**WTM/RKA/EFD/176/2016**

**SECURITIES AND EXCHANGE BOARD OF INDIA**

**ORDER**

**In compliance with the order dated July 26, 2016 passed by the Hon'ble Securities Appellate Tribunal**

**In respect of Mr. Vijay Kumar Gaba**

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1. Securities and Exchange Board of India (hereinafter referred to as "SEBI"), vide an *ex-parte interim* Order cum Show Cause Notice dated January 14, 2015 (hereinafter referred to as "the interim order" or "SCN") alleged that Mr. Vijay Kumar Gaba (hereinafter referred to as "the noticee" or "VKG") was conducting himself as a portfolio manager and providing the services of portfolio management as defined in regulation 2(cb) of the SEBI (Portfolio Managers) Regulations, 1992 (hereinafter referred to "the PMS Regulations"), without obtaining registration from SEBI in accordance with section 12(1) of the SEBI Act, 1992 ("the SEBI Act") and regulation 3 of the PMS Regulations. The following observations and allegations were *inter alia* made in the interim order:

*".....*

4.1 *While the rival claims and counter claims put forward by Sharma and VKG will have to be settled at appropriate legal fora, the question before me in the instant matter is whether VKG is offering portfolio management services to his clients without obtaining registration from SEBI as a portfolio manager.*

4.2 *It is prima facie observed from the admissions of VKG that Sharma had paid ₹3,15,000/- to VKG vide cheque number 761401 dated October 9, 2006 towards the services provided by VKG to Sharma between July 2006 and mid September 2006 on trial basis. As per VKG's own admissions vide letter dated November 19, 2014, he used to charge fees on monthly retainer basis varying between ₹4,000/- to ₹10,000/- (per month) for providing market and investment related services to a few of his clients in Delhi. Though VKG has contended that ₹3,15,000/- received from Sharma was on gratuitous basis, nevertheless, in the circumstances of the case there is indeed enough reason to believe that it was in consideration of some services rendered by VKG which, in the circumstances can be broadly described as portfolio management services.*

4.3 *Considering the abovementioned facts and circumstances and from the terms of the agreement, it is prima facie observed that VKG was providing securities market and investment related advisory services to*

*his clients which tantamount to the services offered by a "portfolio manager", as defined in Regulation 2(cb) of the PMS Regulations.*

…….

4.7 *In this context, it is noted that VKG is not registered with SEBI in any capacity, either as portfolio manager or as a broker or a sub-broker affiliated to any broker. The characteristics and features of the business activity carried out by VKG as discussed in the preceding paragraphs prima facie lead to the conclusion that VKG is conducting himself as a portfolio manager and providing the services of portfolio management as defined in Regulation 2(cb) of the PMS Regulations. This is being done by VKG without obtaining the registration from SEBI in accordance with the provisions of PMS Regulations as described in the preceding paragraphs.*

*…….”*

2. The interim order had directed the noticee to cease and desist from acting as a portfolio manager and not to solicit or undertake such activity or any other activities in the securities market, directly or indirectly, in any manner whatsoever. The noticee was also directed not to divert any funds raised from any of its existing clients/investors.

3. The noticee, vide letter dated February 13, 2015, filed his reply to the interim order, wherein he had made the following submissions:
    1) In the entire order, only one complaint of Mr. Madan Mohan Sharma has been referred to and treated as a genesis/basis for alleging the violation of PMS Regulations by the noticee. It is strange that on a stray case that too of the year 2006, SEBI has chosen to use section 11 of the SEBI Act in the year 2015 and passed the 'cease and desist' order against him.
    2) His advisory services in the nature of research reports, investment advice, analysis of economic trends, patterns of markets, did not fall under any SEBI Regulations in the year 2006 and that no regulations of SEBI covered them. SEBI (Investment Advisers) Regulations, 2013 came into effect from April 21, 2013. He denied having carried out portfolio management services as alleged and denied having violated the PMS Regulations or any provision of the SEBI Act.
    3) The ex-parte interim order was vitiated by gross violation of principles of natural justice as no opportunity was provided to him to explain his version. The circumstances stated in the interim order do not justify dispensation of pre-decisional hearing.

4) The directions issued against the noticee are neither preventive, remedial nor curative but penal. Not even a *prima facie* case was made out to warrant the issuance of the ex-parte interim order.
5) The power to issue directions under section 11 and 11B is a drastic power having serious civil consequences and ramifications on the repute and livelihood of those against whom it is directed. Such power is not available for routine and retrospective application and cannot used for penal action.
6) SEBI has to justify the need for invocation of the said power clearly after about 8 years from the alleged cause of action and in the backdrop of chronology, multiple proceedings between the parties and especially when Mr. Madam Mohan Sharma did not complain about purported non-compliance of PMS Regulations by the noticee.
7) Nothing has been brought on record to justify the delayed action and that too when the noticee had already stopped advisory services when he joined DSP Merill Lynch on 26.06.2007.
8) Without prejudice to the above and in the alternative, it was submitted that in the facts and circumstances of the case, sections 11(1), 11(4), 11B and 11D of the SEBI Act have no relevance and these provisions are inapplicable.
9) The noticee requested inspection and copy of the SEBI letter dated October 31, 2014 as mentioned in paragraph 2.1 of the interim order.
10) The noticee submitted that he is a Chartered Accountant by qualification and was providing general market research report and investment advice to a few stockbrokers and corporate investors from 1994 - March 2007. He does not have any website nor did he send SMSs.
11) Based on his study of macro-economic trends, technical and fundamental research, he used to provide guidance on investment strategy for medium to long term period through weekly reports and personal presentation. His clients were free not to follow his advice or they could consider his guidance as one of the inputs in their overall strategy as he was not aware about their risk appetite, convictions and scrip specific views.
12) His research reports were common for clients/subscribers and *inter alia* contained market trends, macro trends, implications on economy/sectors, general independent and unbiased observations, patterns etc. Each recipient of the report would consider the contents differently based on his profile, psyche, investment/trading preferences/objectives/fads/hedging /leveraging/churning strategies, financial status

and other considerations so that they can devise a holistic approach to their financial planning and investment avenues.

13) None of his clients entrusted their existing portfolio of shares to manage nor entrusted their funds to the noticee to manage. He did not manage any portfolio of securities and/or funds of anyone. No one had authorized the noticee, in their KYC documents to brokers to place buy/sell orders of shares on their behalf or for any other stock market - pre-trade, trade or post-trade activity. No one had any grievance against his services which were advisory in nature and with express and implied cautions, market risks and disclaimers.
14) The noticee never advised his clients about intra-day trading, trading in futures and options or speculative trading of any kind based on technical charts. He firmly believed in medium to long term investments in equity shares of 'good to great' companies and emphasized on wealth protection.
15) The noticee is not a SEBI registered sub-broker. Since August 2012, he is an AMFI registered mutual fund distributor but did not undertake such activity till date.
16) The noticee had joined DSP Merill Lynch Limited as Research Analyst on June 28, 2007 and worked there till May 18, 2012. Consequently, he could not advise anyone in his personal capacity after he joined this company in view of strict compliance norms and code of conduct prohibiting employees to interact with outsiders in the matter of their personal trading and investment. Post leaving the aforesaid job in May 2012, the noticee did not undertake any advisory activity for anyone and none is pointed out in the interim order.
17) The alleged cause of action pertains to the year 2006-2007, the complaints were filed by Mr. Sharma in the year 2012, 2013 and 2014 and SEBI had considered and acted upon Mr. Sharma's old complaints for which Mr. Sharma has already taken several proceedings against his broker, Master Capital Services Limited and the noticee. Mr. Sharma's complaint to SEBI has therefore previous background which needs to be looked into.
18) SEBI's interim order considers very old 'cause of action' i.e., Mr. Sharma's old complaints and SEBI has not explained the reasons for taking cognizance of his grievances and acting against the noticee. The complaints are nothing but arm twisting tactics, showing muscle power and vendetta against the noticee. The genesis of the said order is the said complaint, which has a certain background and that has been suppressed by Mr. Sharma.

19) The noticee submitted that he was not given an opportunity to cross-examine Mr. Sharma. The noticee had requested SEBI to furnish copies of all correspondence and statements made by Mr. Sharma to SEBI and grant him an opportunity to cross examine him.

20) The noticee further submitted that the complainant, Mr. Sharma has not furnished full, complete and true details of the matter which need to be considered, analysed and examined critically before any final order is passed against him.

21) On inspection of documents, SEBI has provided copy of letter dated November 03, 2014 of Mr. Sharma addressed to SEBI.

22) Mr. Sharma's complaints against the noticee and Master Capital Services Limited (MCSL) was of cheating for which the parties have taken proceedings against one another in different fora. Mr. Sharma has executed KYC documents with MCSL, BSE/NSE Trading Member and therefore had privity with MSCL. Mr. Sharma has filed arbitration case at NSE, Patna for his money claims against MCSL to which noticee was not made a party. Mr. Sharma has admitted that he used to place buy-sell orders of shares etc. directly on MCSL and pay-in/pay-out of funds /shares etc., pre-trading, trading and post-trading activities were between Mr. Sharma and MCSL to the exclusion of VKG.

23) The noticee never admitted any liability to Mr. Sharma and the documents dated December 10, 2010 (purported agreement) and June 01, 2007 referred to by him have been disputed by the noticee long time back before different authorities/fora.

24) The noticee had rendered some advisory services on a trial basis to Mr. Sharma (for which there was no agreement) during July 2006 to September 2006 for which Mr. Sharma had raised no grievance or dispute at the relevant time to anyone.

25) Mr. Sharma had paid a sum of ₹3,15,000/- by cheque in October 2006 to the noticee. As the said payment was on a gratuitous basis, he did not send the said cheque through a covering letter and without receiving any bill from the noticee. Mr. Sharma did not demand the money back from the noticee. The complaints of Mr. Sharma to SEBI in the year 2014 are an afterthought, mischievous and malafide. Further, Mr. Sharma has suppressed several facts, approached SEBI with unclean hands to SEBI and hence guilty of *suppressio veri* and *suggestio falsi*.

26) Erroneous statements:

The noticee had stated in his letter dated November 19, 2014 to SEBI as under:

Para 5 - "I usually charged fee on monthly retainer basis. It varied between Rs.4,000/- to Rs.10,000 per month."

The statement was quoted as under in the interim order:

iv.h - "I usually charge fee on monthly retainer basis. It varied between Rs.4,000/- to Rs.10,000 per month." The alphabet 'd' is omitted after charge in the statement. The fees charged were in the past before the noticee joined DSP Merill Lynch on June 28, 2007. After joining, DSP Merill Lynch, the noticee could not/did not offer any service to anyone and this is reflected in his bank statements submitted to SEBI.

27) The noticee reconfirmed that he did not render any advisory, PMS or any such services to anyone after he joined DSP Merill Lynch i.e., from June 28, 2007 onwards. At no point of time, Mr. Sharma lodged any complaint against the noticee with DSP Merill Lynch.

28) Referring to the definitions of 'portfolio' and 'portfolio manger' as defined under regulation 2(ca) and regulation (cb) respectively under the PMS Regulations, the noticee stated that he had not executed any contract or arrangement with Mr. Sharma - no terms and conditions existed and none is pointed out by Mr. Sharma. The noticee was not entrusted with the portfolio of securities by Mr. Sharma nor did he advise or direct or undertake on behalf of Mr. Sharma the management or administration of his portfolio of securities or his funds.

29) The noticee had not exercised any control or was he was authorised to manage portfolio of securities and funds by Mr. Sharma. No authority of any kind or power of attorney was given to the noticee by Mr. Sharma.

30) According to the noticee, it is critical to note that the complaint of Mr. Sharma on the basis of which action has been initiated on the noticee, is primarily against the broker. He understood that SEBI had conducted an inspection of MCSL in pursuance of Mr. Sharma's complaint around August 2014 and had found no serious irregularity in the operation of Mr. Sharma's account and he himself operated his regular trading account. From SEBI's public record, it is clear that no action whatsoever has been taken against MCSL so far.

31) The noticee denied having violated the provisions of regulation 2(cb), 14(1) or any provision of PMS Regulations and section 12(1) of the SEBI Act.

32) The noticee contended that the interim order did not point out specific characteristics and features of the alleged business activity prior to June 28, 2007. It was not even Mr. Sharma's case that the noticee offered some advisory services after June 28, 2007.

33) The interim order was based on conjectures and surmises and imagination that 'VKG may continue to carry out this business', when he had specifically not carried out any activity of PMS.

34) Even assuming but without admitting that the noticee's advisory services prior to June 28, 2007 were of PMS nature, they were stopped from June 28, 2007 when he joined DSP Merill Lynch. The fear and apprehensions of SEBI are totally out of context and misplaced. When the noticee was not soliciting and collecting funds from investors (not a single case pointed out) and not carrying on portfolio management (not a single case pointed out), there was no need to pass any *ad-interim exparte* order against the noticee.

35) In view of his submissions, the noticee requested that he may be discharged from the proceedings.

4. The noticee was afforded an opportunity of personal hearing on March 27, 2015 when he appeared with his Advocate and made submissions on the lines of his reply. The noticee also filed written submissions dated April 01, 2015, wherein he *inter alia* made the following submissions:

   a) The noticee never provided any service to anyone in violation of any SEBI rules and regulations. He has already submitted an affidavit along with his reply dated February 13, 2015.

   b) The interim order in paragraph 4.1 has categorically observed that the same does not relate to complaint of Mr. Sharma and the matter needs to be settled by the court only.

   c) The question under examination was whether the noticee was offering services as portfolio manager at present. As stated in the reply dated February 13, 2015, the noticee had joined DSP Merill Lynch as Research Analyst in June 2007 and worked till May 2012. Since 2012, he did not provide any service to anyone in the nature of portfolio management service requiring registration from SEBI.

   d) The proceeding against the noticee is *prima facie* based on erroneous reading of his reply dated November 19, 2014. In this letter, the noticee mentioned that he 'usually charged', whereas in the interim order, it was mentioned 'usually charge'. This manner of presentation suggested that the noticee continued to provide services even today. SEBI has not provided an iota of evidence to suggest any findings showing continuation of PMS services by the noticee in violation of SEBI regulations.

   e) The noticee referred to paras 3 and 4 of his reply dated November 19, 2014, which is also reproduced below:

   "3. *As clarified earlier, I had no arrangement with Mr. Sharma whatsoever. I would like to categorically state that I did never provide any "Portfolio Management Services" or any fund based*

*services in the nature of "Portfolio Management Services" to anyone. I had joined DSP Merill Lynch at Mumbai on June 28, 2007 as Research Analyst and was working with them till 18 May 2012. 4. Before joining DSP Merill Lynch in June 2007, I used to provide market and investment related services to some broker/sub-broker and couple of corporate investors in Delhi. The services provided were mostly in the nature of macro strategy, technical and fundamental research, training and investor education. I did conduct a number of training sessions for brokers under the aegis of Delhi Stock Exchange. I did never provide any service to any individual including Mr. Sharma regarding investment in equity shares".*

However, according to the noticee, paragraph 3(iv)(g) of the interim order has selectively quoted his reply as follows:

*g. "I had no arrangement with Mr. Sharma whatsoever, I would like to categorically state that I did never provide any "Portfolio Management Services" or any fund based services in the nature of "Portfolio Management Services" to anyone. ...I used to provide market and investment related services to some broker/sub-broker and couple of corporate investors in Delhi. The services provided were mostly in the nature of macro strategy, technical and fundamental research, training and investor education. I did conduct a number of training sessions for brokers under the aegis of Delhi Stock Exchange. I did never provide any service to any individual, including Mr. Sharma, regarding investment in equity shares."*

The underlined text above read with the sentence following immediately makes it clear that the service were not in the nature of PMS as contemplated by SEBI regulations. By erroneously highlighting selectively, the nature of services provided by the notice in the distant past are sought to be altered. The omission of the statement regarding the noticee joining DSP Merill Lynch in para 3 and the words " *Before joining DSP Merill Lynch in June 2007"* at the beginning of para 4 at page of the reply completely altered the timeline of the noticee's activities.

f) The noticee had stated in his reply dated November 14, 2014 and affidavit dated February 12, 2015 that his services prior to June 2007 were purely in the nature of investment advisory, which did not require registration with SEBI till April 21, 2013.

g) The noticee did not have any contract or arrangement with anyone including Mr. Sharma of the nature specified in the definition of 'portfolio manager' under the PMS Regulations.

h) The photocopies of the purported mutual agreement dated December 10, 2010 and letter dated June 01, 2007 provided by Mr. Sharma are post facto forged, fabricated. The signatures of the noticee in the first page of mutual agreement dated December 10, 2010 were obtained under threat. These have been disputed and are subject to multiple judicial proceedings. The photocopies of the above documents cannot become the sole basis for inferring that the noticee had any agreement with anyone. This is particularly when no evidence, factual, circumstantial or otherwise has been provided to show that the noticee had any arrangement or made any promise before starting the noticee's services. Relying upon these documents without establishing the authenticity or even verifying the originals is completely unjust.

i) The proceedings, as per para 1 of the interim order, are based on the complaint of Mr. Sharma. The complaint dated June 22, 2014 of Mr. Sharma addressed to Hon'ble Member of Rajya Sabha has prayed for action only against MCSL and the complainant did not seek any action against the noticee as there are already multiple criminal litigation pending in various courts. Mr. Sharma had already invoked arbitration proceedings against MCSL.

j) It is ludicrous to believe that a seasoned politician like this noticee would give cheques for ₹5.85 crore to a stranger and then back this up with another ₹1 crore without any documentation, promise, complaint or action on his part for 5 years.

k) The interim order is not based on findings of any investigation. It is completely predicated on a stray and motivated complaint and erroneous interpretation of and construction from his reply. The interim order, according to the noticee, was based on conjectures and not on any evidence and material and fails to make out even a *prima facie* case.

5. Thereafter, the noticee vide letter dated June 11, 2015 forwarded copies of the Order dated April 20, 2015 passed by Hon'ble High Court at Patna and the Arbitration Award (NSE) dated April 27, 2015 and submitted that the Hon'ble High Court at Patna has quashed the proceedings initiated by the complainant against the noticee in the Hon'ble District Court, Patna. While quashing the proceedings, the Hon'ble Court has noted that the complainant denied in the Court that 'he made any payment' to noticee nor 'he entered into agreement' with noticee. He also submitted that the Arbitration Award *inter alia* observed that there was no evidence of the noticee's involvement in the case.

6. SEBI, thereafter, passed an Order dated July 15, 2015, wherein it was concluded that the noticee acted as an unregistered portfolio manager in contravention of section 12(1) of the SEBI Act and the PMS Regulations. This Order had restrained the noticee from making an application to SEBI for offering portfolio management services or investment advisory services or any activity in the securities market requiring registration for a period of one year. The noticee had challenged this Order before the Hon'ble SAT by way of an appeal in Appeal no. 420/2015 (*Vijay Kumar Gaba vs. Securities and Exchange Board of India*). This appeal was disposed of by Hon'ble SAT on July 26, 2016 with the following direction to SEBI:
"12. …… *Accordingly, the impugned order dated July 15, 2015 is quashed and set aside and the matter is restored to the file of learned WTM with a direction to reconsider it in the light of submissions made by the parties and documents already on record or which may be brought on record by them any other reliable and convincing evidence during the course of fresh hearing in accordance with law and pass an appropriate order within a period of four months from today. We make it clear that all the contentions and submissions made by the parties are kept open*…."

7. In compliance with the direction of Hon'ble SAT, the noticee was afforded an opportunity of personal hearing on September 20, 2016. On this date, the noticee appeared along with Mr. Joby Mathew, Advocate, who made oral submissions. These submissions, which were reiterated vide written submissions dated September 29, 2016, are as under:

   (a) The SEBI Order dated July 26, 2016 was set-aside and remanded to SEBI by the Hon'ble SAT. The Hon'ble SAT found that when the noticee contended that he was rendering some services to the client, SEBI interpreted the same to mean that he admitted that he was rendering PMS services and that SEBI failed to analyze the nature of activities.

   (b) The noticee is a Chartered Accountant by training. Prior to 2012, and since 1996, the noticee had been providing market research reports and investment advice to clients. The noticee provided investment advice on the basis of fundamental and technical analysis and also provided independent research reports on market analysis through a daily report named "*Daily market Roundup*" and a weekly report titled "*Investrekk*". The noticee used to send these market analysis reports to several brokers and investors. However, the noticee never provided any services with respect to portfolio management of any broker/investor. The advice which was included in his reports were for consumption of all clients and related mostly to market trends, macro trends, implications for economy etc, and were not customized for any specific client and therefore this activity was not and could not be held

to be a Portfolio Management Service. If at all, such advice could be considered as Investment Advice and since the SEBI (Investment Advisors) Regulations, 2013 had not been notified during the relevant time, the noticee was not required to obtain registration as such from SEBI under the Investment Advisor Regulations.

(c) In and around June 2006, the noticee met one Mr. Madan Mohan Sharma at Delhi through a mutual acquaintance. He wanted a person who could provide advice on investment in the stock market. The noticee informed him that while he could give general advice, he could not provide him with personalized reports or manage his portfolio and that his reports would be given *gratis*.

(d) During the period July to September 2006, Mr. Madan Mohan Sharma allegedly paid a total sum of ₹5.85 crores to Master Capital Services Limited, a stock broker registered with SEBI and placed buy and sell orders with the said broker. Mr. Sharma never entrusted the noticee with the management of portfolio of funds and/or securities. However, the noticee provided Mr. Sharma and other clients with his opinion regarding markets and specific securities from time to time.

(e) Although no agreement was entered into between Mr. Sharma and the noticee regarding the aforesaid market reports, in and around September 2006, Mr. Sharma paid a sum of ₹3,15,000/- to the noticee as a gesture of appreciation and gratitude for the reports provided by the noticee. In June 2007, the noticee joined DSP Merrill Lynch and shifted to Mumbai and on account of restrictions imposed by his terms of employment, stopped sending reports to his clients, including Mr. Sharma.

(f) However, Mr. Sharma contacted the noticee soon after and requested him to continue advising him. Since it was unethical and his terms of employment prohibited him from providing any such service or report, the noticee declined the request of Mr. Sharma. Enraged by the same, Mr. Sharma issued a notice through an Advocate to the noticee falsely alleging that he suffered losses on account of advice provided by the noticee. A reply was sent by the noticee's Advocate vide letter dated October 23, 2007. Thereafter, between 2007 and 2014 a slew of complainants were filed by Mr. Sharma. In and around June 2014, Mr. Sharma sent a complaint which was forwarded to the noticee vide letter dated November 10, 2014. The noticee submitted a detailed reply to the same vide his letters dated November 19th and 23rd, 2014 and thereafter SEBI passed the interim order.

(g) The relevant question is whether the noticee acted as a portfolio manager in providing reports in the market etc to various clients including stock brokers and Mr. Madan Mohan Sharma. While referring to the definition of "portfolio manager" as defined under regulation 2(cb) of the PMS Regulations, the noticee submitted that he has forwarded copies of the reports provided by him to various stock brokers and investors and it is evident from the same that the opinion/advise contained therein does not relate to any particular portfolio of securities.

(h) As regards Mr. Madan Mohan Sharma's investments, the record clearly showed that he opened an account with Master Capital Services Limited, a stock broker and deposited money with the said stock broker and carried out trades through them. It is not Mr. Sharma's case that the noticee instructed Master Capital to buy or sell securities on his behalf. In fact in the course of proceedings before the Investor Grievance Redressal Cell of the BSE, Mr. Sharma admitted that he had placed orders with Master Capital and that he made payments to them. This is further evident from the fact that even in the arbitration claim filed by Mr. Sharma in the NSE, the noticee is not made a party. A copy of the Arbitration Award was again placed with this submissions.

(i) While in the complaint, Mr. Sharma has set out the purported loss to be ₹6.85 crores, in his arbitration claim, he has mentioned the same as ₹3.39 crores. All these highlight the fact that Mr. Sharma's complaint was erroneous, contained false statements and ought not to have been relied upon by SEBI. The noticee submitted that it is pertinent to note that SEBI itself admitted in the course of hearing before Hon'ble SAT that they had investigated complaints made by Mr. Sharma in respect of trades in his account with Master Capital and did not find any reason to intervene in their dispute or take any adverse regulatory action against Master Capital.

(j) The noticee submitted that he has not entered into any agreement with Mr. Sharma or any other person or entity to provide portfolio management services. In the interim order, reliance was placed on a purported agreement dated December 10, 2010. The noticee denied the said agreement and submitted that his signature on the said agreement was obtained at gun point and therefore the agreement was void *ab initio*. Furthermore, the fact that the purported agreement was entered into in 2010 almost 4 years after the relevant events took place clearly indicate that the same was an afterthought and once again clearly

showed that the advise/opinion given by the noticee to Mr. Sharma was not on the basis of any existing agreement.

(k) According to the noticee, the allegation that he acted as a portfolio manager is therefore baseless, erroneous, false and unsustainable. In the light of his above submissions and submissions made vide letters dated February 13, 2015 and April 01, 2015, the noticee requested SEBI to discharge him from the present proceedings.

8. I have considered the interim order cum SCN, the submissions of the noticee, documents submitted by him and material on record. The allegation against the noticee, as per the SCN is that he acted as a portfolio manager without obtaining registration from SEBI in violation of section 12(1) of the SEBI Act and regulation 3 of the PMS Regulations. The Hon'ble SAT has directed SEBI to reconsider the matter in the light of submissions and documents already on record and other reliable and convincing evidence submitted during the course of fresh hearing and to pass an appropriate order within a period of four months. The noticee has not produced any fresh material pursuant to the Order of Hon'ble SAT and has again submitted a copy of the Arbitration Award through his written submissions dated September 29, 2016. On perusal of the record, I note that the following material are available:

(a) Complaint from Mr. Madan Mohan Sharma,
(b) Legal notice from Mr. Madan Mohan Sharma and reply of the noticee to the same,
(c) Purported Mutual Agreement dated December 10, 2010 and letter dated June 01, 2007,
(d) Noticee's response dated November 19, 2014 to the complaint,
(e) Certificate from Merill Lynch regarding the period of service of the noticee,
(f) Noticee's reply dated February 13, 2015 to the interim order,
(g) Noticee's reply dated April 01, 2015,
(h) Noticee's letter dated June 11, 2015 enclosing copies of Order dated April 20, 2015 of the Hon'ble High Court at Patna and Arbitration Award dated April 27, 2015.
(i) Written Submissions dated September 29, 2016.

9. To answer the question whether the noticee undertook unregistered portfolio management activities, it has to be first established that he acted as a portfolio manager. From a perusal of the case records, the following facts are not disputed by the noticee:
   (a) The noticee is known to the complainant having been introduced by a mutual acquaintance in Delhi around June 2006.

(b) The noticee has rendered investment advisory services to the complainant during the period – July 2006 to September 2006. The complainant paid ₹3,15,000/- by cheque in October 2006 to the noticee.

(c) The noticee used to provide advisory services in the nature of research reports, investment advice, analysis of economic trends during 2006 and prior to his joining Merill Lynch in 2007.

10. On perusal of the complaint, I note that the complainant has stated that the noticee had represented that he was a sub-broker of MCSL and assured giving 30% return on the principal amount irrespective of the market fluctuation and that the noticee would be personally liable for the same. Based on such representation, the complainant had given cheques to the tune of ₹5.85 crore during July 2006 to September 22, 2006. The complainant has stated that he did not fill in the name of the payee in such cheques. The complainant also mentioned that the noticee took his signatures on various blank forms. The complainant had also paid ₹1 crore in the month of October 2007 through 2 cheques of ₹50 lakh each. The complainant also stated he paid ₹3,15,000/- to the noticee in October 2006 as his fee through a cheque. On demand of 30% return, the noticee started buying time and ultimately executed a mutual agreement on December 10, 2010, wherein he admitted his liability and promised to the pay the amount in a time bound manner. All the cheques paid by the complainant were deposited in the account of MCSL and the complainant did not visit the office of the said stock broker. The complainant denied signing any documents/agreement with MCSL and alleged that the KYC forms/agreement were forged documents. However, according to the complainant, MCSL claimed that it has no relation with the noticee and that the complainant only had authorised it to invest in shares and securities. The complainant had mentioned about his complaints to the NSE and BSE. The complainant has alleged that it was a fraudulent attempt to cheat him of his money with the active connivance of the noticee.

11. The noticee has submitted that he never admitted any liability to the complainant and has further submitted that he has disputed the documents namely the Mutual Agreement dated December 10, 2010 (purported executed between noticee and complainant) and the Undertaking dated June 01, 2007 (given by the noticee in favour of the complainant) before different authorities/fora. The noticee has stated that he has filed cases challenging the authenticity of these two documents. The Mutual Agreement mentions that the complainant had handed over ₹5.85 crore to MCSL on the instructions of the noticee. The agreement records that the noticee failed to honour the commitment of giving 30% returns to the

complainant. The agreement also mentions that the noticee requested ₹1 crore from the complainant so that he may manage his affairs and give a return of 100% in a period of three years on the amount received from the complainant. The complainant had paid two cheques. The agreement also mentions that the noticee agreed to pay the principal amount with agreed return of 30% p.a. from October 2006 within a reasonable time to the complainant and the noticee will any how pay atleast ₹2 crore within three months from execution of the agreement. The Undertaking dated June 01, 2007 mentions that noticee confirmed that the complainant had given ₹5.85 crore in October 2006 for investment in stocks and mutual funds for and on behalf of the complainant. The noticee was not able to give the return of 30% and that value of the investments became ₹4.35 crores. The noticee requested the complainant to allocate a sum of ₹1 crore separately out of the said amount and shall grow this sum to ₹2 crore on or before October 2010. In case of failure to do so, the noticee undertook to pay the difference from his personal resources.

12. The noticee has contended that he was not entrusted with the portfolio of securities by the complainant nor did he advise or direct or undertake the management or administration of the complainant's portfolio of securities or funds. The noticee also contended that he had no arrangement with the complainant and did not provide any portfolio management services. The noticee has also produced a copy of the Order dated April 20, 2015 (*in Crl. Misc. No.34812/2012 – Vijay Kumar Gaba vs. 1. State of Bihar and 2. Madan Mohan Sharma*) of the Hon'ble High Court at Patna and submitted that criminal proceedings initiated by the complainant against him were quashed. The following observations of the Hon'ble High Court are noted:

> "*I find from the narrative of the Complaint that there is no doubt that the Opposite Party No.2 had levelled an allegation of having handed over cheques to the Petitioner for investment, but nowhere has he averred that the cheques were in his favour. In fact I am quite impressed by the pertinent questions of the Court which had led to the dismissal of the Complainant inasmuch as he had asked the Complainant specifically as to whether he had entered into an agreement with the Petitioner in regard to the aforesaid transactions and also as to whether the cheques had been given in favour of the Petitioner, to which both of queries the replies were in the negative.*
>
> *Having considered that the Petitioner was merely a financial advisor and if at all there is a dispute it is between the Company and the Complainant, I am inclined to quash the proceeding. …….*
>
> *However, this order shall not prejudice the Complainant in any manner with regard to his claims.*"

13. The noticee has also referred to the Arbitration Award and stated that there was no claim against him. I also note from the Award that the prayer of the complainant therein was for refund of ₹6.6 crores with 30% interest by the stock broker, MCSL. The aforesaid Order of the Hon'ble High Court, the complaint and the Arbitration Award makes it clear that the complainant did not give cheques/money to the noticee.

14. The case of the noticee is that he engaged in rendering general advisory services (by way of research reports, investment advice) prior to June 2007 for a fee. It can be seen from the facts that the noticee was acquainted with the complainant and has rendered investment advice to the complainant. The noticee has admittedly received ₹3.15 lakh from the complainant. According to the noticee, this payment was gratuitous and as per the complainant the same was a 'fee' given to the noticee for his services in rendering investment advice. The 'client' here is the complainant. Therefore, the 'arrangement' between them in this regard can be inferred. From the perusal of records i.e. complaint and statement of the noticee, it is pertinent to note that noticee has rendered investment advice to the complainant for his funds in the securities market. In view of the foregoing facts and observations, it now needs to be seen whether the activities of the noticee could fall within the ambit of the definition of 'portfolio manager' under the PMS Regulations.

15. A *'portfolio manager'*, in terms of regulation 2(cb) of the PMS Regulations, is any person who pursuant to a contract or arrangement with a client, advises or directs or undertakes on behalf of the client (whether as a discretionary portfolio manager or otherwise) the management or administration of a portfolio of securities or the funds of the client, as the case may be. The definition of portfolio manager squarely covers the activity of 'advising' the client. There can be portfolio managers who would offer only investment advisory services to their clients. Any person offering investment advice to the client in respect of funds or securities shall be a portfolio manager. This intent is very clear from the definition of the term 'portfolio manager' under the PMS Regulations. It is for this reason that SEBI in the SEBI (Investment Advisers) Regulations, 2013 {in the second *proviso* to regulation 4(g)} has stipulated that existing portfolio manager *offering only investment advisory services* may apply for registration under the Investment Advisers Regulations after expiry of his current certificate of registration as a portfolio manager. It is also important to note that SEBI has exempted portfolio managers from the requirement of obtaining registration as Investment Adviser under the said Regulations. From the above discussion, it is clear that any person offering only investment advice to a client shall also be termed a portfolio manager. Therefore, the noticee though

offering 'investment advisory services' was not registered as a 'portfolio manager' during the relevant period of time. Section 12(1) of the SEBI Act and regulation 3 of the PMS Regulations mandate that a person should hold a certificate of registration from SEBI in order to be associated with the securities market as a portfolio manager. I therefore conclude that the noticee had acted as an unregistered portfolio manager in contravention of section 12(1) of SEBI Act and regulation 3 of the PMS Regulations.

16. SEBI vide Order dated July 15, 2015, had restrained the noticee from making an application to SEBI for offering portfolio management services or investment advisory services or any activity in the securities market requiring registration for a period of one year. I note that the noticee has already undergone the period of prohibition as imposed vide the SEBI Order. Further, there is no record to suggest that the noticee continued with such activity post 2007. Therefore, I am of the opinion that such prohibition, which has already been undergone by the noticee, would be commensurate with the breach. With the above observations, I hereby dispose off the instant proceedings in respect of Mr. Vijay Kumar Gaba.

**Date: October 28th, 2016**
**Place: Mumbai**

**RAJEEV KUMAR AGARWAL**
**WHOLE TIME MEMBER**
**SECURITIES AND EXCHANGE BOARD OF INDIA**