REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 7607 OF 2005

SECURITIES & EXCHANGE BOARD OF INDIA ….. APPELLANT

VERSUS

M/s. PREBON YAMANE (I) LTD. ….. RESPONDENT

J U D G M E N T

VIKRAMAJIT SEN, J.

1 This Appeal assails the Judgment dated 17.8.2005 pronounced by the Securities Appellate Tribunal (hereinafter 'SAT') directing the Appellant as well as the National Stock Exchange (NSE for brevity) to continue to grant the Respondent the "fee continuity benefit" as was available to them before the NSE decided to permit segmental surrender of membership to its members. In response to the fee demanded by the Appellant, namely the Securities and Exchange Board of India (SEBI for short), the Respondent has paid, albeit under protest, the principal amount of ₹4,37,20,256/- together with ₹26,96,590/- being the interest accrued thereon. The factual matrix is that on 27.5.1994, Oracle Stocks and Shares Ltd. (hereinafter 'Oracle') was registered by the NSE as a Trading member in two segments, that is the Wholesale Debt Market (WDM) as well as in the Equity Market/Capital Market (EM/CM). Subsequently, on 14.1.1999, Oracle informed the NSE that it had entered into a 50:50 Joint Venture

with Prebon Holdings B.V. (Prebon Group), namely Prebon Yamane (India) Ltd. (the Respondent), but restricted in respect to the WDM segment alone. NSE advised Oracle to bifurcate the WDM and the EM/CM segments whereupon Oracle forwarded a proposal in writing seeking the approval of NSE for the segregation of its Membership of WDM and of the EM/CM segments. By its letter dated 11.2.1999, NSE approved the proposal of Oracle for segregation but subject to certain conditions, inter alia, that if the trading member Oracle was desirous of surrendering its trading membership, both the entities viz. Oracle and the Respondent would have to surrender their respective memberships simultaneously. As is palpably apparent, NSE looked after its own financial interests by demanding ₹10 Lacs as approval fee together with an interest free security of ₹50 Lacs. Both entities were also required to maintain their shareholding pattern and comply with the net worth and all other requirements - Oracle in respect of corporate trading of the Capital Market and the Respondent in respect of the corporate trading in the WDM segment. The Respondent was also called upon to submit its shareholding pattern. It seems facially obvious to us that even the NSE was alive to the possibility of Oracle hiving off or transferring its WDM operations to the Respondent without complying with all the applicable Rules and Regulations. NSE maintained this position even later on, as is evident from a perusal of its letter to the Respondent positing that both memberships, though vesting in separate parties, were treated as 'concomitant'. It is also relevant to underscore that the Appellant was not privy to these negotiations.

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2 We must hasten to add that shortly subsequent to these events, the Appellant by its letter dated 4.4.1999 to the Respondent had granted registration to it "as a stock broker". The Appellant made its permission conditional inter alia, upon payment of fees for registration provided in the Securities and Exchange Board of India [Stock-Brokers and Sub-Brokers] Regulations, 1992, the salient parts of which we shall extract for ease of reference. However, the relevant terms contained in the letter dated 4.4.1999 are these -

> 2 d) It shall pay the amount fees for registration in the manner provided in the Securities and Exchange Board of India [Stock Brokers and Sub Brokers] Regulations, 1992; and
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> 5. You are now, in terms of clause [d] of the conditions of grant of registration certificate, required to pay the fees in accordance with regulation 10[1] read with Schedule-III of the Securities and Exchange Board of India [Stock Brokers and Sub Brokers] Regulations, 1992 and remit the same through the stock exchange of which you are a member. All the stock exchange have been separately given necessary instructions in regard to collection of fees from the stock brokers and remittance thereof to the Board.

3 In this continuum NSE, in its letter dated 30.1.2002, again conveyed to the Respondent that both the memberships, though vesting in different entities, were 'concomitant'. This reiterated stand of the NSE was submitted by the Respondent to the Appellant with a request to grant fee continuity benefit on the basis of the facts of the case. The Appellant has admitted that on receipt of this request from the Respondent, it recorded in its file notings that the two membership cards could be treated as composite and that the turnover of the two cards may be taken together for the purpose of turnover fees. It is not in dispute that till 2003 the Respondent had

been availing of the benefits permissible under the fee continuity provisions. This position was also accepted by the Appellant, as both the membership cards were treated as composite and 'concomitant' and the turnover of the two cards of Oracle and the Respondent were taken together on the predication that the Respondent's WDM membership was a continuation of WDM segment of Oracle's membership.

4 On 18.9.2003, the Respondent applied to the NSE for membership in the Derivatives Segment which the NSE, as per procedure, forwarded to the Appellant for its approval. On 24.6.2004, the Appellant returned the application and issued a provisional fee liability statement disclosing that after making the necessary adjustments of the amount paid with respect to its membership in the WDM Segment, there were unpaid dues in the name of the Respondent to the tune of ₹5,59,45,054 towards principal and interest. It was indicated that the application may be resubmitted only after payment of the outstanding fees. In its letter dated 23.8.2004 to the Respondent, NSE clarified that although segmental surrender of the trading membership was permissible since December, 2002, it had nevertheless to be kept in perspective that when the Respondent and Oracle had made the subject proposal in January, 1999, it was accepted on the condition that "should any one of the entities decide to surrender their membership, then both the entities have to surrender their respective membership simultaneously".

5 After receiving the provisional fee liability statement which stated a fee liability of ₹5,59,45,054, Respondent filed an Appeal on 8.11.2004 under Section 15T of the

SEBI Act, 1992. This was contested by the Appellant before the Securities Appellate Tribunal (SAT), which observed that at the time that NSE had granted fee continuity to the Respondent, there was no provision for segmental surrender, as a result of which, subject to certain conditions, fee continuity was granted to Respondent despite it being a new entity. The SAT held that this letter did not have the effect of revocation or cancellation of the earlier conditions which were specifically imposed while granting assignment of WDM Segment from Oracle to the Respondent. Counsel for the Respondent brought to the notice of the SAT that the Respondent had already paid, albeit under protest pending disposal of the appeal, a sum of ₹4,37,20,256 towards the principal amount of the Appellant's claim and a further sum of ₹26,96,590 as interest. However, the SAT directed the Appellant to refund both the amounts to the Respondent. Hence, the present Appeal.

6 Learned Senior Counsel for the Appellant has relied on Regulation 10 and Schedule III of the SEBI (Stock Brokers and Sub Brokers) Regulations, 1992, which are reproduced for the facility of reference:

> 10. (1) Every applicant eligible for grant of a certificate shall pay such fees and in such manner as specified in Schedule III or Schedule IIIA, as the case may be: Provided that the Board may on sufficient cause being shown permit the stockbroker to pay such fees at any time before the expiry of six months from the date on which such fees become due.
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> (2) Where a stock-broker fails to pay the fees as provided in Regulation 10, the Board may suspend the registration certificate, whereupon the stock-broker shall cease to buy, sell or deal in securities as a stock-broker.

SCHEDULE III
Regulation 10

I. Fees to be paid by the Stock Broker.

1. Every stock broker shall subject to paragraphs 2 and 3 of this Schedule pay registration fees in the manner set out below :

(a) where the annual turnover does not exceed rupees one crore during any financial year, a sum of rupees five thousand for each financial year;

(b) where the annual turnover of the stock-broker exceeds rupees one crore during any financial year, a sum of rupees five thousand plus one hundredth of one per cent of the turnover in excess of rupees one crore for each financial year;

xxx xxx xxx

(c) After the expiry of five financial years from the date of initial registration as a stock-broker, he shall pay a sum of rupees five thousand for every block of five financial years commencing from the sixth financial year after the date of grant of initial registration to keep his registration in force. (currently deleted)

xxx xxx xxx

4. Where a corporate entity has been formed by converting the individual or partnership membership card of the exchange, such corporate entity shall be exempted from payment of fee for the period for which the erstwhile individual or partnership member, as the case may be, has already paid the fees subject to the condition that the erstwhile individual or partner shall be the whole-time director of the corporate member so converted and such director will continue to hold a minimum of 40 per cent shares of the paid-up equity capital of the corporate entity for a period of at least three years from the date of such conversion.

Explanation: It is clarified that the conversion of individual or partnership membership card of the exchange into corporate entity shall be deemed to be in continuation of the old entity and no fee shall be collected again from the converted corporate entity for the period for which the erstwhile entity has paid the fee as per the regulations.

7 The learned senior Counsel for the Appellant has contended that a membership of the Stock Exchange is an essential pre-requisite, for which the fee prescribed in Regulation 10 is payable by every such member. The amount that is payable as fee is

determined as per the provisions under Schedule III. Emphasis has been placed on Clause 4 of Schedule III (supra) as it provides the only exception to the payment of fees. Facially, it appears to us, this exception has been carved out only for the enablement of persons who are vulnerable to unlimited personal liability in respect of their business debts, to avail of the advantages of converting their mode of transacting business into a corporate structure, provided this conversion is not misused to essentially transfer the business and yet escape payment of transfer fees; hence the insistence of retention of forty per cent share holding. It also manifests that for all other transfers, fees are payable to the Appellant, which depends on these collections for defraying its manifold expenditures. The legal propriety of these pecuniary demands by SEBI have received the attention of the Court and have been found proper in B.S.E. Brokers Forum vs. SEBI (2001) 3 SCC 482.

8 Reliance has also been placed on letter dated 4.4.1999 issued by the Appellant to the Respondent, by which a certificate of registration was issued to the Respondent subject, inter alia, to condition (d) which provides that the Respondent and similarly situated entities shall pay the amount of fees for registration in the manner provided in SEBI (Brokers and Sub Brokers) Regulations, 1992. This letter also requested the Respondent to study the Rules and Regulations carefully. Learned Senior Counsel for the Appellant contended that the Respondent could not claim "fee continuity" on the basis of internal file notings. Reliance has been placed on the well entrenched legal principle that estoppel has no efficacy against a statute. **Sethi Auto Service Station** vs. Delhi Development Authority 2009 (1) SCC 180 clarifies this position thus -

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13. Thus, the first question arising for consideration is whether the recommendation of the Technical Committee vide minutes dated 17th May, 2002 for re-sitement of appellants petrol pumps constitutes an order/decision binding on the DDA?

14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department; gets his approval and the final order is communicated to the person concerned.

15. In Bachhittar Singh v. The State of Punjab AIR 1963 SC 395, a Constitution Bench of this Court had the occasion to consider the effect of an order passed by a Minister on a file, which order was not communicated to the person concerned. Referring to the Article 166(1) of the Constitution, the Court held that order of the Minister could not amount to an order by the State Government unless it was expressed in the name of the Rajpramukh, as required by the said Article and was then communicated to the party concerned. The court observed that business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. Before an action is taken by the authority concerned in the name of the Rajpramukh, which formality is a constitutional necessity, nothing done would amount to an order creating rights or casting liabilities to third parties. It is possible, observed the Court, that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion which may be opposed to the earlier opinion. In such cases, which of the two opinions can be regarded as the "order" of the State Government? It was held that opinion becomes a decision of the Government only when it is communicated to the person concerned.

16. To the like effect are the observations of this Court in Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr. 2003 (3) SCR 409, wherein it was said that a right created under an order of a statutory authority must be communicated to the person concerned so as to confer an enforceable right.

9 The manner in which the Respondent understood its role and participation in the Wholesale Debt Market (WDM) segment along with Oracle is comprehensively contained in the Respondent's letter dated February 4, 2002. (This letter, although copiously relied upon by the parties in the course of argument was not available on the Court records. On 18.9.2015 we called upon the Appellant to furnish a copy thereof which was done by its learned Senior counsel who has assured us that copies thereof had already been served on the learned counsel for the Respondent) We think it appropriate to reproduce the contents thereof as it is a summation of the case of the Respondent:

> "The National Stock Exchange (NSE) was formed in 1993-94 with a view to promote the Debt Market and Capital Markets. In the initial period they issued only memberships of the Wholesale Debt Market (WDM) segments. M/s. Oracle Stocks and Shares Limited (Oracle) applied for and was granted registration of the WDM segment of the NSE. Subsequently, the NSE issued membership in the Equity Market segment wherein the members who were holding membership of the WDM segment were automatically entitled to membership in this segment by paying an additional deposit.
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> Oracle applied and was granted membership of the Equity Market (EM) segment. NSE did not issue a new registration number to Oracle and the company continued to do business in both the segments. Thus, the memberships of the WDM and the EM segments were treated as concurrent and there was no fresh registration with SEBI separately for the EM segment.
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> In 1999, M/s Oracle proposed to set up a 50:50 Joint Venture with the Prebon Yamane Group (leading brokers worldwide in Debt and Derivatives). Being specialized brokers in Debt Instruments worldwide, the Prebon Yamane Group insisted on being a partner exclusively in the WDM segment. Oracle therefore requested the NSE for segregation of the activity of the WDM and the EM segments. During that period, the NSE, as a matter of policy, was not issuing separate memberships for WDM and EM. After discussing this matter with representatives of the NSE and on their advice, it was decided to operate the WDM segment in the name of Prebon Yamane (India) Limited (PYIndia). As a part of the procedural formalities, a separate registration number was issued by the

NSE (in the name of Prebon Yamane India Ltd.). Oracle would continue to hold 50% of the subscribed capital in the new entity.

Although Oracle and PYIndia were given two separate registration numbers for EM and WDM respectively, the NSE did not collect the deposit of Rs.15 million which it would normally have done for new WDM members. Instead, the NSE merely transferred (without refunding the amount to Oracle) a part of the total deposits of Oracle, amounting to Rs.10 million, in favour of PYIndia. PYIndia did not bring in fresh deposits for the WDM membership of NSE.

Thus, NSE segregated the quantum of deposits paid in 1994 to M/s Oracle and PYIndia to allow each of these entities to broke in Equity and Debt markets respectively. It was also stipulated by the NSE that neither of these entities can surrender one of the memberships without surrending the other. Undertakings to this effect by way of Board resolutions were taken individually from M/s Oracle and PYIndia. Thus, in essence, the NSE treated both these companies as one composite member with the same promoter group.

The NSE treats the induction of the Prebon Group and the consequent assignment of the WDM segment of Oracle Stocks & Shares Ltd. to Prebon Yamane India Ltd. as a continuation of the original WDM membership that was granted to M/s Oracle Stocks & Shares Ltd. The view of the NSE in this regard, confirming that both the memberships are concomitant, is enclosed herewith.

In view of the facts mentioned above and the NSE's view in this regard, we would request you to give the status of fee continuity to the composite membership taken by M/s Oracle and PYIndia.

In other words, if Oracle has paid turnover fees from 1994, and the broking business has commenced from 1994, any fees be levied in either Oracle and/or PYIndia for the balance period, as a composite entity."

10 Learned Senior Counsel for the Respondent has contended that transfer from one juristic person to another is not the appropriate test and that since the Regulations employ the term "entity", it is necessary to determine whether the entities are essentially the same. Senior Counsel has submitted that since Oracle, who was an existing member, had a 50% stake in the Respondent, in effect the Respondent was another manifestation or *avatar* of Oracle. Further, the Appellant had conducted inspections of the Respondent but had not raised any issue or recorded any objections

at that time. Reliance has been placed on the letter dated 30.1.2002 issued by the NSE to the Respondent, which had stated that as per the policies of the NSE, segmental surrender of trading membership was not permitted, and therefore the assignment of WDM segment to the Respondent has been treated as a continuation of the WDM membership that was originally granted to Oracle. It has been strenuously contended that the Appellant had a change of mind and heart consequent upon the issuance of its Circular dated 28.3.2002 which stated that in case a broker had more than one registration certificate from any stock exchange, he would be required to pay fees as per the Regulations for each and every certificate that he held. The Circular further stated that in the event of a broker holding only one Registration Certificate but more than one card on any Exchange, registration fee would be payable on the registration certificate and not on the number of cards held by the broker, and the broker's turnover would be reckoned as the aggregate turnover of all cards. It appears that this provision had been relied upon in the Judgment dated 3.6.2010 in WP (C) No.17349/2004, which was struck down by the Delhi High Court in Association for Welfare of Delhi Stock Brokers vs. Union of India, and an Appeal thereagainst is pending before this Court. However, we find that issue which were in contemplation in those proceeding are dissimilar to what we have in hand.

11 Reliance has also been placed on the affidavit filed by the Appellant before the SAT. Therein the Appellant admitted that the Respondent had applied for fee continuity vide letter dated 4.2.2002 which had enclosed the letter of the NSE confirming that both the memberships had been considered concomitant by it. The

Appellant, based on the same, approved in the file that the two cards could be treated as composite for all practical purposes and the turnover of the two cards may be taken together for the purpose of ad-valorem fee. We have already noted that **Sethi Auto Service Station** enunciates that file notings cannot be relied upon with the intent of binding the concerned Authority or Department.

12 Counsel for the Appellant has pointed out that the Respondent has not paid fee as per Schedule III, Clause 1(c). The Respondent only paid the basic fee indicating that its turnover for the financial year was not beyond ₹1 Crore. However, the fixed basic fee of ₹5000 was paid by the Respondent in 1999, 2000 and 2001. Had the Respondent indeed believed that it had been granted continuity, then as per Clause 1(c) of Regulation 10, the Respondent would have paid ₹5000 only once, for the block of 5 years. Furthermore, to prove that the Respondent was under no misconception with regard to it not having been granted "fee continuity", reference was made to two letters dated 4.2.2002 and 18.9.2003. Both these letters were applications seeking grant of fee continuity. Thus, the Respondent was never under an understanding that it had been granted fee continuity.

13 After considering the submissions of the learned Senior Counsel for both parties and appreciating the facts of the case, it is evident to us that as per Clause 4 of Schedule III, the Respondent was not an 'entity' as envisaged in the Regulations as would be entitled to "fee continuity" or exemption from payment of fees. The Regulation 4 clearly refers to a newly formed entity through conversion from either a

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sole proprietorship or a partnership to a limited Company, which alone has been bestowed the benefit of continuity. Given that the Respondent is barred by the provisions, the Appellant's internal file notings are of no consequence and the Appellant is not estopped from coming to a contrary conclusion. The Respondent's argument that the Appellant experienced a change of heart after the issuance of the Circular dated 28.3.2002 is untenable, because if that was indeed what the Respondent believed, it would not have written a letter requesting fee continuity on 4.2.2002, a date prior to the issuance of the circular dated 28.3.2002. Thus, the Respondent has failed to prove that it believed it was granted fee continuity, in light of its letter to the Appellant requesting the same. Further, it appears to us that the Respondent was an entity quite distinct from Oracle, with the consequence that it would be bound to pay the fee in accordance with Schedule III, Clause (a) or (b) as the case may be, and would not be entitled to claim the advantage of Clause (c). In fact, this is the very understanding of the Respondent since fees were deposited by them under Clause (a) in sharp contradistinction of Clause (c).

14 The amounts deposited by the Respondent have been properly calculated. The Respondent is not entitled to any refund therefrom. The Appeal is accordingly allowed. The Interim Order granted by the Court stands recalled.

……J.
[VIKRAMAJIT SEN]

……J.
[SHIVA KIRTI SINGH]

New Delhi,
November 03, 2015.