

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 24.06.2015
Date of Decision : 30.06.2015

Misc. Application No. 117 of 2013
And
Appeal No. 185 of 2013

Prime Broking Company Limited
Ashford Centre, 7th Floor,
Shankarrao Naram Marg,
Opp. Peninsula Corporate Park,
Lower Patel,
Mumbai- 400 013

...Appellant

Versus

1. National Securities Clearing Corporation Limited
Exchange Plaza,
Bandra-Kurla Complex,
Bandra (East),
Mumbai-400 051

2. National Stock Exchange of India Limited
Exchange Plaza,
Bandra-Kurla Complex,
Bandra (East),
Mumbai- 400 051

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

...Respondents

Mr. Zal Andhyarujina, Advocate with Mr. Nirav Shah and
Mr. Rishikesh Soni, Advocates, i/b DSK Legal for the Appellant.

Mr. Rafique Dada, Senior Advocate with Mr. Sachin Chandrana,
Advocate and Mr. Pritvish Shetty, Advocate i/b Manilal Kher Ambalal
& Co. for Respondent Nos. 1 & 2.

Mr. Mihir Mody, Advocate with Mr. Rushin Kapadia, Advocate i/b K.
Ashar & Co. for Respondent No. 3.

CORAM: Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member

Per: Justice J.P. Devadhar

1. Appellant is aggrieved by the impugned order passed by the Committee on Declaration of Default of National Securities Clearing Corporation Limited (“NSCCL” for short) on October 15, 2013. By that order the appellant is declared to be a defaulter under Bye Laws 1(1), 1(2) and 1(4) of Chapter XI of the Bye Law on NSCCL (Futures and Options Segment) and consequently the appellant is also declared a defaulter in the capital market segment with immediate effect.

2. Facts which have bearing on the present appeal are as follows:

- a) Appellant is a company registered under the Companies Act, 1956 and is a Stock Broker duly registered with Securities and Exchange Board of India (“SEBI” for short) and is a Member of Bombay Stock Exchange (“BSE” for short) and National Stock Exchange (“NSE” for short).
- b) Respondent No. 1 (NSCCL) is a Clearing Corporation to whom the Respondent No. 2 (NSE) has conferred duties and functions of a Clearing House as stipulated under Section 8(A) of the Securities Contracts (Regulation) Act, 1956 (“SCRA” for short).
- c) On January 16, 2003 appellant executed a Clearing Membership Undertaking (F&O

Segment) in favour of NSCCL, thereby agreeing to abide by the Bye Laws, Rules and Regulations of NSCCL. On January 17, 2003 appellant executed a Trading Membership Undertaking (F&O Segment) in favour of NSE thereby agreeing to abide by the Bye Laws, Rules and Regulations of NSE. On February 15, 2003 appellant executed a deed of pledge in favour of NSCCL, where under, the appellant has pledged various securities including 20 lac shares of Gitanjali Gems Limited (“Gitanjali” for short) towards margin deposit requirement.

- d) On February 23, 2005 SEBI issued a circular whereby a comprehensive risk management framework for the cash market was announced. By the said circular Stock Exchanges were called upon to put in place necessary systems to ensure the operationalization of the comprehensive risk management framework. The Stock Exchanges were also advised to ensure that their risk management framework is in line with the provisions contained in the annexure to the said circular and take steps to make necessary

amendments to the relevant Bye-Laws, Rules and Regulations for the implementation of the above decision immediately. The Stock Exchanges were also called upon to bring the provisions of the said circular to the notice of member brokers/ Clearing Members of the Exchange.

- e) On December 31, 2010 SEBI issued a master circular on matters relating to Exchange Traded Derivatives. As per clause 1.2.1 of the said master circular, the Clearing Member's liquid Net Worth must satisfy both the conditions set out therein on a real time basis viz (one) Liquid Net Worth shall not be less than Rs. 50 lac at any point of time and (two) the mark to market value of gross open positions at any point of time of all trades cleared through the Clearing Member shall not exceed $33 \frac{1}{3}$ (thirty three one by three) times his liquid net worth. The said clause further provides that the notional value of gross open positions at any point in time in the case of Index Futures shall not exceed $33 \frac{1}{3}$ (thirty three one by three) times the liquid net worth of a member. As per clause 1.2.4 of the said

master circular, Equity Securities classified under Group 1 in the underlying cash market may be accepted towards liquid assets in the derivative markets and the equity securities shall be valued/marked to market on a daily basis after applying a haircut equivalent to the respective Value at Risk (“VaR” for short) of equity security. The said clause further stipulates that the list of acceptable equity securities shall be updated on the basis of trading and mean impact cost on the 15th day of each month and when a security is dropped from the list of acceptable equity securities, the existing deposit of that security shall continue to be counted towards liquid assets till the end of month.

- f) On December 13, 2011, NSCCL issued a circular to all Clearing Members including the appellant, requesting them to take note of the revised norms with respect to acceptance of securities as collaterals. By the said circular, market wide permissible security limit across all the segments and member specific limits for each segment were also set out in the said circular. It was stated in the said circular that

the permissible quantity for a security shall be upfront announced to the market along with the list of approved securities for the month, so that the said limits could be adjusted accordingly. It was further stated in the said circular that the date of implementation of the revised norms shall be intimated subsequently. However, all members were requested to take note of the norms mentioned therein, identify the security wise and member wise excess quantities and initiate steps for adherence to the revised norms. If any clarification was needed, the members were requested to contact the officials of NSCCL named in the said circular.

- g) Since June 2012, the appellant had entered into long dated NIFTY options contracts for a value of Rs. 400 crore, having maturity in September 2012 and December 2012 which were subsequently party rolled over to March 2013 and June 2013.
- h) During the period from January to December 2012 several meeting were held between NSCCL and its members including the

appellant wherein the meaning, implementation and impact of the norms laid down in the circular dated December 13, 2011 were explained. On September 12, 2012 appellant sent an E-mail to NSCCL acknowledging the meetings that were held with a view to clarify the scope and ambit of the circular dated December 13, 2011. While appreciating the concern of the Exchange in imposing the restrictions, the appellant requested that the current rules be continued till the end of the fiscal year. NSCCL in its reply E-mail also dated September 12, 2012 stated that NSCCL will be happy to provide further clarification if needed and requested the appellant to inform its plan of action to comply with the revised norms.

- i) In order to give enough time to the members to adjust to the new norms and prepare themselves to the circular dated December 13, 2011, NSCCL published circulars with a list of approved securities with market wide and member specific permissible limits every month from June 2012 applicable from the 1st day of the subsequent month.

- j) By a circular dated December 20, 2012, NSCCL brought into effect the market wide and member specific limits with effect from January 1, 2013. Along with that circular a list of securities for which market wide and member specific limits shall become applicable with effect from January 1, 2013 were annexed and the members were requested to take note of the market wide and member specific permissible limits provided therein and comply accordingly.
- k) As per the circular dated December 20, 2012 read with circular dated November 13, 2011, appellant was required to replace the following pledged ineligible securities by January 1, 2013:-
- i) 1,71,431 shares of ABG Shipyard Ltd.
 - ii) 37,98,757 shares of Alok Industries Ltd.
 - iii) 10,93,252 shares of Ananjneya Lifecare Ltd. (Now known as Dr. Datsons Labs Ltd.)
 - iv) 28,000 shares of Flexituff International Ltd. &
 - v) 3,72,917 shares of Gitanjali Gems Ltd. ('Gitanjali' for short)

- l) As the appellant failed to replace the ineligible securities by January 1, 2013 there was margin shortfall in the F&O Segment amounting Rs. 92,08,16,556.95 and in view of the margin shortfall, NSCCL was constrained to disable the appellant from trading on the NSE platform with effect from January 1, 2013.
- m) With a view to minimize margin shortfall appellant brought in cash collateral from time to time and vide its letters dated January 14th, 16th, 17th, 2013, February 1st, 11th, 12th, 2013 and March 12th & 13th 2013 requested NSCCL to release the ineligible securities to the extent specified therein. By letters dated 1st, 5th, 13th, 14th, 15th and 18th March, 2013 the appellant requested NSCCL to sell the pledged shares to the extent specified therein at market rate and adjust the sale proceeds towards the margin shortfall.
- n) On January 30, 2013, Mr. N. Jayakumar, Chairman-Managing Director of the appellant sent an E-mail to NSCCL acknowledging therein that due to the securities which have become ineligible from January 1, 2013 there

is margin shortfall of Rs. 92 crore (approx.) and assured NSCCL that the appellant would make good the margin shortfall before end of March 2013.

- o) On March 14, 2013 officials of NSCCL had a meeting with N. Jayakumar of the appellant, wherein, proximity of the maturity of its options contracts were discussed and the appellant was informed that even after repeated assurance appellant had failed to make good the margin shortfall. It was also decided that if the appellant does not make good the margin shortfall by March 18, 2013 NSCCL shall be constrained to sell the pledged securities including shares of Gitanjali in order to reduce the margin shortfall.
- p) On March 18, 2013, NSCCL received two complaints, one from Sarvin Mercantile Private Limited (“Sarvin” for short) and another from Trusha Infrastructure Private Limited (“Trusha” for short) against appellant alleging non-delivery of 7 lac shares and 13 lac shares of Gitanjali respectively which were alleged to have been brought by them through

the appellant six months back. In the complaints it was also stated that 20 lac shares of Gitanjali bought by them have been parked with NSE by the appellant without their consent and therefore, the appellant should be directed to release those shares into their account. Copies of the said complaints were also marked to Mr. N. Jayakumar, Chairman-Managing Director of the appellant, Additional Commissioner of Police, Economic Offences Wing (“EOW” for short) Mumbai and DIG, Central Bureau of Investigation, Mumbai.

- q) As the appellant failed to make good the margin shortfall by March 18, 2013, NSCCL, despite complaints received on March 18, 2013, invoked the pledge and from March 19, 2013 started liquidating the equity shares of Gitanjali with a view to minimize the margin shortfall. Accordingly, during the period from March 19, 2013 to March 22, 2013 NSCCL sold 2,97,731 shares of Gitanjali.
- r) On March 25, 2013 NSCCL received a letter dated March 23, 2013 from the EOW. By that letter, EOW requested NSCCL to withhold the

shares of Gitanjali pledged by the appellant till further orders in view of the fact that the said shares are subject matter of investigation pursuant to criminal complaints filed by Sarvin and Trusha which are duly registered and being investigated by EOW.

- s) By its letters dated March 26, 2013, April 1, 2013 and April 10, 2013 NSCCL requested the EOW to withdraw the letter dated March 23, 2013 inter alia on the ground that the shares of Gitanjali were pledged by the appellant with NSCCL and since the appellant failed to comply with its margin shortfall obligation, NSCCL was entitled to invoke the pledge and sell the said shares in the open market.
- t) After expiry of the rolled over contracts of the appellant in March 2013, there was settlement shortfall of Rs. 158.04 crore. By its letter dated April 2, 2013, appellant admitted its pay-in obligation in F&O Segment amounting to Rs. 158.04 crore and requested NSCCL to adjust the pay in obligation against its fixed deposit and cash lying with NSCCL as margin deposit in F&O Segment. Accordingly,

Rs. 130,23,80,854, in the form of fixed deposit receipt, Rs. 1,52,39,319.11 in the form of cash collaterals and Rs. 22,50,00,000 in the form of bank guarantee were adjusted against the settlement shortage of Rs. 158.04 crore by liquidating the aforesaid deposits/cash collaterals/bank guarantee. As a result of above adjustment, the settlement shortage as on April 2, 2013 was reduced to Rs. 3,77,79,826.89. By a letter dated April 3, 2013, appellant requested time till April 8, 2013 to arrange funds to make good the aforesaid settlement shortfall and also agreed to pay delayed payment charges in respect thereof. However, no such funds were arranged.

- u) On April 11, 2013 NSCCL addressed a letter to the appellant stating therein that the appellant has continuously fallen short of the settlement obligation and margin requirement in the F&O Segment and failed to arrange funds pay-in within the stipulated time. By its letter dated April 12, 2013 appellant admitted its pay-in obligation and stated that all efforts are being made to meet the shortfall in the pay-

in obligation and while requesting for more time, agreed to bare any delayed payment charges payable on the pay-in shortage.

- v) On April 27, 2013 EOW passed an order under Section 102 of the Code of Criminal Procedure, 1973 (“CrPC” for short). By that order, NSCCL was directed to freeze the shares of Gitanjali pledged with it by the appellant. NSCCL challenged the said order of EOW before the Bombay High Court by filing a Criminal Application under Section 482 of CrPC. By its interim order dated May 10, 2013 the Bombay High Court held that the disputes raised by Sarvin and Trusha fall within the realm of Civil Law and directed that the order passed by EOW shall remain in force till May 24, 2013 and before that date the parties who are claiming right in the shares including the two complainants should obtain an order from the competent Civil Court. It was further held that in the event, NSCCL wish to exercise their rights in terms of the pledge deed without the intervention of the Court, they may do so after May 24, 2013.

- w) Challenging the aforesaid order, Sarvin and Trusha filed Special Leave Petition before the Apex Court and by its order dated May 22, 2013 the Apex Court set aside the order of Bombay High Court dated May 10, 2013 and while restraining NSCCL from dealing with the shares of Gitanjali, the Apex Court directed the Bombay High Court to hear the criminal application filed by NSCCL finally at the earliest. Accordingly, the Bombay High Court heard the matter and by its order dated August 22, 2013 rejected the criminal application filed by NSCCL. NSCCL has filed Special Leave Petition challenging the order of the Bombay High Court dated August 22, 2013 which is pending before the Apex Court.
- x) While the settlement shortfall of Rs. 3,77,79,826.89 remained outstanding, there was further settlement shortfall to the tune of Rs. 91,01,08,825 on the expiry of the rolled over contracts in June 2013. Thus, the total settlement shortage as on June 28, 2013 was Rs. 94,78,88,651.89 (Rs. 91,01,08,825+ Rs. 3,77,79,826.89).

- y) By its letter dated June 28, 2013, NSCCL called upon the appellant to fulfill its cumulative settlement obligation amounting to Rs. 94,78,88,651.89 by July 3, 2013, failing which NSCCL would initiate suitable actions including suspension of membership, expulsion or declaration of default. Challenging the said notice appellant filed a writ petition before the Bombay High Court which was disposed of on July 2, 2013 by recording a statement made by the counsel for NSCCL that a show cause notice would be issued and thereafter an order would be passed in accordance with law after giving an opportunity of hearing to the appellant.
- z) On July 12, 2013 NSCCL liquidated following deposits/securities and adjusted the same towards the cumulative settlement shortfall amounting to Rs. 94.78 crore.
- i) Additional Base Capital Cash (CM Segment) Rs. 1,70,00,000.
 - ii) Sale proceeds of liquid Bees Rs. 1,59,15,847.38. As a result of above adjustment, the cumulative settlement

shortfall stood reduced to
Rs. 91,49,72,804.51.

- aa) On July 31, 2013 appellant through its advocates addressed a letter to the advocates for the appellant raising a counterclaim of Rs. 213.02 crore (Rs. 80 crore towards reputational loss, Rs. 20 crore towards business loss, Rs. 101.85 crore towards loss in value of Gitanjali shares, Rs. 2.93 crore being loss in value of other shares, Rs. 8.24 crore towards wrongly imposed penalties). By the said letter NSCCL was called to adjust the outstanding liability of Rs. 90.90 crore and pay the balance amount of Rs. 122.12 crore to the appellant within 7 days of receipt of the said letter. Since no such payment was made, appellant has filed a suit against NSCCL in the Bombay High Court and the same is pending.
- bb) On August 2, 2013 NSCCL issued a show cause notice to the appellant to show cause as to why the appellant should not be declared as defaulter in view of the appellant failing to pay the cumulative settlement shortfall amounting of Rs. 91,49,72,804.51. On August 28, 2013 a show cause notice was also issued by NSE to

the appellant to show cause as to why action should not be initiated against the appellant for failure to pay dues of NSCCL. After considering the reply filed by the appellant and after hearing the representative of the appellant the Committee on Declaration of Default of NSCCL passed the impugned order dated October 15, 2013 thereby declaring the appellant to be a defaulter for the reasons stated therein. Challenging the aforesaid order present appeal is filed.

3. Mr. Zal Andhyarujina, learned counsel appearing on behalf of the appellant extensively argued before us by submitting that failure on part of NSCCL in taking prompt action to sell the pledged shares has led to continued margin/settlement shortfall and therefore for the lapses committed by NSCCL the appellant could not be declared as defaulter so as to shut the business of the appellant completely. Mr. Rafique Dada, learned Senior Advocate appearing on behalf of Respondent Nos. 1 & 2 on the other hand submitted that the appellant has consistently failed to make good the margin money deficit from January 01, 2013 and thereafter consistently failed to discharge the settlement shortfall that took place in March/June 2013. Mr. Dada submits that as a result of the default committed by the appellant in discharging the pay in obligation, NSCCL had to pay to the counter parties on behalf of the appellant a sum of Rs. 91,49,72,804.51 out of its own profits and its

accumulated reserves which amount has not reimbursed by the appellant till date and hence no fault can be found with the impugned order passed by the Committee on Declaration of Default of NSCCL.

4. Basic dispute in the present case is, whether the Committee on Declaration of Default of NSCCL is justified in declaring the appellant to be a defaulter under Bye Laws 1(1), 1(2) & 1(4) of Chapter XI of the Bye Laws of NSCCL (F&O) Segment.

5. Bye Laws 1(1), 1(2) & 1(4) of Chapter XI of the Bye Laws of NSCCL (F&O Segment) read thus:-

“CHAPTER XI: DEFAULT

1. DECLARATION OF DEFAULT

A clearing member may be declared a defaulter by direction/circular/notification of the relevant authority of the segment if:

(1) he is unable to fulfill his clearing, settlement or obligations; or

(2) he admits or discloses his inability to fulfill or discharge his duties, obligations and liabilities;

or

(3)

(4) he fails to pay any sum due to the Clearing Corporation as the relevant authority may from time to time prescribe; or

(5) to (9)....”

(emphasis supplied)

6. Admittedly due to the revised prudential norms laid down by SEBI and implemented by NSE/NSCCL, certain securities furnished by the appellant towards margin money had become ineligible in December 2012 and had to be substituted or equivalent cash collateral furnished by January 1, 2013. As the appellant failed to replace ineligible shares in accordance with the circular of NSCCL dated December 20, 2012, there was margin shortfall in the F&O Segment amounting to Rs. 92,08,16,556.95 as on January 1, 2013. Fact that there was margin shortfall on January 01, 2013 is admitted by the Chairman-Managing Director of the appellant, by his letter dated January 30, 2013. Fact that on expiry of rolled over contracts at the end of March 2013 there was settlement shortfall amounting to Rs. 158,04,00,000/- is also admitted by the appellant by its letter dated April 2, 2013. Admittedly, the said settlement shortfall of Rs. 158.04 crore stood reduced to Rs. 3,77,79,826.89 on April 2, 2013, by adjusting the appellant's fixed and cash deposits, as per the request of the appellant. It is not in dispute that the said settlement shortfall of Rs. 3,77,79,826.89 was not made good by the appellant till the end of June 2013. Admittedly, on expiry of the rolled over contracts at the end of June 2013, there was additional settlement shortage amounting to Rs. 91,01,08,825/-. Thus, the cumulative settlement shortage at the end of June 2013 was Rs. 94,78,88,651.89 (Rs. 3,77,79,826.89+Rs. 91,01,08,825). Due to further adjustment of Rs. 1,70,00,000/- (from Additional Base Capital Cash [CM Segment]) and Rs. 1,59,15,847.38 (sale proceeds of Liquid Bees) made by NSCCL, the cumulative settlement shortfall stood

reduced to Rs. 91, 49,72,804.51. Admittedly, the appellant has not discharged that settlement shortfall obligation till date even though NSCCL has discharged that obligation by making payment to counter parties out of its own profits and its accumulated reserves in accordance the Bye-Laws, Rules and Regulations of NSCCL. Thus, the appellant who became defaulter on January 1, 2013 due to failure to make good the margin shortfall, further defaulted in making good the settlement shortage that occurred during March and June 2013 settlement, and the appellant continues to be defaulter as the appellant has failed and neglected to reimburse the settlement shortfall of Rs. 91,49,72,804.51 which is paid by NSCCL to third parties for and on behalf of the appellant. In these circumstances no fault can be found with the decision of the Defaulters Committee in declaring the appellant to be defaulter under Bye Laws 1(1),1(2) & 1(4) of Chapter XI of the Bye Laws framed by NSCCL.

7. However, it is argued on behalf of the appellant, that in the meeting held on March 14, 2013 between the appellant and NSCCL it was decided that if the appellant does not make good the margin shortfall by March 18, 2013, then, NSCCL shall sell the pledged shares including shares of Gitanjali in order to reduce margin shortfall. As the appellant failed to make good the margin shortfall, NSCCL invoked the pledge and sold 2,97,731 Gitanjali shares during the period from March 19, 2013 till March 22, 2013 up to 10:34 A.M. and thereafter abruptly stopped to sell Gitanjali shares. It is vehemently argued on behalf of the appellant that if all the 20 lac pledged Gitanjali shares were sold

between March 19, 2013 to March 22, 2013 there would not have been any margin shortfall and in such a case appellant would have ceased to be a defaulter. It is further contended on behalf of the appellant that for the gross negligence on part of NSCCL in failing to sell all 20 lac shares of Gitanjali during the period from March 19, 2013 to March 22, 2013, appellant cannot be penalized and therefore, impugned order of the Defaulters Committee is liable to be quashed and set aside.

8. There is no merit in the above contention for the following reasons:-

- a) Under the Pledge Deed power was conferred on NSCCL to sell the pledged shares in case the appellant commits breach of margin money norms or settlement norms and that power was for the benefit of NSCCL and the Pledge Deed did not require NSCCL to exercise the said power in a particular time. On the appellant committing breach of the margin money norms, whether to sell the pledged shares or to give some more time to the appellant to comply with the norms was at the discretion of NSCCL. Therefore, assuming that in the meeting held on March 14, 2013 it was decided that if the appellant fails to make good the margin deficit by March 18, 2013, NSCCL could invoke the pledge and sell the pledged

Gitanjali shares, it cannot be said that in law NSCCL was bound and liable to sell entire quantity of pledged Gitanjali shares from March 19, 2013 and consequently, it cannot be said that the appellant ceased to be a defaulter merely because NSCCL has not sold entire quantity of pledged Gitanjali shares.

- b) As rightly contended by the counsel for NSCCL, selling 20 lac shares of Gitanjali on March 19, 2013 or immediately thereafter, would have adversely affected the market price and NSCCL could not have sold shares at the cost of affecting the market integrity and public interest. Argument of the appellant that from March 19, 2013 if every day NSCCL had sold the pledged Gitanjali shares upto the level of prescribed circuit breaker limit there would not have been any margin shortfall is without any merit, because, if large quantity of shares were off loaded every day, there was every possibility that share prices of Gitanjali coming down and in such a case selling shares of Gitanjali at a lower price would have harmed the interest of the appellant.

- c) It is relevant to note that at no point of time appellant had instructed NSCCL to liquidate shares of Gitanjali and appropriate the sale proceeds towards margin money deficit. In fact by letters dated 14th, 16th, 17th January, 2013, 1st, 11th, 12th February, 2013 and 12th & 13th March, 2013 appellant chose to transfer cash collateral from time to time and sought release of various pledged securities (except shares of Gitanjali) which became ineligible pursuant to circular dated December 20, 2013. It is also relevant to note that by letters dated 1st, 5th, 13th, 14th, 15th and 18th March 2013 appellant requested NSCCL to sell various pledged securities (but not Gitanjali shares) at market rate on its behalf to meet its margin obligation in the F&O Segment. Thus, the appellant who from time to time authorized NSCCL to sell various other pledged shares which had become ineligible, but never authorized NSCCL to sell the Gitanjali shares is not justified in contending that if NSCCL had invoked the pledge and sold the Gitanjali shares then there would not have been any margin deficit in March 2013.

- d) Argument of the appellant that in the meeting held on March 14, 2013 it was conveyed to the appellant that since the appellant had not brought in additional margins in the form of cash, NSCCL would sell the shares of Gitanjali with immediate effect from March 19, 2013 is falsified from the letters addressed by the appellant to NSCCL after March 19, 2013. In none of those letters appellant has made any grievance that NSCCL has failed to sell the shares of Gitanjali in breach of the understanding arrived at between the parties on March 14, 2013. On the contrary, in the letter addressed to NSCCL on April 02, 2013, appellant admitted its pay-in obligation in the F&O Segment amounting to Rs. 158.04 crore and requested NSCCL to adjust the pay-in obligation against its fixed deposit/cash lying in with NSCCL as margin deposit in F&O Segment. Admittedly, the market price of Gitanjali shares between March 18, 2013 and March 22, 2013 was around Rs. 600/- per share and if the understanding between the parties in the meeting held on March 14, 2013 was to liquidate 20 lac shares of Gitanjali from March

19, 2013, then the appellant in its letter dated April 2, 2013, instead of requesting NSCCL to adjust the fixed deposit/cash lying with NSCCL, towards margin deficit would have accused that the NSCCL has committed breach of the understanding arrived at on March 14, 2013. Very fact that there is not a whisper in the letter addressed by the appellant on April 02, 2013 relating to the alleged obligation of NSCCL to sell the shares of Gitanjali after March 18, 2013 clearly shows that the plea of the appellant that as per the understanding arrived at on March 14, 2013, NSCCL was obliged to sell entire 20 lac shares of Gitanjali after March 18, 2013 is patently false and such a plea is raised by the appellant as an afterthought. Even in the letter addressed to NSCCL on April 03, 2013 the appellant has asked for time to arrange funds and agreed to pay delayed payment charges but not referred to the understanding that was allegedly arrived at on March 14, 2013. Therefore, the letters addressed by the appellant on 2nd and 3rd April, 2013 clearly falsify the claim of the appellant that after March 18, 2013 NSCCL was bound

and liable to sell the pledged shares of Gitanjali.

- e) It is relevant to note that in its letter dated July 01, 2013, appellant for the first time raised the issue relating to the alleged obligation of NSCCL to sell the Gitanjali shares after March 18, 2013. Even in the said letter it is merely alleged that NSCCL could have sold pledged Gitanjali shares during the period from March 18, 2013 to April 27, 2013. From the aforesaid letter it is abundantly clear that On March 14, 2013 NSCCL had threatened that if margin obligation was not met with by March 18, 2013, NSCCL would be constrained to sell the pledged Gitanjali shares after March 18, 2013 and that there was no obligation on part of NSCCL to sell those shares by a particular date. Therefore, the appellant who is guilty of violating the margin money norms is not justified in accusing that NSCCL has failed to sell the pledged Gitanjali shares between March 18, 2013 to April 27, 2013.
- f) Apart from the above, admittedly on March 18, 2013 appellant as also NSCCL had received

two complaints one from Sarvin and another from Trusha. In those complaints it was stated that 20 lac shares of Gitanjali (7 lac shares by Sarvin and 13 lac shares by Trusha) were purchased by them from the appellant about six months back and instead of delivering 20 lac shares of Gitanjali to them, the appellant had illegally parked those shares with NSE without their consent and therefore the complainants requested NSE to direct the appellant to release those shares into the complaint's accounts. It appears that in view of the statement contained in the Pledge Deed that the pledged shares are free from encumbrances, NSCCL proceeded to invoke the pledge and proceeded to sell the pledged Gitanjali shares from March 19, 2013 in spite of the complaints received on March 18, 2013.

- g) It is a matter of record that after selling some of the pledged Gitanjali shares on 19th, 20th, 21st March 2013, NSCCL sold 9763 shares of Gitanjali on March 22, 2013 upto 10:34 A.M. and thereafter abruptly stopped selling shares of Gitanjali. Although no cogent explanation is given by NSE/ NSCCL for abruptly stopping

sale of Gitanjali shares on March 22, 2013, it is possible that on March 22, 2013 NSCCL anticipated some follow up action by EOW and therefore NSCCL deemed it to stop further sale of pledged Gitanjali shares. Assuming that there was no such information received by NSCCL, it was open to NSCCL to reconsider its decision to sell the pledged Gitanjali shares in view of complaints received in respect of those pledged shares. In other words, fact that NSCCL proceeded to sell pledged Gitanjali shares even after receiving complaints in respect thereof did not preclude NSCCL from deciding not to sell the pledged Gitanjali shares, as NSCCL was not obliged to sell the pledged shares within any specified period.

- h) Relying on a decision of the Apex Court in case of Vimal Chandra Grover v/s Bank of India reported in (2000) 5 SCC 122 & relying on two decisions of the High Court of Justice Queen's Bench Division Commercial Court in the case of Euroption Strategic Fund Limited v/s Skandinaviska Enskilda Banken AB reported in (2012) EWHC 584 (comm.) & in the case of Marex Financial Limited v/s Creative Finance

Ltd. reported in (2013) EWHC 2155 (comm.) it is contended on behalf of the appellant that having exercised its right invoke the pledge and sell the pledged shares, NSCCL had a duty to act honestly, in good faith and not to act arbitrarily, capriciously, perversely or irrationally. In the present case, it is contended that since NSCCL abruptly stopped selling pledged Gitanjali shares on March 22, 2013 without any justification, the impugned order is liable to be quashed and set aside. There is no merit in the above contentions. Decision of the Apex Court in case of Vimal Chandra Grover (supra) is distinguishable on facts as in that case appellant therein had written a letter to the bank for selling the shares, but the bank had failed to sell the shares, whereas, in the present case, in none of the letters addressed by the appellant it is stated that the appellant had authorized NSCCL to sell the pledged Gitanjali shares. Similarly, decision in the case of Euroption (supra) is distinguishable on facts, because, in that case parties thereto did not intend to create pledge of the property transferred as margin whereas, in the present Gitanjali shares were

pledged to secure the margin money. Similarly, decision in case of *Marex Financial Ltd.* (supra) is distinguishable on facts as in that the dispute related to closing out between the broker and two of its clients and the same did not relate to invocation of pledge whereas, in the present case dispute between the parties is in relation to sale of shares by invoking the pledge. As noted earlier, even before NSCCL could invoke the pledge and sell shares, there were complaints received from two complainants alleging that the shares in question were purchased by them from the appellant six months prior to the complaints and without their consent appellant had pledged the shares with NSCCL. Once complaints were received against the appellant, it was within the discretion of NSCCL either to sell the pledged shares or not to sell the shares. Fact that initially NSCCL inspite of the complaints chose to sell the Gitanjali shares would not mean that NSCCL was bound and liable to liquidate all 20 lac Gitanjali shares after March 18, 2013. In any event, these facts on record distinguish the present case from various

decisions relied upon by the counsel for the appellant.

9. Argument of the appellant that the securities once accepted under the prevailing norms cannot be made ineligible by revising the norms is without any substance, because it is the duty of NSE/NSCCL to constantly monitor the dealings on the Exchange and take suitable steps to preserve the market integrity, if necessary, by amending the prescribed norms. In the present case, even after revising the norms, considerable time was given to the concerned parties to get acclimatized with the revised norms and in fact several meetings were also held in that behalf between the appellant and NSE/NSCCL. Therefore, the argument of the appellant that the securities once accepted as eligible cannot be made ineligible or the argument that the revised norms were not clear is without any merit and deserves to be rejected.

10. Argument of the appellant that having extended the deadline for compliance of the circular dated December 20, 2013, NSCCL was not justified in shutting down the terminal of the appellant on January 01, 2013 is also without any merit, because, it is only after giving sufficient time to get acclimatized with revised norms, circular dated December 20, 2013 was issued stating that the revised norms would come into force with effect from January 01, 2013. As the appellant as also various other members failed to comply with the revised norms, their terminals were shut down and the terminals were restored only when the revised

norms were complied with. Although various other members complied with the revised norms though belatedly, appellant has failed to comply with the norms and therefore action had to be taken against the appellant.

11. It is contended on behalf of the appellant that the letter of EOW dated March 23, 2013 requesting NSE/NSCCL not to sell the pledged Gitanjali shares was received by them on March 25, 2013 and if the entire pledged Gitanjali shares were sold between March 19, 2013 till March 22, 2013, there would not have been any margin deficit at all. It is also contended on behalf of the appellant that having taken a stand before the High Court in their Criminal Application that as a pledgee NSE/NSCCL has the right to sell the pledged shares it is not open to the NSE/NSCCL to take a contrary stand before this Tribunal. There is no merit in the above contention. Fact that NSE/NSCCL had right to sell the pledged shares in case of default committed by the appellant is not in dispute. But when the EOW is investigating the complaints in relation to the Gitanjali shares pledged by the appellant, whether, the NSE/NSCCL would be justified in selling the pledged Gitanjali shares is the question. Fact that NSCCL initially sold Gitanjali shares by disregarding the complaints received and thereafter abruptly decided to stop selling the Gitanjali shares cannot be a ground to find fault with NSCCL, because, in the first instance NSCCL could not have sold Gitanjali shares without verifying the grievance made in the complaints that the pledged Gitanjali shares were encumbered or not. In any event, it was open to the

NSCCL to stop selling the disputed shares so that corrective measures could be taken. Therefore, irrespective of the fact that the letter of EOW dated March 23, 2013, was received by NSE/NSCCL on March 25, 2013, it was open to the NSCCL to stop selling the Gitanjali shares on the basis of the complaints received on December 18, 2013.

12. Argument of the appellant that NSCCL did not bother to keep the appellant informed about the developments with EOW and thus NSCCL acted in complete disregard and flagrant violation of its fiduciary responsibility is devoid of any merit. Admittedly copies of the two complaints both dated March 18, 2013 were marked to the appellant. Appellant has not disputed receipt of those complaints. If there was no merit in the complaints, appellant ought to have addressed a letter to NSE/NSCCL stating that there is no merit in the complaints and that NSCCL must ignore the complaints and sell the shares immediately. Very fact that the appellant did not address any letter in that behalf speaks volume about the conduct of the appellant. It is relevant to note that even though the Bombay High Court treated the complaints as Civil disputes, the Apex Court held that till the Criminal complaints are investigated by EOW, NSE/NSCCL shall not sell the Gitanjali shares. Admittedly, appellant has not initiated any proceedings against the two complainants till date. Merely because NSE/NSCCL have initiated proceedings to secure their rights under the pledge, appellant is not justified in contending that NSE/NSCCL were obliged to intimate to the appellant the steps taken by them in the matter.

13. Fact that the appellant has filed a suit in the High Court at Bombay claiming damages from NSE/NSCCL on various grounds set out therein cannot be a ground to hold that the appellant has actionable claim against NSE/NSCCL. It is only when the claim is established and the suit is decreed, appellant would have actionable claim against NSE/NSCCL. Therefore, fact that the appellant has filed a suit for damages against NSE/NSCCL would not affect the decision of the Committee in declaring the appellant to be a defaulter, as the appellant had failed to discharge the settlement shortfall amounting to Rs. 91,49,72,804.51 from April 2013 till the passing of the impugned order.

14. Argument of the appellant that the impugned order is based on several statement of facts which were not put to the appellant does not merit consideration, because, in various letters the appellant has admitted that on January 01, 2013, there was margin shortfall to the tune of Rs. 92,08,16,556.95. Admittedly, that margin shortfall was not made good inspite of seeking time to comply with. It is admitted by the appellant that on expiry of rolled over contracts in March 2013 there was settlement shortfall to the tune of Rs. 158.04 crore. Although the said settlement shortfall was brought down to Rs. 3,77,79,826.89 by adjusting the cash collaterals/ adjustment of FDR's etc, it is an admitted fact that on expiry of rolled over contracts in June 2013, there was once again settlement shortfall to the tune of Rs. 91,01,08,825/-. Thus, the

cumulative settlement shortfall rose to Rs. 94,78,88,651.89. As a result of further adjustments made by NSCCL the outstanding settlement shortfall stood reduced to Rs. 91,49,72,804.51. As the appellant failed to discharge that liability, NSCCL was obliged to discharge that liability by paying Rs. 91,49,72,804.51 to third parties from its own profits and the accumulated reserves and settle the trades of the appellant. Admittedly, the appellant has failed to reimburse that amount to NSCCL till date. In these circumstances, no fault can be found with the decision of the Committee in declaring the appellant to be a defaulter under the Bye Laws framed by NSCCL in the F&O Segment.

15. For all the aforesaid reasons, we see no merit in the Appeal and the same is hereby dismissed with no order as to costs. In view of the dismissal of the Appeal, the Miscellaneous Application No. 117 of 2013 becomes infructuous and is disposed of accordingly with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member