(2015) 6 ABR 696 : (2015) 12 AD (SC) 165 : (2015) 4 BC 541 : (2015) 129 CLA 163 : (2015) 8 MLJ 107 : (2015) 12 SCALE 280 : (2016) 133 SCL 223

Supreme Court of India

Case No: Civil Appeal No. 7607 of 2005

Securities and Exchange Board of India	APPELLANT
Vs	
Prebon Yamane (I) Ltd.	RESPONDENT

Date of Decision: Nov. 3, 2015

Acts Referred:
Constitution of India, 1950 - Article 166(1)#Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992 - Regulation 10, 10(1), 4#Securities and Exchange Board of India Act, 1992 - Section 15T

Citation: (2015) 6 ABR 696 : (2015) 12 AD (SC) 165 : (2015) 4 BC 541 : (2015) 129 CLA 163 : (2015) 8 MLJ 107 : (2015) 12 SCALE 280 : (2016) 133 SCL 223

Hon'ble Judges: Vikramajit Sen and Shiva Kirti Singh, JJ.

Bench: Division Bench

Advocate: Chander Uday Singh, Sr. Advocate, Dhaval Mehrotra, Bhargava V. Desai, Saumya Mehrotra and Rishi Gautam, Advocates, for the Appellant; C.A. Sundaram, Senior Advocate, Mayank Mishra, Tishampati Sen and Dheeraj Nair, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

Vikramajit Sen, J
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 Rs. 4,37,20,256/- together with Rs. 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 Rs. 10 Lacs as

approval fee together with an interest free security of Rs. 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.

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

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 Rs. 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 Rs. 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 Rs. 4,37,20,256 towards the principal amount of the Appellant''s claim and a further sum of Rs.

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.

(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

(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

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, Bombay and Others etc. Vs. Securities and Exchange Board of India and Others etc., .

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 and Another Vs. Delhi Development Authority and Others, clarifies this position thus-

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 Vs. The State of Punjab, , 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 Others Vs. State of Maharashtra and Another, , 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.

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.

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 v.

Union of India, and an Appeal there against 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 Rs. 1 Crore. However, the fixed basic fee of Rs. 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 Rs. 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 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.