existence of stock at member managed warehouses, upon which trades were being executed. Grant Thornton carried out a stock verification exercise and found significant shortages vis-à-vis expected collateral. The judgment referred to the findings of misutilization of client monies/ settlement fund in the Grant Thornton report:

□1.12. Misutilisation of client monies/settlement fund : As per the rules and bye-laws of the NSEL exchange □Margin deposits received by clearing members from their constituent members and clients in any forms shall be PART C accounted for and maintained separately in segregated accounts and shall be used solely for the benefit of the respective constituent members' and client position. Grant Thornton found evidence (including emails) that client monies/settlement fund, was used regularly for fulfilling the obligations of defaulting members.

Further, NSEL utilised client monies/settlement fund for its own business purposes on a regular basis. For example, on 28-3-2013, Rs 236.5 crores was withdrawn from the Settlement Fund in order to fund NSEL's own business overdraft account.

There was a running deficit in the client monies/settlement fund balance from April 2012 to June 2013. The finance team of FTIL had raised this as an area of concern on several occasions. The report‘s finding on the lack of documentation of the warehousing activities were discussed in the judgment:

□The report then goes on to say that there was no documentation in relation to warehouse activities for long- term trades indicating that such contracts were not secured by warehouse stocks. The warehouses were customer managed warehouses and the underlying collateral were not in custody of NSEL. NSEL did not have control over these warehouses and Grant Thornton was denied access to a number of warehouses. The Warehouse Development and Regulatory Authority had in fact rejected NSEL's application for registration of its warehouses way back on 16-5-2011. Notwithstanding such rejection, NSEL's website represented that its warehouses were registered with the Authority. No verification or due diligence was ever undertaken by NSEL to ensure compliance by its members of the conditions outlined

> in its rules and bye-laws even though in terms of NSEL bye-laws, warehouse receipt issued by NSEL were meant to evidence a commodity being held in an approved warehouse. NSEL did not insist upon deposit of commodities in the warehouses prior to executing sale transactions. Instead NSEL resorted to issuing Delivery Allocation Reports (DAR) representing to genuine investors that each transaction was delivery based and backed at the time of sale by the required quantity of commodities in its warehouses. PART C The conclusion in the FMC order dated 17.12.2013 which revealed the conspiracy unfolded by 63 Moons and NSEL was also referred to in the following extract:
>
> ❑5.1. Noticee 1: Financial Technologies (India) Ltd. (FTIL) : We have discussed the equity structure of NSEL, which is wholly owned by FTIL. We have also pointed out that Shri Jignesh Shah, Chairman-cum-Managing Director of FTIL has been a Director on the Board and also functioning as Vice-Chairman and a key management person of NSEL since its inception.

Similarly, Shri Joseph Massey and Shri Shreekant Javalgekar have been Directors of the said company from its very beginning till the settlement crisis at NSEL first came to light in July 2013. The facts establishing the fraud involving a settlement default over Rs 5500 crores at NSEL have been discussed at length in the SCNs issued to the noticees as well as reiterated, albeit illustratively by us at para 14.7 of this Order. The responsibility of FTIL as the holding company possessing absolute control over the governance of NSEL has also been highlighted. The control of FTIL over NSEL becomes further crystallised from the responses given by M/s Grant Thornton before the Commission on 3-12-2013 stating that Shri Jignesh Shah, Mr Joseph Massey and a host of other officials of FTIL reviewed the forensic audit report and it was only after obtaining their clearance, the forensic auditor finalised its report.

15.1.1. The violation of conditions prescribed in the exemption notification, trading in paired contracts to generate assured financial returns under the garb of commodity trading, admission of members who were thinly capitalised having poor net worth and giving margin exemptions to those who were repeatedly defaulting in settling their dues, poor warehousing facilities with no or inadequate stocks, no risk management practices followed, non-provision of funds in SGF, consciously appointing Shri Mukesh P. Shah as statutory auditors for FY 2012-13 who was related to Shri Jignesh Shah, and apparent complicity with the defaulters to defraud the investors, etc., lead to an inescapable conclusion that a huge fraud was perpetrated by NSEL while having the presence of two Board members of FTIL on the Board of NSEL, one of whom was the Vice-Chairman of the company.

15.1.2. The facts of the case and the manner in which the business affairs of NSEL were conducted leaves no doubt in our minds that FTIL, notwithstanding its contentions that it was ignorant of the affairs and conduct of NSEL, exerted a dominant influence on the management, and directed, controlled and supervised the governance of NSEL. In the face of a fraud of such a magnitude involving settlement crises of Rs 5500 crores PART C owed to over 13,000 sellers/investors on the trading platform of NSEL, FTIL, cannot seek to take refuge behind the corporate veil so as to

unjustifiably isolate itself from the fraudulent actions that took place at NSEL resulting in such a huge payment crisis.

15.1.3. FTIL has its principal business of development of software which has become the technology platform for almost the entire industry engaged in broking in shares and securities, commodities, foreign exchange, etc. As has been demonstrated by FTIL in their written submission, FTIL has floated a number of regulated exchanges—both for securities and commodities derivatives—in India as well as abroad. NSEL was incorporated to provide a trading platform of commodity spot exchange on a pan-India basis for the purpose of which apparently it sought and was granted exemption from the operation of the FCRA, 1952. Since the objective of the NSEL was promoting spot trading in commodities on an electronic platform, its business model did not contemplate venturing into trading in forward contracts. FTIL had already promoted MCX, a regulated exchange under FCRA, 1952, for the purpose of trading in forward contracts. Therefore, having secured an exemption from the purview of FCRA, 1952 on the ground that it was intended to promote spot trading, NSEL was not authorised to allow trading in forward contracts through the scheme of paired contracts, thereby defying conditions stipulated in the exemption notification granted to it. The motive behind allowing trading in forward contracts on the NSEL platform in a circuitous manner on NSEL which was neither recognised nor registered under FCRA, 1952 indicates mala fide intention on the part of the promoter of FTIL to use the trading platform of its subsidiary company for illicit gains away from the eyes of Regulator. The fact that FTIL promoted NSEL sought exemption from FCRA, 1952 provisions even before they had started any trading or operation, points to their intention from the outset. In this manner, it misinterpreted the conditions stipulated in the exemption notification in collusion with a handful of members, which ultimately culminated in a massive fraud involving Rs 5500 crores, which has the potential effect of eroding trust and confidence in exchanges and financial markets.

15.1.4. Keeping in view the foregoing observations and the facts which reveal misconduct, lack of integrity and unfair practices on the part of FTIL in planning, directing and controlling the activities of its subsidiary company, NSEL, we conclude that FTIL, as the anchor investor in the Multi-Commodity Exchange Ltd. (MCX) does not carry a good reputation and character, record of fairness, integrity or honesty to continue to be a shareholder of the aforesaid regulated exchange. Therefore, in the public interest and in the interest of the Commodities Derivatives Market which is regulated under FCRA, 1952, the Commission holds that Financial Technologies (India) Ltd. (FTIL) is not a "fit and PART C proper person" to continue to be a shareholder of 2% or more of the paid-up equity capital of MCX as prescribed under the guidelines issued by the Government of India for capital structure of commodity exchanges post 5 years of operation. It is further ordered that neither FTIL, nor any company/entity controlled by it, either directly or indirectly, shall hold any shares in any association/Exchange recognised by the Government or registered by the FMC in excess of the threshold limit of the total paid-up equity capital of such Association/Exchange as prescribed under the commodity exchange guidelines and post 5-year guidelines. (emphasis supplied) 49 The two-Judge Bench of this Court took note of the modus operandi through which the trading members were duped by a conspiracy hatched by a few trading members along with NSEL. However, this Court held that the order amalgamating NSEL and 63 Moons did not fulfil the requirements of Section 396 of the Companies Act 1956 as the □essentiality' aspect in Section 396 was not satisfied

since the □emergency situation' requiring amalgamation was short lived. Further, it was observed that the rationale for the amalgamation was the financial incapability of NSEL to effect recoveries from the defaulting members. The Court noted that the final order of amalgamation dated 12 February 2016 referred to the actions taken for recovery by the EOW and the Enforcement Directorate which indicated methods other than amalgamation through which the monies could be recovered. The action taken by the EOW and the Enforcement Directorate is referred to in the following extract:

> □92.1. What is important to note is that by the time the final order of amalgamation was passed i.e. on 12-2- 2016, the final order itself records:
>
> □8.1. Economic Offences Wing, Mumbai:
>
> (i) Total amount due and recoverable from 24 defaulters is Rs 5689.95 crores.
>
> (ii) Injunctions against assets of defaulters worth Rs 4400.10 crores have been obtained.

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(iii) Decrees worth Rs 1233.02 crores have been obtained against 5 defaulters.

(iv) Assets worth Rs 5444.31 crores belonging to the defaulters have been attached of which assets worth Rs 4654.62 crores have been published in Gazette under the MPID Act for liquidation under the supervision of MPID Court and balance assets worth Rs 789.69 crores have been attached/secured for attachment by the EOW.

(v) Assets worth Rs 885.32 crores 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 the MPID Act for liquidation under the supervision of the MPID Court and balance assets worth Rs 3 crores have been attached/secured for attachment by the EOW.

(vi) MPID Court has already issued notices under Sections 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.

(vii) The Bombay High Court has appointed a 3- member committee headed by Mr Justice (Retd.) V.C. Daga and 2 experts in finance and law to recover and monetise the assets of the defaulters.

(viii) Rs 558.83 crores have been recovered so far, out of which Rs 379.83 crores have been received/recovered from the defaulters and Rs 179 crores were disbursed by NSEL to small traders/investors.

8.2. Enforcement Directorate:

(i) ED has traced proceeds of crime amounting to Rs 3973.83 crores to the 25 defaulters;

(ii) ED has attached assets worth Rs 837.01 crores belonging to 12 defaulters;

(iii) 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.... (emphasis supplied) This Court noted that the ‘essentiality‘ requirement in Section 396 of the Companies Act was not fulfilled:

92.2. What concerned the FMC in August 2014 has, by the date of the final amalgamation order, been largely redressed without amalgamation. The emergency situation 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 PART C 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 crores have been obtained against the defaulters, with INR 835.88 crores crystallised by the committee set up by the High Court, 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 applicability of Section 396, cannot be said to have been satisfied. The judgment held that NSEL had falsely represented that it had full stock as collateral and that the stock was valued at Rs. 6,000 crores:

91.3. 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 10-7-2013, 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. Further, there is no doubt whatsoever that in July 2013, as a result of NSEL stopping trading on its exchange, a PART C payment crisis of approximately INR 5600 crores arose. The further question that remains is whether, given these facts, the conditions precedent for the applicability of Section 396 were followed.
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> 50 This Court in its decision in 63 Moons (supra) took note of the modus operandi by which the defaults came about, specifically highlighting the role of NSEL in not complying with the rules. It set aside the amalgamation order on the narrow ground that the pre-conditions for the exercise of power under Section 396 had not been fulfilled. One of the reasons which persuaded this Court to set aside the order of amalgamation was that the EOW and the Enforcement Directorate had already taken steps to realise the amounts in default. The judgment in 63 Moons (supra) has after a detailed analysis of the Grant Thornton report and the FMC‘s order held that the defaulters and NSEL conspired to dupe the members of their money.

C. 5 Constitutional Validity of the MPID Act 51 The respondents challenged the constitutional validity of the provisions of the MPID Act before the High Court on the ground that it is arbitrary. The High Court in the impugned judgment did not deal with the constitutional validity of the provisions and left the question open. The respondents contended before this Court that the judgment in Bhaskaran (supra) while holding the Tamil Nadu Act to be constitutionally valid only made a passing reference to the MPID Act. Thus, it was argued that this Bench is not bound by the judgment in Bhaskaran (supra) while deciding on the validity of the provisions of the MPID Act. PART C 52 A Full Bench of the Bombay High Court had held that the state legislature did not possess the legislative competence to enact the MPID Act.36 On the other hand, a Full Bench of the Madras High Court had upheld the constitutional validity of the Tamil Nadu Act. The correctness of the judgment of the Madras High Court was assailed before this Court in Bhaskaran (supra). The judgment of the Full Bench of the Bombay High Court was cited and considered by the two judge Bench which heard the appeal against the judgment of the Madras High Court. This Court held that the state legislature does possess legislative competence to enact the law in question and that the legislation was not for the transaction of banking or the acceptance of deposits but for the protection of the depositors who are deceived by fraudulent financial establishments. The Court held:

> □26. The Tamil Nadu Act was enacted to ameliorate the conditions of thousands of depositors who had fallen into the clutches of fraudulent financial establishments who had raised hopes of high rate of interest and thus duped the depositors. Thus the Tamil Nadu Act is not focused on the transaction of banking or the acceptance of deposit, but is focused on remedying the situation of the depositors who were deceived by the fraudulent financial establishments. The impugned Tamil Nadu Act was intended to deal with neither the banks which do the business or banking and are governed by the Reserve Bank of India Act and the Banking Regulation Act, nor the non-banking financial companies enacted under the Companies Act, 1956.

> 27. The Reserve Bank of India Act, the Banking Regulation Act and the Companies Act do not occupy the field which the impugned Tamil Nadu Act occupies, though the latter may incidentally trench upon the former.

The main object of the Tamil Nadu Act is to provide a solution to wipe out the tears of several lakhs of depositors to realise their dues effectively and speedily from the fraudulent financial establishments which duped them or their vendees, without dragging them in a legal battle from pillar to post. Hence, the decision of this Court Vijay C. Puljal v. State of Maharashtra, (2005) 4 CTC 705 (Bom) PART C in Delhi Cloth Mills [(1983) 4 SCC 166] has no bearing on the constitutional validity of the Tamil Nadu Act. The judgment of the Full Bench of the Bombay High Court in Vijay C. Puljal v. State of Maharashtra37 was specifically disapproved in the decision of this Court in Bhaskaran (supra), where the Court held:

> ☐14. The learned counsel for the appellant relied on the Full Bench decision of the Bombay High Court in Vijay C. Puljal case [(2005) 4 CTC 705 (Bom)] in support of his contention that the Tamil Nadu Act, like the Maharashtra Act, was unconstitutional being beyond the legislative competence of the State Legislature. We do not agree.
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> 15. We have carefully perused the judgment of the Full Bench of the Bombay High Court in Vijay case [(2005) 4 CTC 705 (Bom)] and we respectfully disagree with the view taken by the Bombay High Court. It may be noted that though there are some differences between the Tamil Nadu Act and the Maharashtra Act, they are minor differences, and hence the view we are taking herein will also apply in relation to the Maharashtra Act." (emphasis supplied)

53 Besides holding that the State legislature did not lack legislative competence to enact the law, the judgment in Bhaskaran (supra) also concluded that the Tamil Nadu enactment did not violate the provisions of Articles 14, 19(1)(g) or 21 of the Constitution. In that context, while dismissing the constitutional challenge against the legislation enacted in Tamil Nadu, the Court held:

> ☐31. We fail to see how there is any violation of Articles 14, 19(1)(g) or 21 of the Constitution. The Act is a salutary measure to remedy a great social evil. A systematic conspiracy was effected by certain fraudulent financial establishments which not only committed fraud on the depositors, but also siphoned off or diverted the depositor's funds mala fide. We are of the opinion that the (2005) 4 CTC 705 (Bom) PART C act of the financers in exploiting the depositors is a notorious abuse of faith of the depositors who innocently deposited their money with the former for higher rate of interest. These depositors were often given a small pass book as a token of acknowledgment of their deposit, which they considered as a passport of their children for higher education or wedding of their daughters or as a policy of medical insurance in the case of most of the aged depositors, but in reality in all cases it was an unsecured promise executed on a waste paper. The senior citizens above 80 years, senior citizens between 60 and 80 years, widows, handicapped, driven out by wards,

> retired government servants and pensioners and persons living below the poverty line constituted the bulk of the depositors. Without the aid of the impugned Act, it would have been impossible to recover their deposits and interest thereon.

32. The conventional legal proceedings incurring huge expenses of court fees, advocates' fees, apart from other inconveniences involved and the long delay in disposal of cases due to docket explosion in courts, would not have made it possible for the depositors to recover their money, leave alone the interest thereon. Hence, in our opinion the impugned Act has rightly been enacted to enable the depositors to recover their money speedily by taking strong steps in this connection.

33. The State being the custodian of the welfare of the citizens as parens patriae cannot be a silent spectator without finding a solution for this malady. The financial swindlers, who are nothing but cheats and charlatans having no social responsibility, but only a lust for easy money by making false promise of attractive returns for the gullible investors, had to be dealt with strongly. The small amounts collected from a substantial number of individual depositors culminated into huge amounts of money. These collections were diverted in the name of third parties and finally one day the fraudulent financers closed their financial establishments leaving the innocent depositors in the lurch. 54 The judgment held that the Tamil Nadu Act is constitutionally valid and constitutes a salutary measure which was long over-due to deal with these matters. Significantly, the above extracts from the decision in Bhaskaran (supra) indicate that the differences between the enactment in Tamil Nadu and Maharashtra □are minor and the view of the court on the validity of the former will govern the validity of the latter enactment as well. PART C 55 The judgment in Bhaskaran (supra) was followed by another two-Judge Bench of this Court in New Horizons Sugar Mills Limited v. Government of Pondicherry38. The case arose from the action of the Government of Pondicherry of attaching the properties acquired by a company. The validity of the Pondicherry Protection of Interests of Depositors in Financial Establishments Act 2004 was also in question. A two-Judge Bench of this Court considered whether the pith and substance of the enactment istraceable to the entries in the Union List or the State List of the Seventh Schedule to the Constitution. After adverting to the earlier decision in Bhaskaran (supra) which upheld the Tamil Nadu enactment while disapproving the Full Bench decision of the Bombay High Court on the legislative competence of the State legislature to enact the MPID Act, this Court held:

> □50. In addition to the above, it has also to be noticed that the objects for which the Tamil Nadu Act, the Maharashtra Act and the Pondicherry Act were enacted, are identical, namely, to protect the interests of small depositors from fraud perpetrated on unsuspecting investors, who entrusted their life savings to unscrupulous and fraudulent persons and who ultimately betrayed their trust.
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> 51. However, coming back to the constitutional conundrum that has been presented on account of the two views expressed, by the Madras High Court and the Bombay High Court, it has to be considered as to which of the two views would be more consistent with the constitutional provisions. The task has been simplified to some extent by the fact that subsequently the decision of the Bombay High Court [(2005) 4 CTC 705 (Bom)] declaring the Maharashtra Act to be ultra vires, has been set aside by

> this Court [Sonal Hemant Joshi v. State of Maharashtra, (2012) 10 SCC 601] , [State of Maharashtra v. Vijay C. Puljal, (2012) 10 SCC 599] , so that there is now a parity between the judgments relating to the Maharashtra Act and the Tamil Nadu Act.

[...] (2012) 10 SCC 575 PART C

59. [...] The objects of the Tamil Nadu Act, the Maharashtra Act and the Pondicherry Act being the same and/or similar in nature, and since the validity of the Tamil Nadu and Maharashtra Act have been upheld, the decision of the Madras High Court in upholding the validity of the Pondicherry Act must be affirmed. We have to keep in mind, the beneficial nature o the three legislations which is to protect the interests of all depositors, who invest their life's earnings and savings in schemes for making profit floated by unscrupulous individuals and companies, both incorporated and unincorporated. Following the decision in Bhaskaran (supra), the challenge to the Pondicherry enactment on the ground of legislative competence was repelled. 56 The validity of the MPID Act was specifically dealt with in two decisions of this Court in State of Maharashtra v. Vijay C. Puljal and Sonal Hemant Joshi v. State of Maharashtra40. In both the decisions, this Court upheld the constitutional validity of the MPID Act in view of the earlier decision in Bhaskaran (supra). In Soma Suresh Kumar v. Government of Andhra Pradesh41, a two judge Bench of this Court upheld the provisions of the Andhra Pradesh Protection of Depositors of Financial Establishments Act 1999 following the earlier decisions in Bhaskaran (supra) and New Horizons Sugar Mills Limited (supra). 57 Having discussed the judgments of this Court on the constitutional validity of the state legislations governing financial establishments offering deposit schemes, including the MPID Act, there is no reason for us to reopen the question. This Court has held that the MPID Act is constitutionally valid on the grounds of legislative competence and when tested against the provisions of Part III of the Constitution.

(2012) 10 SCC 599 (2012) 10 SCC 601 (2013) 10 SCC 677 PART C C. 6 The High Court s Judgment 58 Referring to the Bye-laws and rules of NSEL, the High Court held that NSEL is an electronic trading platform which only facilitated transactions between buyers and sellers. In this context, it observed that NSEL did not receive the pay- in in its own right but only for the purpose of passing it on to the selling trading member on the same day. The High Court observed:

> "The nature of transaction to be carried out on the NSEL platform was also therefore, in public domain since the trading on this electronic platform commenced. The business/transaction which operated through NSEL, do not disclose any payin amount received by NSEL in its own right but it was only received in the process of settlement of the commodity trade and only for the purpose of passing it on the selling trading member on the same day. This amount cannot be said to be received as a deposit within the meaning of Section 2(c) of the MPID Act which contemplates "deposit' to be a receipt of money or acceptance of a valuable commodity on the promise that such money or valuable commodity would be returned/repaid by the financial establishment after a specified period or otherwise. The High Court has lost sight of the fact that Section 2(c) of the MPID Act defines "deposit' in broad terms. Further, according to the definition, the return may be either in money,

> commodity or service, and it is not necessary that the commodity or the money must be returned in the same form. The definition includes the receipt of money and the return of a commodity, or even the receipt of a commodity and a return in the form of a service. Further, Bye-law 10.8 indicates that NSEL was not merely an intermediary. The Bye-law states that the buyer shall pay the Clearing House the value of the delivery allocation. However, till the completion of the delivery process, the money will be retained by the Clearing House of NSEL.
>
> PART C

59 Referring to the contract notes and the confirmation receipts generated on the electronic platform, the High Court observed that NSEL was only a □medium'. However, the High Court subsequently noted that □something has gone wrong somewhere in these transactions'. Further, the High Court referred to the First Information Report filed by Mr. Pankaj Saraf observing that even the complainant had not stated that he had deposited any amount with NSEL. The Court goes on to note:

> □In no way, the complainant in the FIR allege a promised return in the form of any interest, bonus, profit, but yield- the difference in the price of a commodity between the two trading dates i.e T+2 and T+30/33/25 was calculated as a yield but this, in our view, would not fall within the purview of deposit since neither the NSEL received the commodities to be retained by itself nor did it receive any amount to be deposited in its account.

60 The High Court also observed in paragraph 33 of the judgment that at the most, only the sellers in T+2 (and buyers in T+25) could be referred to as a □financial establishment'. This finding was made without analysing the functioning of the exchange vis-à-vis Sections 2(c) and 2(d) of the Act. The Court also held that the □warehouse receipts' do not establish the nature of the transaction that took place in the platform. In this regard it observed:

> □.. this receipt do not provide an answer to the nature of transaction that took place on the platform of NSEL and though it is no doubt that the commodity came to be accepted as a deposit, but it should be accepted with an assured return and in the present case, the commodity which was accepted was because it was to be sold to a purchaser and it is not the case of the State that it was a pure transaction where commodities are accepted as deposit. PART C The High Court observed that since transaction charges were charged by NSEL and the amount paid by the buyer used to be paid by NSEL by the settlement date, it is not a financial establishment.

61 The High Court has formed an erroneous opinion that firstly, only if the return includes interest, bonus or any other added benefit, it would be a deposit for the purpose of the MPID Act. However, Section 2(c) states that the return may be □with or without any benefit in the form of interest, bonus, profit or in any other form . The definition does not stipulate that there must be an added benefit, rather that the □added benefit' is irrelevant for the purpose of the definition; secondly, that

for the purpose of Section 2(c), the receipt of the commodity or money □must be retained by itself'. The definition does not provide any such embargo. Rather, the definition is broadly worded to include even the possession of the commodities for a limited purpose. The High Court has read the definition of □deposit' narrowly without any reference to the salutary purpose of the MPID Act.

62 The High Court also made observations on the merits of the criminal proceedings. Referring to the role of NSEL in the default in payments, it observed that at the highest, the actions of NSEL would constitute offences under Sections 465 and 467 of the IPC. The EOW filed a charge sheet under Section 173 CrPC before the Sessions Judge, Special Court under the MPID Act for offences punishable under Sections 409,465,467,468,471,474 and 477(4) read with Section 120(B). The High Court ought not to have made observations on the merits of the criminal proceedings when the writ petition was restricted to the PART C issue of whether NSEL is a financial establishment for the purpose of the MPID Act.

63 The High Court observed that the decision of this Court in 63 Moons (supra) does not have □any serious effect on the present proceeding', though this Court has discussed at length the modus operandi of NSEL in duping the trading members by throwing light on the structure of the exchange. Though it was observed that the question of constitutional validity was settled in Bhaskaran (supra), New Horizons (supra), Sonal Hemant Joshi (supra) and Vijay Kulijal (supra), the challenge of the respondent to the constitutional validity of the MPID Act was still kept open by the High Court. Such an observation was made in spite of noticing in paragraph 39 of the judgment that this Court in Bhaskaran (supra) had observed that the MPID Act and the Tamil Nadu Act have minor differences and that the statute did not violate Articles 14, 19(1)(g) or 21 of the Constitution.
64 Further, while referring to the earlier order of the Division Bench dated 1 October 2015, where it was prima facie recorded that NSEL is a □financial establishment' for the purpose of the MPID Act, the High Court observed that it was not bound by the prima facie view. The primary ground for the Division Bench for arriving at a prima facie view was the representations made assuring a 14% to 16% yield. However, the High Court in its impugned judgment dispelled the argument on the ground that only a □faint reference' was made to assured returns. Such an observation misrepresents the factual instances which are backed by documentary material.

65 The appellant also contended that the writ petition filed by the respondent is not maintainable since there was an alternative remedy of raising an objection PART C before the Designated Court under Section 7 of the MPID Act. Though there is merit in the argument of the appellant, since the High Court decided on the validity of the impugned attachment notifications on merits, and arguments have been addressed in the present proceedings, we have proceeded to decide the matter on merits.

66 For the reasons recorded in this judgment, we allow the appeals and set aside the impugned judgment of the Bombay High Court dated 22 August 2019. The impugned notifications issued under Section 4 of the MPID Act attaching the properties of the respondent are valid.

67 Pending application(s), if any, stand disposed of.

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April 22, 2022