June 27, 2002

Before Appellate Bench No. 1

In the Matter of

Appeal No. 2 of 2002

Lahore Stock Exchange……Appellant

Versus

Mr. Shahid Ghaffar, Commissioner (Securities Market)……Respondent

Impugned Order passed by: Mr. Shahid Ghaffar, Commissioner, (Securities Market)

Date of impugned order:.....7 December, 2001

Date of Hearing……26 April, 2002

Present:

For the Appellant - Lahore Stock Exchange(Guarantee) Limited, Lahore (LSE):

1. Mr. Aamir Zareef Khan, Deputy Secretary (Legal), LSE
2. Mr. Faisal Islam, Advocate, counsel for LSE

For the Respondent no. 1 - Securities Market Division of the Commission:

3. Syed Aamir Masood, Director.
4. Ms. Sumbul Naved Qureshi, Junior Executive.

For the Respondent no. 2 - Mr. Aslam Motiwala:

5. Mr. Aslam Motiwala in person.
6. Mr. Salim Chamdia.

For the Respondent no. 3 - Mr. M. Aamer Riaz:

7. Mr. M. Aamer Riaz in person.
8. Mr. Ejaz Ahmed Bodla, Advocate
9. Mr. Riaz Chaudhry, representative

For the Respondent no. 4 - Mr. Tanveer Malik:

10. Mr. Tanveer Malik in person.
11. Mr. A. Rafay Alam, Advocate.

For the Respondent no. 5 - Karachi Stock Exchange(Guarantee) Limted, Karachi (KSE):

12. Mr. Muhammad Rafique Umer, Legal & Corporate Affairs Adviser, KSE
13. Mr. Arif Habib, former Chairman, KSE.

ORDER

This is an appeal dated 5th. January, 2002 filed by the Lahore Stock Exchange (LSE) against the order (impugned order) dated 7th. December, 2001 passed by the Commissioner (Securities Markets) of the Commission.

2. The appeal finally came up for hearing on 26 April, 2002. Mr. Aamir Zareef Khan, Deputy Secretary (Legal), LSE and Mr. Faisal Islam, Advocate, attended on behalf of the appellant, LSE. Syed Aamir Masood, Director and Ms. Sumbul Naved Qureshi, Junior Executive, of the Commission, represented the Respondent no. 1. Respondent no. 2, Mr. Aslam Motiwala, attended in person with Mr. Salim Chamdia, Chairman of the Karachi Stock Exchange (KSE). Respondent no. 3, Mr. M. Aamer Riaz, appeared in person with Ejaz Ahmed Bodla, Advocate and Riaz Chaudhry. Respondent no. 4, Mr. Tanveer Malik, appeared in person with Mr. Rafay Alam, Advocate. Mr. Muhammad Rafique Umer, Legal & Corporate Affairs Adviser, KSE and Mr. Arif Habib, represented Respondent no. 5.

3. The brief facts of the case are as follows: -

a) During the trading period from Monday, 22 May, 2000 to Friday, 26 May, 2000 the Respondent no. 3, on behalf of his client, Respondent no. 2, placed an order for the sale of 1,061,400 shares of Adamjee Insurance Company Limited (AICL) on the Lahore On-Line Trading System (LOTS) of the LSE that was executed in 33 (thirty-

three) trades at rates between Rs. 105 and 109. Respondent no. 4 before us, was the buying broker for his client, Diamond Industries Limited in respect of all these 33 trades.

b) While 23 (twenty-three) of these 33 (thirty three) trades aggregating 1,002,500 shares of AICL related to Respondent no. 3's client, Respondent no. 2 before us, the other 10 (ten) trades aggregating 58,900 shares of AICL related to Respondent no. 3's other clients.

c) The manager of the clearing house of LSE communicated to the then Managing Director of LSE his suspicion that the trades between Respondent no. 3 (selling broker) and Respondent no. 4 (buying broker) is a cross transactions and being executed with a fraudulent intention in order to shift exposures from one member to another.

d) The LSE taking prompt notice of the said manager's communication on Tuesday, 30 May, 2000 directed that 23 trades, out of the 33 trades, pertaining to 1,002,500 shares of AICL be deleted from LOTS.

e) On 31 May, 2000 Respondent no. 2 wrote to Respondent no. 3, challenging the decision of the LSE pertaining to deletion of these 23 trades, and requested that the 33 trade transactions be honoured. A copy of his communication was also forwarded to the Commission for necessary action.

f) The Commission took cognisance of Respondent No. 2's grievances and called a hearing in this respect on 15 July, 2000. Mr. Tariq Iqbal Khan, the then Commissioner, Securities Market Division of the Commission passed an order remanding the case back to LSE and directed it to decide the case afresh.

g) Pursuant to the order dated 15 July, 2001 passed by the then Commissioner, Securities Market, LSE constituted a sub-committee of the Board of Directors to look into the matter. The sub-committee, on 15 September, 2000 declared that 23 trade were deleted rightfully from LOTS and recommended that a fine of Rs. 25,000 be imposed on Respondent nos. 3 & 4 by the LSE.

h) Respondent no. 2 then submitted his reply dated 22 September, 2000 disputing the findings of the sub-committee. The Commission once again considered the matter and forwarded the same to the Joint Committee of the Commission and Stock Exchanges (Joint Committee) for investigation and adjudication.

i) The Joint Committee observed that Respondent no. 2 and Respondent no. 3 had complied with all procedural requirements; and that had the LSE not deleted 23 trades, the parties concerned would have honoured the transactions. The committee observed that the inability of the parties not to honour the transactions was due to the acts of LSE. As any action against the LSE did not fall within the jurisdiction of the Joint Committee, the matter was forwarded to Commission for adjudication in December, 2000.

j) On 3 January, 2001, the Commission issued a directive restraining the LSE from implementing its decision and to treat the 23

trade transactions as genuine and allow the settlement of trades in question. The LSE was also accorded an opportunity of hearing on 8 January, 2001 if it had anything to urge before Commission. The LSE in response assured full co-operation and compliance of the said directive vide its letters dated 5 January, 2001 & 11 January, 2001.

k) On 13 March, 2001, LSE retracted from the position taken earlier and desired withdrawal of the said directive of the Commission. LSE also requested for another hearing in the matter. Accordingly, an opportunity of hearing was afforded to all the parties on 14 September, 2001 that was attended by Respondent nos. 2 & 3, Managing Director of the Appellant and representatives of Respondent no. 5. Subsequently the impugned order was passed by the Respondent Executive Director who directed the LSE to take steps for honouring the said 23 transactions and also to ensure payment to Respondent no. 2. Respondent no. 2 was directed to deliver to the LSE, 1,002,500 shares of AICL inclusive of all benefits received on these shares since 30 May, 2000.

4. Mr. Faisal Islam, counsel for the Appellant after briefing the Bench with the facts of the case made the following submissions: -

l) In view of the fact that a suit No.1592 of 2000 is pending before Sindh High Court and M/s. First Capital ABN (ABN) and Respondent no. 2 are the parties in the said suit of Rs. 2.5 million AICL Shares which are in dispute and are the same as transacted with ABN and further that in this case damages have also been claimed from ABN for not honouring the Badla transaction regarding the said shares, judicial proprietary demands that this Appeal should not be heard until the decision of the Sindh High Court. Similar proceedings were also pending before the Arbitration Committee of KSE which was subsequently stayed by the Sindh High Court as the High Court itself was seized with the matter. He also submitted that ABN has alleged in the said suit that it was simply a facilitator and behind ABN it was infact Mr. Iftikhar Shafi another major market player. It has been argued that in the event the Sindh High Court passes judgment in favour of Respondent No. 2 and accepts its prayer then these proceedings would become infructuous as there would be no relief left to be granted.

m) Narrating the factual aspects, Mr. Faisal stated that in 1998, prohibition on entering into a negotiated deal was imposed by LSE on Lahore Automated Trading System (LOTS). However, in between 22 to 26 May, 2000 certain transactions were characterized as disputed transactions by the Manger, Clearing House, LSE on account of their being cross and negotiated deals. In this regard letters written by Respondent Nos. 3 & 4, the members of LSE who carried out the disputed transactions were also referred, in particular, letter dated 30 May, 2000 allegedly from Respondent no. 4 a firmly stating that the subject transactions were executed on LOTS in connivance with other member through intercom facility. Another letter dated 5 June, 2000 from Respondent no. 3 seeking advice with respect to release of Adamjee Shares held originally by LSE as exposure deposit was also pointed out. Attention was also drawn to letters dated 8 June, 2000 & 20 June, 2000 written to Respondent no. 3 who was acting as broker

to Respondent no. 2 reiterating Respondent no. 2's demand to resolve issue pertaining to the deleted transactions. However, in the minutes of Board's meeting of LSE held on 13 July, 2000 when Respondent Nos. 3 & 4, members, LSE appeared before the Board and Respondent No. 2 was also present, the statements of Respondent Nos. 3 & 4 as recorded clearly provide the admissions made by the party with respect to entering into a negot1iated deal. An order dated 31 July, 2000 by a single Commissioner was also referred to whereunder much before the passing of the Impugned Order a direction was given to LSE to explain as to what action has been taken against the two brokers Respondent Nos. 3 & 4 after their acceptance of violation of Regulations of LSE and it was observed that the connivance and malpractice accepted by the two members also casts aspersion on their integrity. The counsel for LSE argued that as per the Notification dated 1 June, 1998, the Appellant restrained the members of LSE from entering into Negotiated Deals in LOTs. Negotiated Deal has been defined in Automated Trading Regulations for Lahore On-Line Trading System to "mean a deal which has been negotiated between two parties outside the regular market". The transaction done by Respondent nos. 2 & 3 in connivance with each other by agreeing on the price and the quantity of the shares for the purpose of their sale and purchase through intercom facility would be termed as a Negotiated Deal irrespective of the fact that "the option for brokers to access the special window on their trading terminals which allowed Negotiated Deals, had been shut down by LSE", as mentioned at page 8 of the Impugned Order. The word "negotiate" has been defined in Black's Law Dictionary, Seventh Edition, 1999 at page 1059 as follows: To communicate with another party for the purpose of reaching an understanding; to bring about by discussion or bargaining. Therefore, the communication of Respondent Nos. 2 & 3 on the intercom for the purpose to effect the sale and purchase of the shares in a particular quantity and at a specific price amounts to Negotiated Deal. The counsel argued that in view of the background given above the deleted transactions did infact constitute negotiated deal as it can be established by showing the nexus between the members who were negotiating and settling the prices via intercom. The parties had used intercom facility and the fact that these transactions were executed in split of seconds and minutes also support this view. It is contended that these transactions were not done in one go in an attempt to give an impression that it was not a negotiated deal. Moreover, the admission of the parties itself is an evidence. LSE's counsel submitted that in view of the acceptance of LSE decision by the concerned parties the same could not have been challenged.

n) The principles of natural justice were not adhered to as LSE was not given an opportunity of being heard. It has been alleged that despite LSE's repeated reminders the Appellant was not provided with the copy of the Appeal and the show cause notice and the notice of hearing dated 7 September, 2001 was defective as it did not specify particular allegations and was not clear as to which Appeal it was referring to the last time Appellant had knowledge of the Appeal, it was six months prior to the receipt of notice and it was not disclosed to the Appellant that the hearing of Appeal infact is with respect to

Respondent no. 2's letter dated 22 September, 2000. It could have been any Appeal, therefore, we had asked Commission to provide a copy of the Appeal. Commission failed to clarify and/or confirm in this regard despite requests being made by LSE, adjournment was flatly refused and the counsel was expected to argue without having been provided with the details of the case. It is stated that the Impugned Order was announced in blatant disregard of all principles of natural justice. The maxim "audi alteram partem" embodies a well-founded principle of law that no one is to be condemned unheard. Reliance was placed on SCMR 2232; PLD 1959 SC 45 (case at 2); 1994 SCMR 1299. The Impugned Order has been passed in utter disregard of these well-established principles of law and natural justice and, therefore, should be set-aside. The counsel argued that as the Appellant was not given an opportunity of hearing by the learned single Commissioner, it would be appropriate to remand the case to the learned single Commissioner for decision afresh where the issue of non-hearing of a party arises, the appellate courts have always remanded the case. This is also to safeguard the vested right of the party to avail all the remedies (including those of appeals) available under the statute PLD 1985 SC 376; PLD 1964 Pesh. 250 (case at 3B); PLD 1969 SC 599; PLD 1980 Quetta 29.

o) The matter was decided without carrying out any investigation or inquiry. The counsel further submitted that no order by Commission can be passed without investigation. Reference was made to clauses (b), (c) & (f) read with Section 20 of Securities and Exchange Commission of Pakistan Act, 1997(the "SECP Act") and Section 21 of Securities and Exchange Ordinance, 1969. It is submitted that Securities and Exchange Board of India Act, 1992 (the "SEBI Act") is the parallel legislation to the Act. The powers of Commission under Section 20 of the Act are almost similar to the powers of Securities and Exchange Board of India ("SEBI") under Section 11 of the SEBI Act. It is argued that after reading the case M.Z. Khan vs. Securities and Exchange Board of India, AIR 1999 Delhi 164 (cae at 6); Karnavati Fincap Ltd. vs. Securities and Exchange Board of India, company cases (1996) Vol.87 p.186 (case at 7), although none of which is relevant to the issues involved in the instant case, one thing is quite clear that the order passed by SEBI or the adjudicating officer in India under the SEBI Act (which are appealable before Securities Appellate Tribunal) are based on the inquiry/investigation undertaken by the adjudicating officer. In view of the above grounds, the orders appealable before this honourable Bench are required to be passed on the basis of proper investigation. While doing the inquiry/investigation, the investigating officer under the Act and Securities and Exchange Ordinance is empowered, like the adjudication officer in India, to exercise the powers under Section 29 to 32 of the Act and Sections 21 and 22 of Securities and Exchange Ordinance. The Impugned Order was passed without any investigation of the matter as provided under the Act and Securities Ordinance, which, inter alia, require recording of the evidence and examining the witnesses. Therefore, the Impugned Order is ex facie illegal.

p) The Commissioner (Securities Market) completely overlooked the reliance placed by the Appellants on LOTS Regulation 19(f).

Therefore, there was absence of application of mind on the part of the Executive Director. The learned single Commissioner failed to consider and appreciate Regulation 19(f) of the LOTS Regulations on the basis of which the Disputed Transactions were deleted. Regulation 19(f) reads as follows:

- Notwithstanding any thing contained in these regulations, the exchange may in its sole discretion cancel any Order (before or after settlement) with the prior approval of the Board of Directors.

Firstly, Regulations 7 and 8 which are referred to in the Impugned Order are not relevant in the present case and secondly, in view of the non-obstante clause in Regulation 19(f), Regulation 19(f) has an overriding effect on Regulations 7 & 8 as far as the inconsistency contained therein. The learned single Commissioner's failure to take Regulation 19(f) into consideration and his failure to appreciate its effect renders the Impugned Order bad in law. Regulation 19(f) authorizes the Board of LSE to cancel any Order (before or after settlement). The word "settlement" has not been defined in the LOTS Regulations. However, in Black's Law Dictionary, Seventh Edition, 1999 at page 1377 this word has been defined as follows:

- The conveyance of property – or of interests in property – to provide for one or more beneficiaries.
- An agreement ending a dispute or lawsuit.
- Payment, satisfaction, or final adjustment.

Therefore, the words "after settlement" in brackets clearly show that the power under this Regulation is wide enough to include even a "trade" as discussed in the Impugned Order. The counsel also referred to the object clause of Memorandum of Association which empowered LSE to delete any transaction if the same is considered dishonourable and unethical.

q) The Impugned Order is passed without any jurisdiction. The counsel strongly objected to the jurisdictional aspect allegedly exercised vide Impugned Order. It is his argument that the Bench must look into the scope and extent of Regulator's power in exercise of jurisdiction conferred upon Commission. Commission cannot be allowed to settle private disputes between the parties. For this purpose mechanism is provided under the Ordinance. Remedy in the present case is provided for under Section 7 of the Ordinance and as there is no other provision empowering Commission under which action can be taken against LSE. As for Section 20 it has been emphasized that these are general regulatory powers and merely a subsidiary clause. Therefore, independent of the Ordinance no action can be taken in pursuance of the said provisions under the Act. Attention of the Bench was also drawn to Section 73 & 74 of the Contract Act. The counsel for LSE argued that the Impugned Order is not clear in its operative part, which reads as follows:

- LSE to take steps to honour 23 trades for 1,002,500 shares of AICL and how payment to Respondent no. 2 at the earliest and;
- Respondent no. 2 to deliver 1,002,500 shares of AICL inclusive of all benefits (such as bonus shares and cash dividend) received on these shares since 30 May, 2000.

It is counsel's view that his understanding of the Order is that LSE has to sell the shares in the market and whatever it receives the same shall be delivered to *Respondent no. 2*. On the other hand another interpretation which the Respondents may give is that LSE has to honour the transaction as it was on the date of deletion and the Appellants is required to pay damages to *Respondent no. 2* on the basis of difference between the original price and the present price of the shares. This in his view amounts to over stepping the jurisdiction by Commission as awarding damages falls within the domain of a Civil Court. Reliance was placed on (1995 SCMR 1431 and 1985 SC 69). It is argued that no two jurisdictions can have parallel jurisdiction. He further referred to Section 23 of the Contract Act and argued that in view of the said provision a contract entered into violations of Regulations was void as it was based on fraud. The same cannot be upheld in law. The Negotiated Deals, when barred under the Notification, cannot be given effect to under the provisions of Section 23 of the Contract Act, 1872 (the "Contract Act").

r) While concluding his arguments following facts were further raised to support the view that the contract between Respondent nos. 2 & 3 was even otherwise in violation of the provisions of Section 23 of the Contract Act, therefore, the Impugned Order could not be passed in favour of the same. It was contended that as per the statement of Respondent no. 3 he had only 300,000 shares for delivery against the purchase order by Respondent no. 4 of the total 1,002,500 shares. This shows the fraudulent character of the Disputed Transactions. A contract based on fraud cannot be enforced and in case of any dispute in this regard can only be decided by the civil court [1994 SCMR 150]. All purchases of the shares were made by Respondent no. 4 in the sub-account (021) of Diamond Industries, whose account was already in debit balance in huge amounts. Had the Disputed Transactions been allowed the same would have caused injury to LSE clearing house because the default on part of Respondent No. 4 was imminent in view of the common knowledge. Had the Disputed Transactions not been deleted, it would had further affected the investors' confidence and, therefore, were opposed to public policy [1984 SCMR 1; AIR 1933 Bom 209 and PLD 1985 SC 86].

5. The following submissions were made on behalf of Respondent no. 2: -

a) Respondent no. 2 was represented by Mr. Saleem Chamdia who stated that the basic issue involved in this matter is whether the Manager of LSE Clearing House deleted the transactions on valid grounds. The grounds taken for deletion of transaction are that these were (a) cross transactions (b) negotiated deal. Furthermore, there was apprehension on part of the Clearing House against the parties involved in transactions that the transactions are an attempt to shift

risk exposure. As for the jurisdictional issue, he submitted that I would leave it for Respondent no. 1 to argue on this ground.

b) Attention of the Bench was drawn to the regulation defining the term “negotiated deal”. It was argued that the said regulation clearly provides that such a deal can only take place outside the regular market whereas the Appellant has himself admitted that the negotiated deals were banned since 1998. Furthermore, the window through which the negotiated deals are operated was also shut. The Appellants have also admitted that the transactions were carried on LOTS, therefore, the question of negotiating the deal does not arise. It has also been submitted that the transactions were not executed within few seconds but over a period of 40-45 minutes and not all trades executed were cancelled only 23 out of 33 trades were cancelled. As for the statement and admissions made by Respondent no. 4, Mr. Chamdia submitted that Respondent no. 4’s acceptance and admission has no meaning as the prices of these shares were going down and Respondent no. 4 being a buyer naturally had not interest in honouring the said transaction. As for the shifting the risk of exposure it has been submitted by Mr. Chamdia that it is beyond his comprehension as to how any such risk could be apprehended where 300,000 shares were lying with the clearing house as share deposit. The grievance that Respondent no. 2 had, was that not only the transaction was not honoured but even the shares deposited with LSE were not returned and it was only with the intervention of the Commission in November that the said shares were returned. The irony, as argued by Mr. Chamdia is that objection is now being taken that receiving of the said shares by Respondent no. 2 establishes the point that he had no objection to cancellation/deletion of the transaction.

c) Mr. Chamdia further contended that when the same matter was referred back to LSE by the Commission, the said members were penalized only to the extent of Rs 25,000/- whereas now such gross violations are being alleged against them. With respect to statements made by members before the Board, Mr. Chamdia requested the Bench to take note of the fact that it is a difficult for a member to proceed against the Stock Exchange and one should not ignore or overlook the practical realities. It is for the Manger Clearing House who is an expert to proceed only after taking into account the relevant rules and regulations and appreciating the facts of the case, which in the present case LSE failed to do and exceeded its authority. He submitted that the Appellants are only referring to regulation 19(f) of LOTS whereas the relevant regulation 7 is more relevant and if these two are read together it would be clear that LSE had no power to delete an executed trade. He cited certain instances from the past where in May, 2000 crisis LSE paid to investors a huge sum of money although it was not lawfully obliged. He expressed his surprise that where there is a lawful claim and even demand note and payment orders were issued the claim is wrongfully denied by LSE. On the allegation of connivance it has been argued that had there been any connivance, the parties should have then opted for trading in maximum quantity and should have done it within seconds. As for the allegation regarding the subject shares being same as those of the suit

pending before the Sindh High Court, it was clarified that it was ABN which did not honour the transaction and hence the failure led to liquidating the transaction. LSE, however, in submission made by Mr. Chamdia has nothing to do with the suit as LSE is only related to second phase and is primarily required to allow honouring of the transactions traded on LOTS. Regarding the objection pertaining to jurisdiction of the Joint Committee, it has been argued that when the matter was referred to the joint committee it was a matter inter se members of Stock Exchanges for which the committee has jurisdiction. The submissions of the counsel for Appellant regarding failure on part of Commission to carry out investigation was also termed as frivolous as all the facts were known to the parties and there was nothing left to inquire about. Mr. Chamdia also pleaded that the Appellant has no basis to object to the relief granted to Respondent no. 2 as all that the Impugned Order requires LSE to do, is to honour the transaction. As a member makes payment and takes delivery from the clearing house and is not concerned with the counter party it is the prime responsibility of the clearing house to ensure settlement. However, he submitted that Respondent no. 2 in any event is not concerned as to who makes the payment whether it be LSE or Respondent no. 4.

6. The following submissions were made on behalf of Respondent no. 5: -

a) Mr. Arif Habib the ex-Chairman of Karachi Stock Exchange appeared on behalf of the said Exchange. At the outset it was pointed out that Respondent no. 5's interest in the pending adjudication is to ensure and maintain integrity of the market. It has been submitted that if one Stock Exchange transaction is not honoured other Stock Exchanges also gets affected. An instance was cited when there was no settlement default in KSE in the May crisis yet it was affected by the same. Having made his preliminary submissions Mr. Habib emphasized that the primary responsibility of a Stock Exchange is to settle the transaction. The basis of calling the deleted transactions irregular, three grounds have been taken by LSE out of which one is that the transaction was aimed at burdening the clearing house of LSE. He submitted that if two members enter into a trade, the clearing house takes deposit, ensures execution and if there is default sells in the market. The shortfall if any, is to be met by counter party and as stated by Mr. Chamdia the prime responsibility is of the clearing house to ensure settlement. Since in the present case exposure deposit had been given, LSE's act of deleting the transaction demonstrates malafide intention. LSE management was not of proper understanding, as LSE had no responsibility to pay for losses, it can infact to the contrary charge fee. As for shifting of exposure it was submitted that if market is open it is open for everybody. It is clear that there was no default and that Respondent no. 4 being a major market player his transactions were targeted. The allegations of connivance by LSE in Mr. Arif's view, cannot hold the ground as LSE itself admits that the transactions were executed on LOTS which entails the procedure that best price best timing gets preference and the said option is open to all. It is argued that even if the parties attempt to arrange, the system of LOTS is such that it lends transparency. LOTS have 250 to 300 terminals available to members who are watching the price and the transaction matches in the split of a second. Furthermore, it has been

argued that it is the good intent of Respondent no. 2 who has already then agreed to an arrangement that out of 2.5 million shares to be sold to ABN 1.5 million shares sold to LSE would be given back to ABN. Regarding the objection raised by the Appellant pertaining to awarding of damages it has been submitted that no damages have been awarded had that been the case it would have included interest/mark up rate as well. All that the order requires is that the rightful claim of Respondent no. 2 must be granted and the transaction must be honoured as the parties were willing to settle and payment order was received from LSE. It has been stressed that the deleted transaction should be honoured the way it was done in May crisis.

b) Mr. Habib emphasized that if trades will not be settled market players will lose their faith. He stated that it is not understandable as to why the transactions were deleted when the buyer had the necessary margin with him. It has been further argued that had the transaction been suspended than it could have been honoured between the parties. However, the transactions were cancelled. Therefore, the parties have no obligation to each other viz a viz transaction. He also expressed confidence in LSE that it will be able to work out either by raising funds or on its own. He cited an instance in the year 1992 when he was the President of KSE a member Zubaida Surmawala defaulted whose assets were worth rupees two crores only whereas the liability was fixed at four crores. Pricing was fixed in a way that two crores were donated by the members. He submitted that sanctity of transaction needs to be emphasized and it is for the members of LSE and LSE itself to honour the transaction, which was carried out on the system. LSE position is that of a guarantor and the system it offers must not fail

7. The following submissions were made on behalf of Respondent no. 3: -

a) Pir Ejaz Ahmed Bodla appeared and argued on behalf of Respondent No. 3. His first and foremost objection was with respect to the maintainability of the Appeal. In his view the appeal has no legality. He referred to the order addressed to LSE dated 7 December, 2001 which he argued is the basic order whether right or wrong, legal or illegal it had to be struck down if passed with jurisdiction. In his submission LSE acquiesce to this order and thus waived its right to raise any subsequent objection. Mr. Ejaz argued that the burden has been mischievously shifted on Respondent nos. 3 & 4. He submits that the subsequent order is an explanation of first order dated 7 December, 2000 and since the first order has already attained finality the present appeal is not competent. It has been argued that in order to establish that the deleted transactions were negotiated deals LSE is alleging use of intercom facility and basing the entire case on guesswork, surmises, conjectures, alleged admissions and have nothing concrete to substantiate the grounds taken for such deletion. He also adopted the argument of Mr. Arif Habib that had the transaction been suspended all parties would have been liable to honour the same. However, on cancellation LSE is solely and primarily responsible to honour the commitment.

b) As for challenging the grounds for holding the transaction as negotiated deal he submitted that the fact that (a) the transactions

were executed through LOTS (b) were between two brokerage houses (c) had no exposure (d) were executed almost in one hour in series of transaction (d) only 23 out of 33 were deleted and were discriminated against, whereas, 10 others were accepted and (e) in the absence of any pre-defined parameter regarding quantity or bulk of trade to be executed at a particular time, no question of violation of any law by the parties arises. It was reiterated that LOTS is a transparent system of bids and offers and it is not possible to select counter party of ones own choice. Transactions are queued up in order of dates and times. It has been submitted that the Appellant in narration of facts has attempted to create an impression that trading members had admitted committing an illegality and offence on their respective parts which is not correct. To the contrary both the trading members Respondent nos. 3 & 4 have acted in a bona fide manner and have been protesting against the decision of the Appellant as evident from their correspondence with the Appellant. In this regard letters dated 31 May, 2000 and 28 September, 2000 from Respondent no. 3 and letters dated 27 September, 2000 and 9 January, 2001 from Respondent no. 4 were also referred to. It has been argued that both the selling and the buying member were ready and prepared to perform their respective part of obligation and LSE had unlawfully and unjustifiably stopped completion of that transaction. Therefore, Impugned Order has rightly been passed. The findings of sub committee were termed arbitrary, capricious and conjectural in view of the Commission's order passed on 3 January, 2001. The counsel for Respondent no. 3 concluded his arguments with the submission that in his view the appeal is misconceived, repetitive, frivolous and hence merits dismissal.

8. The following submissions were made on behalf of Respondent no. 4: -

a) Mr. A. Rafay Alam appeared and argued for and on behalf of Respondent no. 4. At the outset of his submissions, Mr. Rafay appreciating and complementing the submissions made by Mr. Arif Habib informed the Bench that he would like to adopt the arguments of Mr. Arif Habib. However, his preliminary objection is with respect to impleading of Respondent no. 4 in the present case. It was argued that Respondent no. 4 is neither a necessary nor a proper party hence he should not have been impleaded in the present appeal. To support this argument it was stated that no relief has been claimed against Respondent no. 4 and further that he was impleaded after the limitation period for filing an appeal had lapsed. Reliance in this regard was placed on PLD 1964 SC 559 wherein Appeal filed, but respondent was added by way of application after limitation. It was observed that no doubt under Order XLI, rule 20 of the Code of Civil Procedure the Court has power in a proper case to allow a necessary party to be added as a respondent, but the power to allow a necessary party is discretionary and should not be exercised in case of extreme neglect. On 13 February 1963, the Court enquired suo moto why the employer was not added as a party in this case and the appellant thereafter on 19 February 1963, filed a petition for adding the employer as a respondent in the appeal. He however, even then did not file an application for condonation of delay [as the limitation period for the filing of the appeal had lapsed]. In the petition he merely stated that

through inadvertence he did not implead the employer as a party. The employer has acquired a valuable right, which we do not think should be taken away from him in the circumstances of the present case. The preliminary objection, therefore, ought to prevail……This is sufficient to determine the appeal against the appellant. Reference was also made to AIR 1935 Lah. 314 where the court held "that the court is not competent to allow the Appellant to implead a person for the first time after the limitation for appeal had expired". Respondent no. 4 was impleaded as a party two months after filing of the appeal which should not be allowed as litigants do not want to be hounded. Necessary party in Mr. Rafay's submission, is one in whose absence decree cannot be passed whereas Respondent no. 4 cannot be termed as necessary as there is no trade left for Respondent no. 4 to honour. He submitted that he is painfully aware of the fact that Code of Civil Procedure is not applicable and strictly binding to the proceedings before the Bench. However, as these proceedings stem from principles of natural justice the Bench should at least get inspiration from CPC and use it for providing the guiding principles.

b) As for the arguments on cross transaction, negotiated deal and shifting of exposure arguments submitted by other respondents were reiterated. It was submitted that since there is no breach of exposure question of shifting of exposure does not arise. On issue of connivance Mr. Rafay stated that right to trade is fundamental right and any act to prohibit lawful trades ought to be supported by solid grounds. Such grounds cannot be whimsical and arbitrary. While referring to the finding of LSE Board Committee dated 19 September, 2001 it was argued that there is no finding of LSE on record to show whether any intercom was infact used, therefore, this contradicts the very foundation on which LSE bases its allegation. Rebutting the allegations made against Respondent no. 4, it was stated that the letter allegedly signed by Respondent no. 4 cannot be relied upon as it was neither issued on Respondent no. 4's letter head nor bears his signature. Respondent no. 4, however, added that there are times when he signs similarly however, in the case of this letter he never singed such a letter. It was further pointed out that the letter does not bear any date of receipt nor any stamp of LSE which is used in the normal course of business. In this regard a standard format was shown. Mr. Rafay argued that in view of these submissions a name of his client should be cleared as a perfectly clear and lawful was wrongfully deleted. The admissions alleged against the parties under law must be true in fact and law which LSE has failed to prove. While concluding his arguments Mr. Rafay emphasized that the Bench must appreciate that while dealing in securities, in short in the Stock Exchange business, time is of the essence of the contract and since such transactions were deleted wrongfully by LSE, such an act is tantamount to frustration under Section 55 of the Contract Act. No obligation, therefore, can be placed on the buyer i.e. Respondent no. 4 nor he can be forced to enter into the agreement where ground circumstances have changed i.e. prices of shares have gone far below and the transactions were guillotined by LSE without default of either party involved. However, had the transaction been suspended it would have been a different case, the act of cancellation leaves no room for any revival.

9. The following submissions were made on behalf of Respondent no. 1:

a) Respondent no. 1 appeared and argued on behalf of Securities Market Division. He requested the Bench to take note of the working mechanism and the role of the Clearing House as emphasized by Mr. Arif Habib. He further adopted the arguments of all the Respondents regarding negotiated deals and cross transactions being invalid grounds in the particular case. He submitted that since most of the objections raised by the Appellant have already been taken care of, in order to avoid repetition and save the time of the Bench he would only argue on such points which have been overlooked by the parties. His first argument pertained to the act of freezing of trade by LSE. It was argued that LSE had not only acted illegally in deleting the trades but also in freezing them prior to such deletion. Attention of the Bench was drawn to the written representation made by LSE vide its letter dated 13 March, 2000. Reference was made to Regulation 16(f) which empowers LSE to freeze a trade in order to examine whether to allow such trades or prevent the same. It is argued that such freezing is to be exercised within some defined parameters which are provided in the regulation itself. It is based on either a drastic fluctuation of price of certain shares or an extremely high volume of trade. He stated that it is beyond understanding as to why similar transactions which were taking place in other brokerage houses were not frozen. In this regard, Respondent no. 1 referred to the order dated 31 July, 2000 of Mr. Tariq Iqbal wherein LSE was asked whether any action had been taken against the brokerage houses of Mr. Iqbal Khawaja, Mr. Naeem Anwer and Mr. Shahid Nauman Rana for similar transactions. However, LSE failed to give any justification. It was submitted that, as is evident from the minutes of the relevant board meetings and sub-committee meetings, that the acts of LSE in deleting the transactions was done without judicious application of mind. As there was nothing abnormal in the transactions of Respondent no. 2, LSE's act of freezing the transactions was illegal and was unjustly targeted against one investor. LSE never independently applied its mind in examining and determining the validity of the grounds alleged. In this regard he referred to the minutes of the committee of the Board held on 13 July, 2000. He further sated that the alleged admission of Respondent no. 4 that the transactions were executed to overburden and shift the exposure on LSE is without any basis because their own regulations safeguard LSE's position. In any event when LSE talks of overburdening they refer to a default situation and with regard to Respondent no. 4 it is clear that he never defaulted. Even if that were the case, the regulations of LSE require the defaulted members trades to be squared in the open market; his exposure to be utilized to lower the losses inflicted by such default and then the remaining loss is to be borne by the counter party (the hammer rule or hitter rule) which, in this case would be Respondent no. 3. Furthermore, in deciding whether to delete the transactions, LSE took a commercial decision on behalf of its members and their respective investors rather than performing the role of the frontline regulator. Therefore, the exercise of discretion was misconceived. It was submitted that the trades were deleted on the allegation of connivance which hurts the investors and it was only on pointing out of Mr. Tariq Iqbal, the then Commissioner,

that they imposed a nominal fine on its members. The power that they exercise is startling to note when compared to the allegations they have against the members which constitutes a serious offence. Regulation 2.03(b) empowers LSE to expel or suspend, however, no expulsion and suspension on fraud that should have been the course of action was adopted. The fact is LSE has been trying to squeeze the facts of the case to make the transactions fall within the scope and ambit of a negotiated deal. While addressing the objections regarding the lack of enquiry and investigation raised by the Appellant it was submitted that LSE keeps referring to Mr. Iftikhar Shafi's involvement in the whole matter. It is quite clear that what LSE is alluding to the group entity nature of the accounts held and operated by Mr. Shaffi and his consequential price manipulative acts. In this regard, Commission has already completed an enquiry on 31 August, 2000 into Mr. Shaffi's and Respondent no. 4's acts and has finalized its prosecution vide Commission's orders dated 9 April, 2001. Respondent no. 1 contended that acts falling within Section 17 of Securities and Exchange Ordinance, 1969 (including those of fraud and price manipulation which are being alleged against Respondent nos. 2 & 4 fall within the exclusive jurisdiction of Commission and, if that was the case, LSE miserably failed to bring this to the notice of Commission.

b) With respect to scope of Regulation 19(f), it was contended that what must be borne in mind is that even if such power does exist it cannot be absolute and has to be exercised judiciously. Where the grounds made basis for deleting the transaction are not sustainable in view of the relevant regulations the action taken by LSE cannot be termed justifiable. He further submitted that Regulation 19(f) is a general provision whereas Regulation 7 is a special provision which prohibits that a cancel order cannot cancel a trade completed with the specified order. Regulation 7 being the special provision Section 19 would not remain applicable.

c) As for the objections by the Appellant against the exercise of jurisdiction by Commission it has been submitted that it is an absurd argument by a frontline regulator to deprive an investor of its lawful right and then to claim that Commission has no power where the frontline regulator itself abuses its power hurting the sanctity of trade. The matter was first referred to the Joint Committee of the Stock Exchanges being considered a dispute between members of different stock exchanges. Subsequently it transpired not to be a dispute between the members but between the members against LSE. As such the matter was referred back to Commission pursuant to which the directive of 3 January, 2001 was given. The said directive as also argued by Respondent no. 3 attained finality keeping in view that the opportunity of hearing provided to LSE was never availed. Respondent no. 1 contended that LSE unequivocally accepted the said directive as can be seen from the letters dated 5 and 11 January, 2001 and took positive steps towards its implementation. It was only 3 months later that LSE requested Commission to provide it an opportunity of hearing. As for LSE's arguments with regard to having no knowledge of an "appeal" the same was completely untrue. Respondent no. 1 pointed out that LSE, in its own letters dated 5 and 11 of January, 2001 and even in their representation made in its letter dated 13

March, 2001 (which contained the request for a hearing) has referred to the letter of Respondent no. 2 as an appeal.

10. Having heard the parties at length and taking into consideration the relevant law and case law cited by the parties, the issues that have crystallized during the proceedings are primarily as follows:

a) Whether Suit No.1592 of 2000 pending before the Sindh High Court warrants stay of proceedings.

We have taken note of the Appellant's submission and after going through the relevant document it is clear that these were not provided at the earlier stage despite having enough time. As to the plea taken by the Appellant in his appeal that these could not be provided at the earlier stage because not enough time was granted or given to enable the parties in procuring such documents. It seems difficult to sustain such plea. Firstly, the suit was filed around before the written representation made by LSE to the Commission in this matter on *13 March, 2001* and subsequently hearing was held in *September 2001*. Even at the time of filing of the appeal these documents were not available with the Appellants, therefore, insufficiency of time is neither material nor has any merit. Even otherwise, ignoring lack of vigilance on part of LSE it is not convincing at all to stay the proceedings where the parties involved are distinct the issues involved are substantially different and there is no similarity in the relief prayed for in each of the proceedings. Moreover as pointed out by Mr. Habib and Mr. Chamdia the dispute between ABN and *Respondent no. 2* pertains to a different transaction whereas in the present case the transactions involved is also distinct and separate. The mere fact that it pertains or happens to overlap with some shares i.e. the subject matter of the transactions, it does not bar Commission to proceed to adjudicate upon the matter. We are, therefore, not convinced that such litigation pending warrants stay of proceedings before Commission.

b) Whether principles of natural justice have been violated:

In order to determine this issue what is relevant is to see whether the Appellants were granted an opportunity of hearing and whether such opportunity even if granted was adequate to enable the Appellant's to prepare the case. It has been contested by the Appellant that the directive issued on *3 January, 2001* restraining the Appellant from effecting the decision and directing to allow the settlement of the disputed transaction was issued without giving an opportunity of hearing and was based on findings of joint committee. Subsequently when the opportunity of hearing was granted the notice of hearing was deficient in providing the details and the Executive Director instead of adjourning the matter arbitrarily proceeded to decide the matter. We have reviewed relevant documents and the admitted position that transpires before this Bench in this regard is as follows: that on *3 January, 2001* Commission issued a directive restraining it from affecting the LSE decision. The directive was issued and an opportunity of hearing was given to LSE on *8 January, 2001* in the event it had anything to urge against the directive. On *5 January, 2001* and *11 January, 2001* LSE informed Commission that it had instructed its members to comply with Commission directive and also assured "full

cooperation" to Commission with respect to compliance with Commission directive. However, LSE failed to ensure compliance with Commission directive despite reminders being sent in this regard. On *13 March, 2000* LSE altered its earlier position and challenged the validity of the directive and desired withdrawal of the same on several grounds. LSE also requested for an opportunity of hearing. In this regard six months later a notice dated *7 September, 2001* was sent to the concerned parties referring to the matter as *Respondent no. 2's* appeal. Appellant's contention in this regard is that they were not aware as to which appeal Commission was referring to. Furthermore, despite their repeated requests Commission failed to provide LSE a copy of the appeal. In these circumstances it is the Appellant's view that the opportunity of hearing was denied as adjournment should have been allowed to enable Commission to decide the matter on merits. The position stated by *Respondent no. 1* has been confirmed that the Appellant had full knowledge regarding the matter as in its own letters dated *5 and 11 of January, 2001* and even in the representation made in its letter dated *13 March, 2001* (which contained the request for a hearing) LSE has referred to the letter of *Respondent no. 2* as an appeal. Taking all these factors into account one thing is clear that LSE has been blowing hot and cold. It is apparent on record that LSE had ample opportunity and sufficient time to contest the matter. However, LSE chose not to contest by indulging in trivial and technical objections which have no merit and even otherwise cannot be considered if substantial justice is to be administered. With respect to the objection that LSE was not clear as to which appeal the notice dated *7 September, 2001* for hearing was referring, it does not seem tenable because it is quite evident that LSE throughout had knowledge of the said matter and there was only one matter relating *Respondent no. 2* pending before the Executive Director. With respect to the issue of adjournment it is well settled that adjournments cannot be granted as of right, however, it may be granted in view of the exigencies confronting the parties subject to the bona fide of the parties. We have seen the case law cited in support of principles of natural justice and recognize the principles laid down in the said cases. It must be remembered that the application of these principles in the end is to be seen in light of facts and circumstance of each case, it is for this reason that we have not accepted the plea raised by the Appellant on this issue. As for the objection that the Impugned Order did not take into account the validity of the directive dated *3 January, 2001* and regulation 19(f), the same is discussed below.

c) Whether investigation was required under the SECP Act:

Regarding the plea that each and every decision while dealing with the complaint requires investigation, we must comment that this argument is unique. The provisions referred to and relied upon nowhere make it mandatory on Commission to conduct investigation in each and every case. In our view, need for such investigation is primarily dependent on the fact and circumstance of each case. In particular, a case where sufficient documents are already on record to decide a case it would be absurd to say that a probe is still required as a mandatory

requirement. Furthermore, the Appellants have taken this plea for the first time at this stage. No doubt the Commission has powers to investigate under Section 29 and 30 of SECP Act, however, so far the relevant facts and documents are in possession of the parties and the opportunity of hearing has been given it remains in the discretion of the concerned authority to proceed with the matter and in a manner it deems appropriate. There is no denying the fact that the discretion is to be exercised reasonably and judiciously, however, in the present case the Appellants have failed to point out as to how Commission acted arbitrarily in this regard and as to what material facts are still not available on the record. It is pertinent to note that the matter was itself investigated upon twice once by LSE's Committee and then Commission's Joint Committee. We have also reviewed the case law in this regard and note with utmost disappointment that no case is made out in support of Appellant's plea that an investigation ought to be carried out in each and every case while adjudicating under the SECP Act. We have carefully examined the provisions under the SEBI Act and those of the SECP Act and must state that the analogy drawn between the sections is misconceived and misleading. There may be certain commonality but the provisions cannot be termed as identical or corresponding in its scope and ambit.

d) Whether initial directive by SEC attained finality and Respondent No.4 was a necessary or proper party.

The issue of the initial directive becoming the final order and attaining finality in our view is not tenable as it can at best be termed as an interim order. The opportunity of hearing was provided subsequent to the said directive, therefore, the said directive only attained finality on passing of the Impugned Order. The argument raised by the counsel of Respondent no. 4 regarding the necessary and proper party may have merit, however, we are expected to administer laws with a minimum of procedural requirement. While doing so we are conscious of the fact that nothing should be done which is prejudicial of the interest of the parties. Without going into the necessity of discussing this issue in detail what needs to be appreciated is that Respondent no. 4 was an essential party to the transactions and impleading him as a party has facilitated the Bench in adjudicating upon this matter, therefore, doing the same before or after filing an application for condonation of limitation period is immaterial.

e) Whether LSE had power to delete the transactions and the power was judiciously exercised

Appellants have contended that the Impugned Order has failed to take notice of the most relevant provision regarding cancellation powers of LSE which is Regulation 19(f). In our view what must be borne in mind is that even if powers of cancellation are assumed to exists with LSE even where trade has been executed, such powers as pointed out by *Respondent no. 1* have to be exercised reasonably and judiciously and not arbitrarily. We have reviewed and examined the Impugned Order, which at pages 7 & 8 and paragraph 7 onwards clearly discusses the validity of the grounds on the basis of which such transactions were deleted. For ease of reference the relevant excerpts from the Impugned Order are reproduced hereunder:

Whether the transaction is a cross transaction or a Negotiated Deal.

LSE alleges that the manager of its clearing house informed its Managing Director that during the trading cycle from 22 May, 2000 to 26 May, 2000 the trades in question, executed on behalf of Respondent no. 2 by Respondent no. 3 to the counter party Respondent no. 4, appeared from the record of transaction sheets and time stamps to be cross transactions. Pursuant to such information, LSE invoked its purported powers under the Trading Regulations and froze the Transactions. The same was later deleted from LOTS on 30 May, 2000. I have reviewed the Trading Regulations and note that the definitions for cross trades (both explicit and implicit) require that the buyer and seller originate from the same brokerage house. This is definitely not the case here. Furthermore, LSE does not possess the powers to expand arbitrarily the scope of the Trading Regulations to apply to events not covered by the Trading Regulations. As such, I find that LSE did not have the power to freeze the Transactions.

LSE has alleged that, pursuant to its investigations into the matter, it found that the Transactions were, in fact, a Negotiated Deal and in substantiation of the same referred to statements made by Respondent nos. 3 & 4 to the effect that the Transactions were "tailor-made cross transactions to escape the LSE's Exposure/Loss Regulations". The definition of a Negotiated Deal is provided in Regulation-2 of the Trading Regulation as follows:

"Negotiated Deal" means a deal which has been negotiated between two parties outside the regular market.

The provisions regarding Negotiated Deals are contained under Regulation 11 of the Trading Regulations. A bare perusal of Regulation 11 shows that Negotiated Deals are not prohibited per se. In fact, these may be allowed in the discretion of LSE. To understand the concept of the 'Negotiated Deal', one must first appreciate the reasons for its introduction in the securities markets. With the advent of the on-line trading systems in the securities markets, an option was left to the members of the stock exchange to access a window on their trading terminals wherein trades were allowed to be negotiated (in so far as any and all material terms) with another member exclusively. The power to allow such trading was codified in Regulation 11(a) of the Trading Regulations.

However, at the time when the Transactions were executed, LSE had effectively banned Negotiated Deals. Infact, such ban had been in place since 1998. Thus the option for brokers to access the special window on their trading terminals which allowed Negotiated Deals, had been shut down by LSE. Hence, no member of the LSE at the time of the Transactions could enter into a Negotiated Deal, as envisaged by the Trading Regulations or by custom and practice. In view of the above, it is clear that the Transactions were not cross-transactions or negotiated deals within the meaning and scope of the Trading

Regulations. The transactions under question were open market deal carried out as per rules and regulations of LSE.

f) Regarding transfer of risk exposure the observation made at page 10 of the Impugned Order is relevant:

…The clearing house of an Exchange acts like a guarantor for the buying and selling member towards the settlement of trade and in order to ensure settlement of trade, it requires that both the buying and selling members deposit margins at prescribed rates. In the present case, both Respondent no. 3 and Respondent no. 4 had fulfilled their obligations to the clearing house by depositing the requisite margins and thereby showing their intention to honour the trade. However, even where the two members had met with all the terms and conditions in respect of their separate contracts with LSE clearing house, the clearing house itself first froze and then deleted the trade (at least four days after Respondent no. 3 and Respondent no. 4 had executed the trade itself) and, as such, reneged on its mutually exclusive liabilities to Respondent no. 3 and Respondent no. 4. Hence, I am of the view that LSE did not have the power to delete the Transactions.

In normal course of business a selling member will deliver shares to clearing house and the buying member will make payment to the clearing house. In case the buyer fail to make payment to the clearing house what course the Exchanges follow. The Exchange will honour the trade by selling the shares delivered to it in the open market and in case of losses will recover the losses from the buyer. In case the buyer fails to pay for the losses, the Exchange would declare the member defaulter and would dispose off all his assets (such as membership card, room etc.) to recover losses. In case losses are still left the amount sanctioned for clearing house protection fund would be utilized as per regulation. This is also done to honour trade.

g) Regarding the act of LSE whether it had the powers to freeze the transaction even prior to deletion it has been observed in the Impugned Order that:

…I, however, point out that Market Control works to monitor the securities markets on certain fixed standards (above and below which they are empowered to freeze). In view of the fact that trades of similar volumes and even higher volumes in Adamjee Insurance shares were being allowed by Market Control during the month of May, 2000 and before, I see no justification that Market Control should have chosen to single out the said Transactions for freezing, as this amounts to discrimination.

11. We find ourselves in agreement with the observations stated above and made by the single Commissioner for the reasons provided therein are clear and convincing. Furthermore, we also recognize significance of honouring trades, which indeed is of paramount importance in Stock Exchanges. We are also of the view that without sanctity of trade, Stock Exchanges cannot function to generate confidence

and trust of investors. If the Stock Exchanges are allowed to take arbitrary and unjustified decisions it will irreparably damage the image of the Stock Exchanges in Pakistan. In our view when the basis of exercise of such power purported to be conferred on LSE under Regulation 19(f) has been so clearly dealt with and held untenable in law, then it is only an additional point and not a material issue whether LSE had such powers of cancellation. As stated earlier assuming the fact that LSE had such powers to exercise LSE has failed to establish that it exercised its discretion on sound and tenable grounds. The reliance on admissions made by the parties strongly stands rebutted from the record as well as during the hearings and independent of these admissions LSE has not been able to substantiate the grounds taken for such deletion. Therefore, we have no hesitation in upholding the Impugned Order to the extent that the deletion of transaction by LSE was unlawful. The intentions whether be good or bona fide the exercise of discretion certainly is whimsical and without any merit.

12. Whether SEC has jurisdiction to grant relief in terms of the Impugned Order:

The Appellant has vehemently contested the jurisdiction of Commission for granting the relief in terms of the Impugned Order. It has been argued that Commission cannot be allowed to settle private disputes between parties and or to grant damages. The scope of remedy, which may be granted against LSE, is restricted to Section 7 of the Ordinance and Section 20 of the Act provides general regulatory powers. The Appellant in this regard referred to sub clauses of the said provision and termed them as merely subsidiary clauses. With particular reference to sub clause (g) of clause (6) of Section 20 it has been argued that independent of the Ordinance, no action can be taken in pursuance of the said provisions under the Act. The submissions of the Respondents in this regard are primarily to the effect, that all that the Impugned Order requires is to honour the transaction as it existed prior to the date of deletion, nothing more has been asked, no interest or mark up has been charged on it, therefore, it cannot be argued that losses in terms of damages have been awarded. Argument from the side of the Securities Market Division is that the objection that Commission has no power to grant relief against LSE is an absurd argument. A frontline regulator cannot deprive an investor of its lawful right and then claim that Commission has no power against such abuses which hurts the sanctity of trade. In our considered view both the parties are partly correct in their views, however, the issue before us is whether under the circumstances SEC has jurisdiction to force LSE to “honour the deleted transactions” the said phrase quite apparently indicates that LSE has to step into the shoes of the original buyer i.e. Mr. Malik and in our view that is tantamount to ordering for performance of a contract which infact never existed between the two parties. Secondly, when we speak of LSE or a clearing house acting as a guarantor it is more in the sense of a facilitator and, therefore, it cannot be asked to step into the shoes of the party whether buyer or the seller and assume their obligations. However, if owing to the acts or omission of a clearing house any party suffers it must be penalized in accordance with law but cannot be forced to honour the transaction on behalf of the counter parties.

Having said the above, we would like to clarify that we are not in agreement with the Appellant’s view that the scope of remedy, which may be granted

against LSE, is restricted to Section 7 of the Ordinance and Section 20 of the Act provides general regulatory powers. The Appellant's argument that sub clauses of Section 20 are mainly subsidiary clauses is misconceived. In this regard guidance can also be sought from Securities and Exchange Board of India Vs Alka Synthetics Ltd. and others (AIR 1999 Gujrat 221) where the High Court has made some enlightening observations. While dealing with Section 11 of SEBI Act which is more or less analogous to Section 20 of the Act. For purpose of clarity the relevant part of these provisions is reproduced hereunder:

(1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for –

(a) regulating the business in stock exchanges and any other securities market;

…..

13. The above provisions are similar to Section 20(1), (4)(b) read with sub clause (g) of clause (6) of Section 20 of the Act:

20. Powers and functions of the Commission.---(1) The Commission shall have all such powers as may be necessary to perform its duties and functions under this Act.

……

(4) The Commission shall be responsible for the performance of the following functions:

……

(b) regulation the business in Stock Exchange and any other securities market;

……

(6) In performing its functions and exercising its powers, the Commission shall strive--

…….

(g) to take whatever action it can take, and is necessary, in order to enforce and give effect to the Act and the Ordinance or any other law.

14. Coming now to the judgment cited above Securities and Exchange Board of India Vs Alka Synthetics Ltd. and others (AIR 1999 Gujrat 221), attention is drawn to the following:

……so far as the authority of law in the SEBI to issue such directions is concerned, such authority to take measures as it thinks fit is clearly discernible on the basis of the provisions contained in S.11 read with S.11B of the SEBI Act. Merely because in S.11(2) it is provided that, "the measures referred to therein may provide for ….." cannot be taken to mean that such measures have to be laid down in advance. It is a matter of common knowledge that the SEBI has to regulate a speculative market and in case of speculative market varied situations may arise and all such exigencies and situations cannot be contemplated in advance and, therefore, looking to the exigencies and the requirement, it has been entrusted with the duty and function to take such measures as it thinks fit. Thus the measures cannot be laid down as a one time exercise to be followed in defined cases. SEBI has to rise to the occasion for taking appropriate measures to combat even such situations in the speculative market, which may not be conceived in advance. We have to, therefore, consider and interpret the power of SEBI under the provisions so as to see that the objects sought to be achieved by Act is fully served, rather than being defeated on the basis of any technicality. Instead of general principles law, in such cases we have to consider the matter on first principle. The first principle is that the provisions of an Act have to be given a meaning so as to advance the object sought to be achieved by that Act. The duty and function had been entrusted to take such measures as it things fit and in order to discharge this duty, the power is vested under S.11B. In such a situation, it cannot be said that there was no authority of law with the SEBI to take appropriate measures. Now the question arises as to whether such measure should essentially be provided and published in advance. No one can be expected to do any task which is impossible and whereas we have already observed that the measures have to be taken to meet a particular eventuality, which may or may not be conceived earlier, there is no question of laying down such measures in advance and publishing the same. Thus, there is an authority under law to take the measures and merely because the measures have not been laid down in advance and published, it cannot be said that SEBI had no authority under law to issue the directions, as contained in the impugned order. The authority has been given under the law to take appropriate measures as it thinks fit and that by itself is sufficient to cloth the SEBI, with the authority of law. In Corpus Juris Secundum at page 477 the word, 'measure' has been given the following meaning:

"Anything devised or done with a view to the accomplishment of a purpose; a plan or course of action intended to obtain some object, any course of action proposed or adopted by a Government."

……

15. In view of the above, the Bench is of the opinion that Commission has the authority under law to take necessary actions under the provisions of the Act independent of the Ordinance. However, in the present case, under the circumstances we consider it appropriate that LSE be warned and reprimanded to refrain from committing such violations and the concerned division is hereby directed to take action against the Directors who were responsible for such wrongful deletion. As for losses suffered by Mr. Motiwala on account of such deletion, since this is a quasi-judicial body and the exercise of its jurisdiction to grant compensation is

confined to certain parameters and in our view in the present case where issues such as mitigation are significantly relevant, we consider that the courts of law are more appropriate forum for redressing such grievances. In view of the foregoing we uphold the deletion of transaction as unlawful and Mr. Motiwala may seek redressal of his grievances viz a viz compensation for the loss suffered by him due to such deletion before the appropriate forum.

Announced : Islamabad
27 June, 2002

(ABDUL REHMAN QURESHI)
Commissioner
(Enforcement & Monitoring)

(N.K. SHAHANI)
Commissioner
(Insurance & Information Technology)