BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 20 of 2009

Date of decision: 30.12.2009

1. M/s. Opee Stock Link Ltd.
   27/1 Cloth Commercial Centre,
   Sakar Bazaar, Ahmedabad – 380 002.
   Gujarat.

2. Mr. Ashok K. Bagrecha
   Director, Opee Stock Link Ltd.,
   27/1 Cloth Commercial Centre,
   Sakar Bazaar, Ahmedabad – 380 002.
   Gujarat. …… Appellants

Versus

The Securities and Exchange Board of India
SEBI Bhavan, Plot No. C4-A, "G" Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400 051. …… Respondent

Mr. Sanjay Mehta, Advocate for Appellants.

Mr. Kumar Desai and Ms. Daya Gupta, Advocates for the Respondent.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer

Whether the appellants had cornered the retail portion of the shares issued by Jet Airways Limited and Infrastructure Development Finance Company Limited in the Initial Public Offerings (IPOs) made by them is the short question that arises for our consideration in this bunch of five Appeals no.16 to 20 of 2009. These appeals raise similar questions of law and fact and are being disposed of by a common order. Since arguments were addressed in Appeal no. 20 of 2009, the facts are being taken from this case and reference to the facts in other appeals shall be made wherever necessary. Counsel for the parties are agreed that the decision in this case shall govern the other

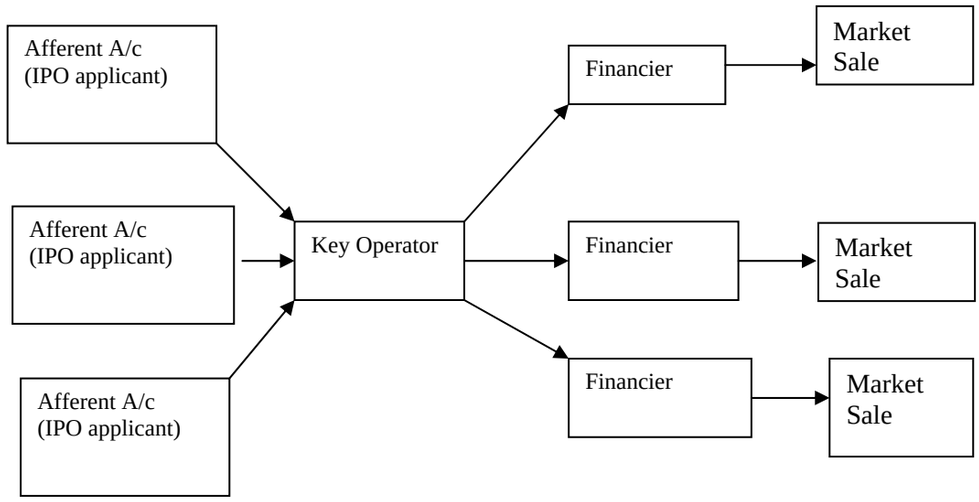
appeals as well. These appeals are an offshoot of the Initial Public Offerings (IPO) scam that was unearthed by the Securities and Exchange Board of India (for short the Board) in the year 2005-06. The Board received some information regarding the alleged abuse and misuse of the IPO allotment process. It initiated a probe. A preliminary analysis of the buying, selling and dealing in the shares issued through IPOs of various companies during the period 2003-05 showed that certain entities opened many demat accounts in fictitious/benami names and the said entities had cornered/acquired the shares of those companies allotted in the IPOs by making applications in fictitious/benami names with each of the applications being of small value so as to make it eligible for allotment under the retail category. Investigations further revealed that subsequent to the allotment of IPO shares, the fictitious/benami allottees transferred the said shares to their principals who were identified by the Board as key operators/master account holders. The Board was prima facie of the view that thousands of entities in whose names demat accounts and bank accounts had been opened and IPO applications made were either benami (name lenders) or non-existent. Pending investigations, the Board by an ad-interim ex-parte order dated April 27, 2006, inter alia, directed Shri Deepakkumar Shantilal Jain and Opee Stock-Link Limited, the appellants now before us, not to buy, sell or deal in the securities market including the IPOs directly or indirectly till further orders. In this interim order the Board noticed that several key operators/master account holders along with financiers through a large number of afferent accounts had manipulated the IPO allotment process by cornering a substantial number of shares allotted in the IPOs which were meant for retail individual investors. In the interim order, the Board defined the terms ‘financier’, ‘key operators’ and ‘afferent accounts’ as under:

> “For the purpose of this order the following terms would mean:
>
> (a) “Financier” is a person who either on his own or alongwith others provided the finance for IPO subscription and are the ultimate beneficiaries in the scheme of cornering retail allotment and forking out a big gain on sale immediately after listing.
>
> (b) “Master Account Holders / Key Operators” are the 24 entities identified in the sweep of this order who allowed their demat accounts for temporarily parking credits received

from a multitude of afferent accounts before transfer to financiers.

(c) "Afferent Accounts" (benami/fictitious accounts) would refer to countless demat accounts in benami and fictitious names, the credits from where found its confluence in the master accounts."

The modus operandi adopted by the delinquent entities for cornering retail portion of IPO shares was pictorially depicted as under:



The ex-parte order was later confirmed in the case of most of the entities including the appellants before us by passing separate orders after affording an opportunity of hearing to them.

2. After the conclusion of the investigations, the Board initiated parallel proceedings against the appellants for issuing directions under Sections 11 and 11B of the Securities and Exchange Board of India Act 1992 (for short the Act) and also for the imposition of monetary penalty by initiating adjudication proceedings under Chapter VIA of the Act. A notice dated November 24, 2008 was issued to the appellants to show cause why suitable directions be not issued to them under Section 11B of the Act. The charges against the appellants pertain to the allotment and subsequent trading of IPO shares of Jet Airways Ltd. and in this appeal we are only concerned with the shares allotted in this IPO. It was alleged in the show cause notice that the first appellant acted as a key operator and had cornered 12053 shares through 553 benami/fictitious demat accounts. The list of these demat account holders was appended to the show cause notice. The IPO opened on

February 18, 2005 and closed on February 24, 2005 and the shares were listed on the Bombay Stock Exchange (BSE) and the National Stock Exchange of India Limited (NSE) on March 14, 2005 and the first appellant is alleged to have received 523 off-market credits of 14 shares each in its demat account. The first appellant is also alleged to have received credits of 1442 and 3021 shares from the demat accounts of H. Nyalchand Financial Services and Pravin Ratilal Sh Stk – a depository participant. It is further alleged in the show cause notice that the first appellant was the ultimate beneficiary of the shares allotted to 553 entities all of whom were mere name lenders or benamis and that they transferred the shares to the first appellant immediately on allotment. The allegation made in paragraph 4 of the show cause notice which indeed is the case set up against the appellants is reproduced hereunder for facility of reference:

> "It is alleged that the noticee is the ultimate beneficiary of shares allotted to 553 entities as all of them were mere name lenders or benamis and transferred the shares immediately on allotment to the noticee."

It is also alleged that the first appellant purchased the shares from the benami demat account holders at the rate of Rs.1170 per share which price was much lower than the then prevailing market price. The break-up of the shares that were transferred to the first appellant in off-market transactions has been given in the show cause notice which is as under:

Date	Total off market share transfer
Till 12.03.05 (day before date of listing)	3272 (232x14,3x8)
14.03.05 (date of listing)	3598 (148x14,84x1,1442x1)
15.03.05 to 09.05.05	5183
	12053

The show cause notice further alleges that some of the demat account holders who transferred the shares to the first appellant had a common address and that there were several discrepancies in the signatures of most of the beneficial owners of those accounts in the declarations made by them which the appellants produced in their defence. Reference is then made to the IPO of Infrastructure Development Finance Company Limited (IDFC) in which Deepakkumar Shantilal Jain (appellant in Appeals no. 17 and 19 of 2009 which are also being disposed of by this order) is said to have cornered shares

from fictitious demat account holders in a like manner. It is alleged that the first appellant and the said Deepakkumar Shantilal Jain had cornered shares in the two IPOs (Jet Airways and IDFC) from 378 common demat account holders. It is also alleged that the second appellant is a relative of Deepakkumar Shantilal Jain who cornered shares in the IPO of IDFC. The modus operandi referred to above has been stated in the show cause notice to be fraudulent by which the appellants cornered the shares meant for retail investors through 553 benami/fictitious accounts to the detriment of the retail investors. It is then alleged that the first appellant sold the shares in the market at a higher price and made an unlawful gain of Rs.12,02,302 which was worked out on the basis of the difference between the purchase price of Rs.1170 and the average sale price of Rs.1296.12. The second appellant is said to have made an illegal gain of Rs.2,24,280 on the sale of 2520 shares which had been transferred to him by the first appellant. In view of all these allegations, the appellants were said to have violated section 12A of the Act and Regulations 3 and 4(1) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003 (for short the Regulations). The appellants did not file any reply to this show cause notice but relied upon the replies they had filed to the ad-interim ex-parte order dated April 27, 2006 which was treated as a show cause notice in which they denied all the allegations. They were afforded a personal hearing by the whole time member and they also filed their written submissions. On a consideration of the entire material collected during the course of the investigations and the enquiry conducted under Section 11B of the Act and taking note of the oral and written submissions made on behalf of the appellants, the whole time member came to the conclusion that the appellants employed a manipulative and deceptive device to corner the shares meant for retail individual investors in the IPO of Jet Airways and this, according to him, was to the detriment of the retail investors and violative of Section 12A of the Act and Regulations 3 and 4(1) of the Regulations. By his order dated December 31, 2008 the whole time member restrained the first appellant from buying, selling or dealing in securities market for a period of one year in addition to the period for which it had already been restrained by the ad-interim

ex-parte order which was later confirmed. The first appellant was also directed to disgorge a sum of Rs.12,02,302 and interest thereon @ 10 per cent per annum from the date of listing of the IPO till actual payment. A further direction was issued that in case the first appellant failed to disgorge the amount, it shall remain out of the securities market for another period of five years without prejudice to the right of the Board to enforce the disgorgement. The second appellant had also been restrained from buying, selling, or dealing in the securities market for a further period of two years in addition to the period for which he had already been restrained under the ad-interim ex-parte order. He was also directed to disgorge the unlawful gain of Rs.2,24,280 allegedly made by him along with interest thereon @ 10 per cent per annum. In case the second appellant failed to disgorge the amount, he was to remain out of the securities market for an additional period of ten years without prejudice to the right of the Board to enforce the disgorgement. It is against this order that the present appeal has been filed under Section 15T of the Act.

3. We have heard the learned counsel for the parties and have carefully gone through the impugned order and also the record to which reference was made by the learned counsel on both sides during the course of the hearing. The primary argument of the learned counsel for the appellant is that his clients while trading in the shares of Jet Airways had committed no wrong and that they did not corner the shares in the IPO allotment as alleged. He further submitted that the appellants purchased the shares from the original allottees in the IPO in off-market transactions and that there is no prohibition in law in their doing so nor is there any bar in their subsequent sale in the securities market. He also submitted that merely because the appellants made some profit by subsequently selling the shares in the market does not justify the passing of the order of disgorgement against them which, according to him, is patently erroneous and wholly unjustified. Shri Kumar Desai learned counsel for the Board, on the other hand, strenuously urged that the appellants are a part of the IPO scam who cornered shares which were meant for the retail investors thereby depriving those investors of their rightful claim under the IPO. The argument on behalf of the Board is that 553 demat

account holders were mere name lenders who transferred the shares to the first appellant under a pre-designed manipulative scheme which was meant to deprive the genuine retail investors of their due. It was further argued on behalf of the Board that after cornering the shares as alleged, the appellants sold them in the market at a price much higher than the purchase price and thereby made windfall gains through illegal means. The learned counsel sought to justify the order of disgorgement passed by the whole time member.

4. In order to appreciate the rival contentions of the parties, it is necessary to notice what the IPO scam was. The Board in its omnibus order of April 27, 2006 referred to above, had spelt out the common modus operandi resorted to by a very large number of entities by which they cornered the IPO shares issued by several companies meant for the retail individual investors. Retail individual investor is one who applies or bids for securities of or for a value of not more than Rs.50,000 which amount was subsequently raised to Rs.1 lac w.e.f. 4.4.2005. It must also be remembered that before one could apply for shares, it was necessary for the applicant to have a demat account in which the shares could be credited on allotment. Large number of entities had cornered IPO shares reserved for retail applicants by making applications in the retail category through the medium of thousands of fictitious/benami IPO applicants with each of the application being for small value so as to be eligible for allotment under the retail category. Such entities had, before applying, opened demat accounts in the names of the applicants which too were fictitious/benami. All these applications had been sponsored / financed directly or indirectly by those who were the ultimate beneficiaries of the scam. The strategy adopted was that subsequent to the receipt of IPO allotment, these fictitious/benami allottees transferred the shares to their principals who controlled their accounts and who, in turn, transferred the shares to the financiers that had originally made available the funds for executing the game plan. In view of the booming market, financiers then sold most of these shares on the first day of listing or soon thereafter thereby making a windfall gain of the price difference between issue price and the listing price. In the very scheme of things, the manipulative process of cornering IPO shares started with the opening of fictitious /benami demat accounts. In other words, opening of

such accounts was the first step towards achieving the sinister object of cornering retail allotment. The second step in the manipulative process as pictorially depicted in the order of April 27,2006 and referred to in paragraph 1 above, is the transfer of shares from the fictitious/benami demat accounts to the demat accounts of the key operators for temporary parking of credits for onward transfer to the financiers who were the ultimate beneficiaries of the scam. The third step was the transfer of the temporary credits from the demat accounts of the key operators to the financiers who had financed the entire game plan and with the sale of shares by the financiers, the IPO scam was complete. In the order dated April 27, 2006 which was subsequently confirmed and on the basis of which the show cause notice was issued to the appellants before us, the first appellant and Deepakkumar Shantilal Jain (appellant in Appeals no. 17 and 19 of 2009) have been identified as key operators in the IPO scam which allegation they have emphatically denied. Now let us see what the whole time member of the Board has found against the appellants in the impugned order. He has recorded a categorical finding in para 10(e) that there is no material on the record to establish that the 553 demat account holders from whom the shares were transferred in the name of the first appellant were benami or fictitious. This is what he has said in this paragraph:

> "There is no material on record that the 553 demat account holders were benami or fictitious. Investigation has not been able to substantiate this. These are name lenders, as alleged in the SCN. The conduct of these account holders substantiates this. All the 553 accounts behaved exactly in the same manner in terms of price and timing, that too, in off-market, which is not transparent. However, the allegation that these were benami or fictitious does not make any material difference to the main charge that the noticees used 553 demat accounts to corner shares in the retail segment of the Jet IPO."

Even though the 553 demat accounts and their account holders from whom the shares were transferred to the first appellant were genuine, the impugned order holds that all of them were name lenders and were hand-in-glove with the appellants. He has given reasons to arrive at this conclusion which we shall deal with a little later. Since all the 553 demat accounts and their holders were genuine, they do not fit into the manipulative scheme of the IPO scam. As already noticed, the IPO scam started with thousands of fictitious applicants applying for allotment of shares in the retail category after opening

fictitious/benami demat accounts. In view of the finding recorded by the whole time member that the 553 demat accounts were genuine, the very first link in the IPO scam chain, so far as the appellants are concerned, is broken. It follows from the finding that not only the demat accounts but also the applicants who applied for the IPO shares were genuine retail investors. It is not the case of the Board that the applications filed by the 553 demat account holders for the allotment of IPO shares in the retail category had been financed by the appellants. In the absence of such an allegation, it cannot but be presumed that genuine retail investors with proper demat accounts had applied for shares with their own funds and were allotted IPO shares in the retail category. Can such an allotment be described as 'cornering of shares' in the IPO. The answer to this question can only be in the negative. We are unable to agree with the whole time member that the genuineness of the 553 demat accounts and their holders does not make any material difference to the main charge levelled against the appellants that they cornered the shares in the IPO allotment.

5. There is yet another reason why the appellants cannot be held guilty of the charges levelled against them. In the interim order dated April 27, 2006, which is the basis of all the enquiries held against several entities including the appellants allegedly involved in the IPO scam, the first appellant and Deepakkumar Shantilal Jain, the appellant in the connected appeals, were identified as key operators in different IPOs. The term key operator was given a specific meaning in the context of the IPO scam and that definition has been referred to in para 1 of our order. According to that definition, a key operator is one who allowed his demat account for temporary parking of credits received from afferent account (s) before transfer to the financiers. On the basis of the investigations carried out by the Board in which the appellants were identified as key operators, they were served with a show cause notice dated November 24, 2008 and the allegation made against them is as under:

> "It is alleged that Opee Stock Link Ltd. (hereinafter referred to as 'noticee') had acted as key operator in the IPO of Jet Airways and cornered 12,053 shares of Jet Airways through 553 benami/fictitious demat accounts."

The appellants in their reply to the interim order of April 27, 2006 which had been treated as a show cause notice had specifically denied that they acted as key operators in the IPO scam. However, on a consideration of the material collected during the investigations and the enquiry conducted by the whole time member and for the reasons that he stated in paragraph 10 of the impugned order with which we shall be dealing a little later, he concluded in paragraph 11 of the impugned order as under:

> "From the analysis in Para 10, it is clear that the 553 demat account holders, who had trading accounts with brokers/sub-brokers, transferred the shares in off-market transactions to noticees, who were not brokers/sub-brokers at the relevant time. The noticees sold these shares in the market and passed on a part of the sale proceeds to the demat account holders and appropriated the balance. This would not have been possible without a prior arrangement between the parties. If there were no arrangement and the noticees were just brokers/pass through, they would have passed on the entire sale proceeds minus the brokerage to the demat account holders. This clearly indicates that the 553 demat account holders were mere name lenders, and they were acting under the direction, supervision and control of the noticees. **Therefore, I conclude that the noticees acted as key operators and had the control over the 553 demat account holders who were mere name lenders and acted as agents of the noticees. They used 553 demat accounts of the name lenders for the purpose of cornering shares to the detriment of RIIs and unlawfully enriched themselves."** (emphasis added)

We cannot uphold the finding that the appellants acted as key operators. When we look at the definition we find that to be a key operator it was essential for him/it to receive shares from afferent/fictitious accounts and it is also necessary that the key operator after parking those shares temporarily in his demat account transfers them to the financier(s) who is/are the ultimate beneficiary of the scam. Admittedly, as per the findings recorded in the impugned order, the demat accounts of 553 allottees who transferred the shares to the first appellant were genuine accounts. It is thus clear that the appellants did not receive any share from any afferent or fictitious account. It is the Board's own case that the appellants had sold the shares in the market and allegedly made unlawful gains. It is clear that the appellants did not transfer the shares to any financiers. Obviously, the question of their parking the shares temporarily for the benefit of the financiers does not arise. In this view of the matter, we have no doubt that the appellants were not the key operators as understood by the Board in the context of the IPO scam. Not only the first

link in the chain but also the second link of the appellants being key operators is missing. They are also not the financiers as per the meaning assigned to this term in the context of the IPO scam. It is common case of the parties that the appellants had not financed any application for the allotment of IPO shares. In this view of the matter, the entire IPO scam syndrome qua the appellants fails.

6. What actually happened in the present case was that genuine retail investors holding proper demat accounts had applied for the shares in the IPO of Jet Airways Limited in the retail category. The retail segment of the issue was oversubscribed by 2.9 times and, therefore, in consultation with NSE, the issuer company finalized the basis of allocation to the retail investors. It is not in dispute that the maximum shares that were allotted to any retail investor was 14 or less. From the chart showing the basis of allocation to the retail investors which was produced before us during the course of the hearing, it is clear that the retail investors were allotted shares in packages of 6,8,10,12 & 14 depending upon the number of shares applied for. Once the allotment was made to the retail investors and shares credited to their demat accounts, the allotment process in the IPO was complete and the allottees were free to trade those shares in the secondary market even before the listing. Since the shares were initially allotted to the retail investors on the basis of the applications filed by them with their own funds, it cannot be said that there was any cornering of shares in the allotment of IPO shares. As already noticed, the shares were allotted to the retail investors not as benamis as they had applied with their own funds and it was thereafter that they sold the shares to the appellants in the secondary market in off-market transactions at the rate of Rs. 1170 per share. Off-market transactions are per se not illegal and this is not the charge against the appellants either. There is nothing to debar the allottees to trade the shares in the secondary market after receiving the allotment under the retail category. Trading and speculation are the two basic activities in the securities market and the Board as a regulator steps in only when such trade or speculation violate the provisions of the securities laws which are meant to protect the market integrity and interest of the investors. We see no such transgression in the instant case. Once the allotment is made in the primary market by the issuer

companies to the genuine applicants, there is nothing to stop them from trading those shares in the secondary market immediately thereafter, which quite a few investors do, and this is what the securities market is all about. When we look at the break-up of the shares that were transferred/sold by the 553 retail investors to the first appellant in off-market transactions, it is clear that majority of the shares were transferred before listing, that is, till the price discovery mechanism of the exchanges was activated which happened only on and after the date of listing. The IPO opened on February 18, 2005 and closed on February 24, 2005 and the shares were listed on March 14, 2005. There is good reason for some of the small-time investors to dispose of their shares even before they are listed because they have a limited financial and risk taking capacity. Because of the uncertainty as to the price of the scrip on its listing, which may be higher than the issue price or could be even lower, the small-time investors do not mind trading in those shares at a lower but safe margin. In the instant case, the issue price was Rs.1100 and the demat account holders sold them at Rs.1170 to the first appellant. The shares which were listed on March 14, 2005 opened at Rs.1211 per share and closed at Rs.1305 per share and the lowest price during the course of the day at which the shares traded is Rs.1172. In this background, there is nothing unusual if the retail investors sold/transferred their shares at Rs.1170 per share. Since the appellants purchased the shares from all the demat account holders in the secondary market after those had been allotted to them by the issuer company and unless it can be shown that the allotment was benami/fictitious, it cannot be held that the appellants cornered the shares in the IPO allotment. There is no question of cornering shares in the secondary market and, if one were to do that, it would be perfectly lawful and justified so long as the disclosure and other legal requirements are complied with. We are, therefore, satisfied that there was no cornering of shares by the appellants.

7. We shall now examine the reasons given by the whole time member for holding that the charge of cornering by the appellants of shares meant for retail investors stands established. The first reason mentioned by him is that 28 demat account holders had a common address. They were genuine persons with genuine demat accounts and they had

applied for the shares with their own funds. These facts are enough to establish the bona fides of the allottees and, in any case, the appellants are not really concerned with their addresses. It will not be out of place to mention that the appellants have admitted that some of them were their friends and relatives. Common addresses of some of the demat account holders do not carry us any further. The other reason which weighed with the whole time member is that the signatures of the demat account holders in the declarations made by them which were produced by the appellants in their defence did not tally with the signatures in their demat accounts with the depository participants/depository. This ground to our mind is very flimsy. How can a doubt arise merely because Anita P. Shah has signed as Anita or Ankit Chandamal Bhandari signed as Ankit C. Bhandri. The other instances referred to in the show cause notice and relied upon in the impugned order are equally tenuous. The appellants seem to have argued before the whole time member that the demat account holders had come to them for trading their shares as they did not have trading accounts. He has referred to 5 instances out of 553 to say that they had trading accounts. Even if this was a sample checking, it does not establish the charge against the appellants. He also doubts as to why the account holders came to the appellants when the later were not brokers/sub-brokers. These are not the issues which could establish the guilt of the appellants. Even if the appellants are not saying the truth, it would not establish the charge of cornering shares. So what if the appellants had approached the demat account holders to purchase their shares with a view to make profit in the secondary market and there is nothing unusual about it. What has weighed with the whole time member is that the appellants were not registered stock brokers and there was no occasion for the demat account holders to approach them for broking activities. There is no evidence of broking in these transactions and the appellants have only purchased the shares in off market transactions from the demat account holders in the secondary market and further sold them. In other words, they did not sell the shares in the market on behalf of the allottees. The factors referred to in para 10 of the impugned order individually or collectively do not establish the unholy alliance between the appellants on the one hand and the demat account holders on the other to manipulate the allotment of IPO shares in

the retail category. The fact that 553 demat account holders transferred the shares on allotment to the first appellant at the same price of Rs.1170 per share may raise a doubt but it cannot be disputed that each one of them had a genuine demat account and they applied for the shares with their own funds. In these circumstances it is difficult to hold that they were mere name lenders. The preponderance of probabilities is surely tilted in favour of the appellants. It will not be out of place to mention that we have had the occasion to deal with some of the IPO scam cases where we had taken a serious note of the manner in which some of the entities had cornered the IPO shares meant for allotment to retail individual investors. In all those cases, the Board was able to establish that the appellants therein had acted as 'financiers' or 'key operators' as understood in the context of the IPO scam and were the actual and illegal beneficiaries of those shares meant for retail investors and to make those illegal gains they had operated through various benami/fictitious accounts in benami and fictitious names. The Board also found in all those cases that the applications of all the allottees had been financed by the financiers directly or through the key operators and it was for this reason that the allottees were held to be mere name lenders. Obviously, such operators who cornered shares in the primary market at the time of the IPO allotment deserve strictest punishment as they vitiated the IPO allotment process. It is not so in the cases before us and the facts of the present case are totally different. The appellants did not corner any shares in the primary market in the segment meant for the retail investors.

8. This brings us to the other aspect of the impugned order by which the whole time member has directed the appellants to disgorge the unlawful gains made by them. He has found that the first appellant purchased the shares at Rs.1170 per share from the demat account holders and sold them in the market at an average price of Rs.1296.92 per share and on the basis of the difference between these prices he has worked out the alleged unlawful gain made by the first appellant to Rs.12,02,302. In the case of the second appellant who sold 2520 shares, the alleged illegal gain is worked out to Rs.2,24,280. Both the appellants have been directed to disgorge these amounts. We had an occasion to deal with the concept of disgorgement in Karvy Stock Broking Ltd. v. Securities and

Exchange Board of India Appeal No. 6 of 2007 decided on 2.5.2008 and this is what we observed in that case:

> "Black's Law Dictionary defines disgorgement as "The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." In commercial terms, disgorgement is the forced giving up of profits obtained by illegal or unethical acts. It is a repayment of ill-gotten gains that is imposed on wrongdoers by the courts. Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct. Disgorgement of ill-gotten gains may be ordered against the one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal act(s) could be asked to do so. Since the chief purpose of ordering disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, it would follow that the disgorgement amount should not exceed the total profits realized as the result of the unlawful activity. In a disgorgement action, the burden of showing that the amount sought to be disgorged reasonably approximates the amount of unjust enrichment is on the Board."

In the present case we have held that the appellants committed no wrong when they traded in the shares in the secondary market and that the charge against them of cornering shares in the IPO allotment process is not established. In view of these findings, the question of directing them to disgorge any amount does not arise. The direction in the impugned order requiring them to disgorge the amounts cannot, therefore, be sustained. While on the disgorgement issue, it is interesting to note the anomaly that has arisen due to the vastly different figures worked out by the whole time member and the adjudicating officer regarding the quantum of illegal gains allegedly made by the appellants. While the whole time member found that the first appellant had made an unlawful gain of Rs.12,02,302, the adjudicating officer came to the conclusion that this appellant had made an unlawful gain of Rs.24 lacs. Again, in the case of the second appellant, the whole time member found that he made an unlawful gain of Rs.2,24,280 whereas the adjudicating officer found that he made a gain of only Rs.16,931/-. Similarly in the case of Deepakkumar Shantilal Jain, the whole time member found that he made an unlawful gain of more than Rs.54 lacs whereas the adjudicating officer found that he made an illegal gain of more than Rs.84 lacs. Since we are setting aside the impugned orders on the ground that the appellants had not cornered any shares in the retail segment of the

IPOs, it is not necessary for us to dwell any further on this issue. However, we cannot resist observing that this anomaly has arisen because the Act enables the Board to initiate parallel proceedings on the same set of facts against a delinquent for issuing directions under Section 11B on the one hand and adjudication proceedings under Chapter VIA for the imposition of monetary penalties on the other. It is not in dispute that directions under Section 11B of the Act are issued by the Board whereas proceedings under Chapter VIA are conducted by an adjudicating officer who is a subordinate officer of the Board and it is he who passes the final order. As both sets of proceedings are independent of each other, as is often argued on behalf of the Board, the possibility of conflicting views on the same set of facts cannot be ruled out. In a given case, the whole time member may hold the delinquent guilty of the charge levelled and the adjudicating officer may completely absolve him of the same or vice versa. Such anomalous situations could arise and these would not be in public interest. We feel that if only one enquiry is held against the delinquent and on the basis of the findings recorded therein, the same body is given the power to issue directions and impose monetary penalties as well, it would not only expedite matters but also avoid conflicting opinions. This would obviously require an amendment in the Act which is in the exclusive domain of Parliament.

For the reasons recorded above, we allow the appeals, set aside the impugned orders leaving the parties to bear their own costs.

In view of the observations made in para 8 above, we direct that a copy of this order be sent to the Finance Secretary, Government of India, New Delhi for information and whatever necessary action that he may deem fit.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

30.12.2009
ddg/-
Prepared and compared by – ddg