

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 3.4.2019
Date of Decision : 1.5.2019

Misc. Application No.40 of 2019
And
Appeal No.246 of 2017

OPG Securities Pvt. Ltd.
OPG House, 4/10, Asaf Ali Road,
New Delhi-110 002.

..... Appellant

Versus

National Stock Exchange of India Ltd.
Exchange Plaza, Plot No.C/1,
'G' Block, Bandra Kurla Complex,
Bandra (East), Mumbai – 400 051.

..... Respondent

Mr. Gaurav Joshi, Senior Advocate with Mr. Saurabh Pikale,
Mr. Ravichandra Hegde, Mr. Robin Shah, Mr. Mitravinda
Chundururu and Mr. Yash Bajaj, Advocate i/b Parinam Law
Associates for the Appellant.

Mr. P.N. Modi, Senior Advocate with Mr. Rashid Boatwalla
and Mr. Rahul Jain, Advocates i/b. Manilal Kher Ambalal &
Co. for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Justice M.T. Joshi

1. Vide impugned order of the respondent NSE dated
4th September, 2017, the appellant is suspended for six months
as a trading member on all segments on the respondent
Exchange.

2. The record would show that on 31st August, 2009, the respondent introduced co-location server at its premises for better use of Algo trading (trading through a computer program) on payment of service fees etc in terms of circular 693 issued by it on 31st March, 2009. The purpose of providing co-location services was to speed up the trading facility through master server and the racks were allotted to the subscribing trading members. The appellant has subscribed for the said facility.

It is the case of the respondent NSE that as a part of contingency plan the respondent had provided secondary/ fall back server which members were supposed to connect only in case the first server fails or were down. The said facility was provided to enable the members not to lose any data in case of difficulties in communication and in obtaining data from the primary server of the respondent. The respondent however found that the present appellant had logged into the second server frequently and obtained data without any valid reasons even though repeated warnings were issued to it. In the circumstances, the respondent issued show cause notice to the appellant dated 14th February, 2017 to show cause as to why necessary disciplinary action should not be taken as per Rule (1) and 3(c) of Chapter IV of the Exchange Rules.

3. It is submitted by the appellant that constant problems and technical glitches were found in the primary server which compelled the appellant to switch to the secondary server. These problems were reported to the respondent from time to time. It has used secondary server as a contingency means and not to gain any advantage. No specific terms was mandated for the use of the secondary server. The use of server by all the members was monitored by the respondent from time to time. As per the respondent's co-location guidelines itself the members were required to check the secondary TBT parameters were working fine with their applicability. In case of non receipt of data through primary server they were free to move to secondary server. i.e., fall back server. Log in credentials for the secondary server were also provided. Detailing some other facts it was requested that the show cause notice be withdrawn.

4. The disciplinary action committee of the respondent took up the matter. It found that instructions were already issued to the members to connect to the secondary server only in case of failure of primary server. According to the Committee various emails were exchanged between the appellants and the respondent to stop the use of secondary server frequently and finally a warning was issued vide email dated 7th June, 2012. It further found that a forensic investigation in the issue was got

done through one Deloitte Touche Tohmatsu LLP by the respondent. The report of this forensic investigation brought to light certain adverse findings as to the conduct of the present appellant. The extract of the said report was already forwarded to the appellant. Thus, finding that the present appellant has from time to time used the secondary server without their being any problem in the primary server, the impugned order was passed by the Committee.

5. Before us several submissions were made by both the sides. Learned counsel for the appellant submitted that full report of the forensic investigation was not provided to it. It is further pointed out that during the pendency of the present appeal SEBI had also started investigation qua the present respondent regarding use/misuse of the co-location facility by various members.

The learned counsel for the appellant, at the time of hearing, submitted extract of some report purportedly prepared by Earnest and Young LLP in the same issue. According to the learned counsel for the appellant the said report depicts a different picture. Learned counsel for the respondent submitted that all the material including the report is being examined by SEBI.

5. In our opinion, in view of the fact that another forensic investigation report has come up it would be in the interest of justice that the impugned order be quashed and set aside and the matter be remanded to the respondent Stock Exchange to have a fresh look in the matter. Hence the following order:-

1. The impugned order is hereby set aside.
2. The matter is remanded to the respondent National Stock Exchange of India Ltd to take a fresh decision in the matter. The respondent will consider the forensic report or any other additional relevant material and pass a fresh order within six weeks from today after giving an opportunity of hearing to the appellant.
3. Misc. Application for interim relief stands disposed of.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

Sd/-
Justice M.T. Joshi
Judicial Member

1.5.2019

Prepared and compared by
RHN