Appellate Bench Orders
Before the Appellate Bench No.1 (Reconstituted)

July 30, 2002

Before Appellate Bench No. 1 (Reconstituted)

In the Matter of

Appeal No. 19, 27 & 28 of 2002

Appeal No. 19 of 2001

Mian Nisar Elahi ---------- Appellant
-v-
Syed Aimer Masood and others----------Respondents

Appeal No. 27 of 2001

Tanveer Malik----------Appellant
-v-
Syed Aamir Masood and others----------Respondents

Appeal No. 28 of 2001

Mian Iftikhar Shafi----------Appellant
-v-
Syed Aamir Masood and others----------Respondents

Impugned Order passed by:	Abdul Rehman Qureshi, Commissioner, Enforcement & Monitoring
Date of Impugned Order:	9 April, 2001
Dates of Hearing:	1. Miscellaneous applications: 13 & 28 December, 2001, 1 & 24 January, 2002, 1 March, 2002, 10 April, 2002 and 6 May, 2002 2. Main case: 16, 17, 21 & 22 May, 2002 and 18 July, 2002

Present:

For the Appellant:

Appeal No. 19 of 2001 (Mian Nisar Elahi):

Mr. Faisal Naqvi of Bhandari and Naqvi, Advocates appearing on behalf of Mr. Aitzaz Ahsan, Senior Counsel for Appellant.

Appeal No. 27 of 2001 (Tanveer Malik):

Mr. Faisal Naqvi of Bhandari and Naqvi, Advocates appearing on behalf of Mr Aitzaz Ahsan, Senior Counsel for Appellant

Appeal No. 28 of 2001 (Mr Iftikhar Shafi):

1. Mr Iftikhar Shafi, Appellant, appeared in person
2. Mian Mumtaz Abdullah, an authorized representative of the Appellant
3. Mr Irfan Qadir, Senior Counsel for the Appellant

For Respondent No.s 1 & 2 (SEC):

1. Mr Aamir Masood, Director (S-III), Securities Market Division, SECP
2. Mr Aly Osman, Joint Director, Securities Market Division, SECP

For Respondent No. 3 (LSE):

1. Mr Aamir Zareef Khan, Deputy Secretary (Legal), LSE
2. Mr Muhammad Arif Saeed of Hassan & Hassan Advocates, counsel of LSE.

For Respondent No. 4 (Muhammad Iqbal Khawaja):

1. Mr Omer Iqbal Khawaja, authorised Representative of Muhammad Iqbal Khawaja
2. Asadullah Javied, authorized representative of Muhammad Iqbal Khawaja,

Respondent No. 5. (Naeem Anwar):

Mr Mirza Mahmood Ahmad of Minto & Mirza Advocates, counsel for Mr Naeem Anwar

Order

1. These proceedings arise out of three Appeals; Appeal No. 27 of 2001 filed by Mr. Tanveer Malik ("Appellant (TM)"), Appeal No. 19 of 2001 filed by Mian Nisar Elahi ("Appellant (NE)"), Appeal No. 28 of 2001 filed by Mr Iftikhar Shafi ("Appellant (IS)") against the orders dated April 9, 2000 passed by Mr. Abdul Rehman Qureshi, Commissioner, Enforcement & Monitoring of Securities and Exchange Commission of Pakistan ("SEC").

2. Even though separate hearings were given to each of the Appellants,

the subject matter, the facts and the issues involved in respect of each of the three Appeals are primarily the same. As such we find it expedient and efficacious to dispose of the Appeals by this single Order. The Appeals first came up for hearing on December 13, 2001 and then on December 28, 2001, January 1, 2002, January 24, 2002, March 1, 2002, April 10, 2002, and May 6, 2002 during which certain miscellaneous applications filed by the Appellants in connection with their Appeals were argued by the parties and disposed off by the Bench.

3. The Appeals subsequently came up for hearing of the main case on May 16, 2002, and then, May 17, 2002, May 21, 2002, May 22, 2002 and finally on July 18, 2002 during which each of the Parties were given an opportunity to give detailed arguments, submissions and evidence in support of their case. Advocate Mr Faisal Naqvi appeared on behalf of Appellant (NE) and Mr. Tanveer Malik Appellant (TM). Mr Iftikhar Shafi appeared in person and was also represented by Mian Mumtaz Abdullah and his counsel, Mr Irfan Qadir. The Respondents No. 1 and 2 were represented by Mr Aamir Masood, Director and Mr Aly Osman, Joint Director of the Securities Market Division of SEC. The Respondent No. 3, LSE were represented by Mr Aamir Zareef Khan and its counsel, Mr Muhammad Arif Saeed. Mr Omer Iqbal Khawaja and Asadullah Javied appeared on behalf of Muhammad Iqbal Khawaja, the Respondent No. 4. Mr Mirza Mahmood Ahmad occasionally appeared on behalf of Respondent No4 and Mr. Naeem Anwar, Respondent No. 5.

4. The brief facts of the case leading upto the filing of the Appeals are as follows:-

i. During the period January to June 2000 the Lahore Stock Exchange (“LSE”) and Karachi Stock Exchange (“KSE”) exhibited a definite pattern of boom and bust cycle. The Stock Market Index rose sharply in a matter of just 12 weeks from January to March 2000, and then receded back with similar momentum in a matter of 8 weeks to the January 2000 level by the beginning of June 2000. This high degree of volatility in share prices was prominent in the scrips of Adamjee Insurance Company Limited (“AICL”) and Bank of Punjab Limited (“BOP”). At the beginning of January, 2000 the index was at 1457 points and the turnover stood at 131 million shares per day. The index peaked on March 22, 2000 at 2054 and trading volume of 395 million shares. Over a period of two months ending on May 29, 2000 the index witnessed a fall of 625 points to 1429 points with a decline in trading volume to 240 millions shares per day. Majority of the data thus covers the important period of January to June, 2000. During the period January to March, 2000 AICL and BOP registered an increase of 227% and 144% respectively. Average daily turnover of these shares attained a level of 10.07 million and 6.7 million shares respectively. Out of this 11% and 17% of the trading volume resulted in deliveries/settlements, carry over trades (“COT”) were in the region of 31% and 40% respectively. The badla rates for AICL and BOP went up from 18% in January, 2000 to 48% by March/April, 2000. In the preceding 18 months the average monthly rates for badla in these scrips ranged from 18% to 20%.

ii. On the last settlement day in May 2000, May 31, and on the subsequent settlement day of June 7, 2000, the brokerage houses of certain members of the KSE and LSE including Hanif Moosa, member of the KSE and Appellant (IS), Naeem Anwar, Muhammad Iqbal Khawaja and Shahid Nauman Rana who were members of the LSE failed to make payment to the clearing houses of KSE and LSE. Following these events, the KSE and the LSE were shut down which was an unprecedented

event in the history of Pakistan. The financial position of the stock exchanges were exacerbated by a panic in the markets. The LSE was on the verge of total collapse. In this situation the SEC arranged lifeboat funds from various financial institutions and other brokers in order that LSE could meet its liabilities in the absence of payment from defaulting brokers.

iii. On June 1, 2000, LSE suspended the trading rights of Appellant (IS) and a number of other defaulting brokers.

iv. On June 5, 2000 LSE suspended the membership rights of Appellant (IS), Mr Naeem Anwar, Muhammad Iqbal Khawaja and Shahid Nauman Rana. On the same date, Appellant (IS) together with his brother, Mr Waqar Shafi entered into an agreement dated June 5, 2000 with LSE wherein Appellant (IS) agreed to satisfy the liabilities arising in the latter three brokerage houses and issued two post dated cheques in its favour for a total amount of Rs. 100,000,000.

v. On June 12, 2000, the Central Depository Company ("CDC") Accounts of Appellant (TM) were suspended by the CDC on the instruction of SEC. This order was subsequently modified by SEC Order dated July 25, 2000, lifting the restriction on all but two of the Appellant (TM)'s CDC Accounts, namely, the sub-accounts named Mian Nisar Elahi and Diamond Industries Limited as LSE was claiming that the shares in the said accounts had been accumulated by the Appellants through price manipulation and in apprehension of such a contravention the said restrain was placed.

vi. On June 17, 2000, SEC appointed an independent enquiry committee under Section 21 of the Securities and Exchange Ordinance, 1969 (the "Ordinance") and Section 29 of the Securities and Exchange Commission of Pakistan Act, 1997 (the "Act") to conduct an enquiry into the affairs of LSE and KSE with respect to the causes of the stock market crisis. The Enquiry Committee was headed by Mr Etrat H. Rizvi and its terms of reference included identifying with available evidence individual brokers and investors who were involved in, among others, Price Manipulation, Cornering and Front Running particularly in the shares of BOP, Dewan Salman, Dhan Fibre, and AICL.

vii. The Enquiry Committee finalized its report on August 31, 2000. Copies of the Report were distributed to the Stock Exchanges by the SEC who directed the former to provide copies to any member or investor upon request. A copy was provided by the SEC directly to Appellant (IS) following his written request. Based upon the said Report, the SEC initiated a verification process in which it accumulated information data by interviewing the Appellants and Respondent brokers at LSE recording their signed statements, obtaining specific trading data relating to AICL and BOP scrips from brokers who maintained accounts on behalf of the Appellants obtaining written submissions from the managements of the Stock Exchanges, and CDC records.

viii. On March 29, 2001, after completing the verification process SEC through Respondent No. 1 issued Show Cause Notice dated March 29, 2002 (the impugned notice) against Appellant (NE) and Appellant (IS), alleging that they had violated Section 17 of the Ordinance and failed to discharge their liabilities to various brokers of the LSE and KSE thereby causing the Stock Exchanges to close down and nearly causing the financial collapse of LSE. They were accordingly directed them to

show cause in writing by April 6, 2001, as to why

(a) SEC should not punish them for violations of Section 17 by imposing a penalty on them under Section 24 of the Ordinance and/ or initiating criminal proceedings in a court not inferior to a court of sessions under Sections 24 and 25 of the Ordinance; and

(b) the liability accruing in favour of the LSE, KSE and various brokers should not be enforced against them. The Impugned Notice also gave them an opportunity of hearing before the Respondent No. 2 at the offices of the SEC on April 6, 2001.

ix. Simultaneously, SEC through Respondent No. 1 issued Show Cause Notice dated March 29, 2001 against Appellant (TM) alleging that Appellant (TM) knowingly and willfully facilitated Appellant (IS) and Appellant (NE) in manipulating the share prices of BOP and AICL and thereby violated Section 17 of the Ordinance, and violated Section 24 of the Central Depositories Act, 1997 (the "CD Act"), and directed him to show cause in writing by April 6, 2001 as to why SEC should not

(a) impose a penalty on him under Section 24 of the Ordinance and/ or initiate criminal proceedings against him under Section 24 read with Section 25;

(b) remove him under Section 7 of the Ordinance from his membership of the LSE;

(c) impose a penalty on him under Section 28 of the CD Act, and/ or initiate criminal proceedings against him under Section 28 read with Section 31 of the CD Act. The impugned Notice also gave him an opportunity of hearing before the Respondent No. 2 at the offices of the SEC on April 6, 2001.

x. On April 2, 2001, LSE, appeared before the Respondent No. 2 and argued in support of their claims against the Appellants and written submissions earlier furnished to the SEC.

xi. On April 6, 2001, the hearings before Respondent No. 2 took place. Appellant (NE) along with his legal counsel, and Appellant (IS) with his representative Mian Mumtaz Abdullah of M/s Abdullah Associates (Consultants), Appellant (TM) and his legal counsel, Khawaja Omer Iqbal, representative of Iqbal Khawaja, Naeem Anwar, and Shahid Nauman Rana, together with their legal counsel were present. The Appellants submitted requests for adjournment and requested copies of documents, including the Enquiry Report, on the basis of which allegations were made in the Impugned Notice. Request for adjournment was not acceded to. However, after hearing the parties who opted to remain at the hearings to argue the matter the Respondent No. 2 thereafter passed two orders dated April 9,

2001.

xii. The order dated April 9, 2001 against Appellant (IS) and Appellant (NE) directed that:

a. criminal proceedings be initiated against the Appellants under Sections 24 and 25 of the Ordinance, 1969;

b. Appellant (IS) be removed from his membership of LSE with immediate effect under Section 7; and

c. the Board of KSE and LSE form a combined committee within 3 days to decide the quantum of all claims of LSE against the Appellants and other brokers including Iqbal Khawaja, Naeem Anwar, Shahid Nauman Rana, and claims of KSE/ certain members and settle the same on a pro rata basis against the shares held in the CDC sub-account titled Mian Nisar Elahi held with the brokerage house of Appellant (TM).

xiii. Simultaneously, the Respondent No. 2 passed the impugned order dated April 9, 2001 against Appellant (TM) directing that

(a) criminal proceedings be initiated against Appellant (TM) under Section 24 and 25 of the Ordinance, 1969 and Section 24, 28 and 31 of the CD Act, 1997;

(b) Appellant (TM) be removed from his membership of the LSE with immediate effect;

(c) LSE be directed to act on Appellant (TM)'s removal in accordance with LSE's own Rules and Regulations;

(d) the Order dated July 25, 2000 of the SEC shall remain valid and binding as against the account named DIL until such time as the SEC has fully investigated, heard and passed an order on whether DIL played any part in and/ or committed any violations of law in respect of trading in the securities market or any one or more of

the Directors of Board of DIL have committed any violations of securities laws or the Companies Ordinance, 1984.

5. The present Appeals arise out of the above impugned orders. The arguments and submissions made by the parties in these Appeals are recorded as follows:

Submissions for and on behalf of the Appellant IS

6. The learned senior counsel, Mr Irfan Qadir, on behalf of Appellant (IS), after briefing the Bench with the facts of the case, made the following submissions:

i. At the outset, the learned counsel, Mr Qadir submitted that the impugned order has made essentially two directions against the Appellant (IS), firstly, that of removal of his membership of the LSE, and secondly, that certain claims against him have been directed to be adjudicated upon by a committee to be constituted with representatives of the LSE. He submitted that the second direction is not only beyond the jurisdiction of SEC but has been rendered ineffective after passing of the order of the Supreme Court dated July 16, 2001 in respect of W.P. 1344/ 2001, which according to the learned counsel, directed that the issue of default and removal from membership is to be decided by a civil court.

ii. Objecting to the jurisdiction of the Respondent No. 2 passing the impugned order, the learned counsel emphasized that since the offence of price manipulation entails criminal punishment, the same could have been only heard by two Commissioners as required under the Act and not by a single Commissioner.

iii. The purpose of price manipulation as defined under Section 17 of the Ordinance is to make wrongful gain, however, in this case, the Appellant (IS) only incurred losses. Furthermore, fraud is an essential element of the offence as defined in S. 17. As regards the meaning of active trading in Section 17(e)(ii) he said that trading and appearance of trading are two different things. Appearance of active trading means persuasion through e-mails or letters or phone calls in order to disseminate information.

iv. The Appellant (IS) filed a civil suit against LSE for damages of upto Rs 1 billion challenging the fact and quantum of his default declared by the LSE. The Supreme Court whilst disposing of the Appeal filed by Appellant (NE) did not of itself confer jurisdiction upon the Appellate Bench, but its Order recognized and declared that the appropriate appellate forum with respect to the impugned order was Appellate Bench.

v. He then proceeded to narrate factual aspects which directly led to the Appellant (IS) suspension by LSE on May 30, 2000. On May 18, 2000 the Appellant (IS) had an equity of Rs. 17 crores, however, by May 30, 2000 this had fallen to Rs. 12 crores, not because of trading losses incurred by Appellant (IS) but because the value of his exposure deposited with LSE had fallen following the sudden and abrupt amendment of the Exposure Regulations by KSE and due to the resultant fall in the market that took place. On Thursday, May 25, 2000 the Appellant (IS) received a

notice from LSE requiring him to deposit Rs. 10 crores in 30 minutes otherwise his trading terminal would be closed. The Appellant (IS) verbally informed LSE that he could no longer deposit the prescribed amounts and that he wanted to square up his position with the clearing house. Notwithstanding Appellant (IS) request the LSE Board did not square up his position. On Tuesday, May 30, 2002 he received a further Notice from LSE requiring him to deposit another Rs. 12 crores inspite of the fact that LSE was well aware that he was unable to make any deposit. The Appellant (IS) then requested the LSE Board in writing by his letter dated May 30, 2000 (Annexure A/3 of his Appeal at page no. 48) that he could no longer meet his exposure requirements and he wishes his outstanding position to be squared up.

vi. According to the learned counsel, the cause of the above events was LSE's failure to follow its own exposure and default regulations. Reference was made to Rule 2(1) of the Member's Default and Procedure for Recovery of Loss Regulations, which according to him places an obligation upon the LSE Board to suspend any member who fails to deposit the prescribed amount following a notice issued by the Exchange and square up his losses and gains. However, in the Appellant (IS) case this was never done at the appropriate time; although his trading rights were suspended on May 30, 2000, his position was not squared up until June 5, 2000, thereby resulting in further losses. He added that the change in the exposure rules should not have been abrupt and the Enquiry Committee itself has examined this matter and given a clear cut finding in the Enquiry Report at page 23:

"As a matter of good governance, the changes in exposure and loss requirements conveyed by Notice of April 19, 2000, should have been approved by the Board and time period should have been given for its implementation to enable the major players to adjust their positions. Although this act of the Management was, in principle, prudent and timely for risk management but implementation had remained weak and patchy".

In this context he referred to the US Securities and Exchange Act, 1934 which he asserted provides ample time to effect a change in the exposure regulations. He claimed that due to the hurried changes in the exposure rules, his client was the direct affectee of the sudden changes.

vii. According to the learned counsel, there was a close linkage and connivance between LSE and the Securities Market Division of SEC and urged that investigations should be carried out. The learned counsel submitted that LSE was separately heard on April 2, 2001 in camera and behind the back of the Appellants. As they do not know what transpired, this information should be provided to them.

7. The authorized representative of the Appellant (IS) Mian Mumtaz Abdullah made the following additional submissions:-

i. On the principle of Natural Justice it was argued that the impugned order violates laid down and well settled principles of natural justice and thus is liable to be declared unlawful, void and of no legal effect. On March 29, 2001 the impugned notice was issued to the Appellant (IS) and was received on March 30, 2001, wherein a completely new charge, i.e. of some so-called group was introduced for the first time by the Respondents. The Appellant appeared before the Commissioner on April 6, 2001 at 9.30 a.m., and requested verbally as well as in writing for necessary documents/ evidence/ statements of witnesses, as well as

reasonable time to answer to the charges. The Appellant (IS) until that time had no idea about the so-called "further investigation" on which the impugned notice and the impugned order relies heavily. The Appellant (IS) was never contacted or referred to in any such investigation. No such investigation report has ever been made available to the Appellant (IS). Apparently, all such investigations went on behind the back of the Appellant (IS). The impugned order relies heavily on the so-called "further investigations". The Appellant (IS) was never contacted or referred to in any such investigation. No such investigation or report has been made available. It is stated that between March 30, 2001 to April 6, 2001, the Appellant (IS) was given six days out of which three were public holidays. Thus the Appellant (IS) had three days in which he had to collect evidence and reply to the lengthy charges which cannot from any stretch of imagination be termed "reasonable". Copies of evidence relied upon by the impugned notice were not provided to the Appellant (IS) alongwith the impugned notice or at any other time. An opportunity to rebut the evidence relied upon by the respondents was thus denied to the Appellant (IS). Statements of witnesses were never placed before the Appellant (IS) and opportunity to cross-examine them was never provided. As a matter of fact, the statements of witnesses and their presence was completely and deliberately withheld from the Appellant (IS) even during the hearing.

ii. That the Appellant (IS) request for adjournment was flatly refused. The attitude of Respondent No. 1, who was present during the hearing, in particular, was very unreasonable and as a matter of fact he appeared from all respects to be leading the proceedings. He pointed out to scores of files setup in the middle of the conference table and asked the Appellant (IS) and his counsel to scrutinize the same. The Appellant (IS) insisted that he be provided copies of the same and time to consult his own record which was denied on the pretext that the matter had to be decided the same day because of a Court Order in WP 1344/ 2000. The hearing ended and the Appellant (IS) was asked to leave amidst protests.

iii. Alleging bias, it was argued that the Appellant (IS) name was placed on the Exit Control List of Pakistan on June 5, 2000 by the Ministry of Interior, Government of Pakistan, Islamabad, on the instance of the Respondent No. 2 vide his letter dated June 5, 2000. In the letter to the Ministry of Interior the Commission had determined that the Appellant had siphoned off Rs. 720 million of investor's money and that he had been declared a defaulter by the LSE. The language of the said letter appeared to be a conclusive finding of SEC.

iv. That within minutes of the passing of the impugned order, LSE, purporting to act upon the impugned order, expelled the Appellant (IS) from the membership of LSE, confiscated the offices along with the records of the Appellant (IS) and thereafter proceeded and attempted to auction the membership as well as the offices of the Appellant (IS). In similar manner LSE also acted against the Appellant TM. The Appellant (IS) being aggrieved and disappointed by the biased attitude, high handedness, unfair and unlawful manner of dealing of the Respondents, preferred to approach the Lahore High Court for redress.

v. That the Appellant (IS) filed WP 1222/2001 before the Lahore High Court on April 13, 2001. The Honourable Court suspended the impugned order by way of interim relief. Inspite of serving the Interim Order of the Lahore High Court, LSE, who was a party to the petition, refused to reverse their actions taken between April 9 and April 13, 2000. In fact, LSE placed their padlocks on the offices of the

Appellant in the late afternoon of April 13, 2000, after learning of the Interim Order of the Court.

vi. From the facts and grounds stated, the Appellant (IS) has clearly established the strong bias of SEC against Appellant (IS), in view of which the impugned notice and impugned order deserves to be declared null and void, unlawful and set aside.

vii. The expression "fraud" is prominently featured in the definition of S.17 of the Ordinance. In support of his argument he referred to Rule 3(c) of the Securities and Exchange Rules, 1971 in which it is stated that a member can only be removed if he has committed a breach of trust or fraud. Since the said Rules have been framed pursuant to the Ordinance it can be inferred that the Legislature in enacting S. 17 of the Ordinance could only have contemplated imposition of severe penalties where the broker had indulged in fraudulent conduct.

viii. He then referred to the definition of fraud in S. 17 of the Contract Act, 1872, and case-law PLD 1977 Lah 1377 and CLC 1997 1260. He submitted that according to the cases, intention to deceive by inducement is a necessary element of fraud. An intention to deceive can also be established by showing misrepresentation, i.e. making of false statements or by suppressing material information. According to the learned counsel, "intention to deceive" is very difficult to prove in the courts of law. A second essential ingredient according to Mr. Abdullah was to show persons injured by the deception of the accused.

ix. Attention of the Bench was also drawn to the expression "manipulation" in S. 17 of the Ordinance. The learned counsel submitted that since this was not defined in the Ordinance or other laws, it is only through case law that one can understand its import and meaning. He cited the following definitions:

Black's Law Dictionary

Series of transactions involving the buying and selling of a security for the purpose of creating a false or misleading appearance of active trading or to raise or depress the price to induce the purchase or sale by others.

New York Stock Exchange Glossary

Manipulation is illegal operation of buying and selling securities for purposes of creating a false or misleading appearance of active trading.

Applying these principles to the facts on record, he contended there was no evidence of the Appellant (IS) misrepresenting his transactions. All his transactions were effected through the transparent new system of trading on Lahore On-line Trading System ("LOTS"). Similarly, there is no evidence that the Appellant actively concealed any facts from counter-parties and all transactions were transparent. Furthermore, the impugned order has not pointed to a single investor except brokers who have been injured by the alleged price manipulative practices of the Appellant (IS).

x. The impugned order is without jurisdiction in respect of the Appellant

(IS) removal from LSE membership. The SEC has no jurisdiction to remove the Appellant (IS) unless he has been guilty of committing fraud or criminal breach of trust. SEC should therefore have waited until the Appellant (IS) had been convicted by a criminal court for the offence under S. 17 of the Ordinance, and then issued an order to remove him. He contended that S. 7 has not been invoked in the impugned order.

8. Appellant (IS) who also appeared in person submitted the following in support of his case:

i. The KSE, by imposing a fresh set of Exposure Rules, handicapped all brokers, and even stopped foreign investment coming into Pakistan. It was from that day that the stock market started to fall. The Appellant (IS) stated that he suffered more than any other person as a result of the changes in the exposure rules.

ii. There was no question of him manipulating the price of BOP shares because he had always been interested in taking a substantial stake in the company. In support of these facts, he pointed out pages 129 to 132 of the Annexures to the Appeal which contained correspondence between him and his advisors Rizvi & Co. with BOP management concerning the nomination of his son and brother for Directorship of the Company and the subsequent election of Directors. As it turned out his nominees failed to get elected in the elections held on May 18, 2001. Had his shareholding increased beyond 50% of BOP as he had been endeavoring to do, he would have been in a position to get his nominees elected as Directors. This highlighted that he was a genuine investor in BOP. Furthermore, the Appellant (IS) submitted that the bulk of his BOP shareholding was acquired more than 5 years earlier. Only a very small percentage was acquired in proximity to the crisis on 'badla. However, there was never any sale of BOP shares by him. It was LSE who had proceeded to sell his BOP shares after the crisis. It was therefore not clear to him how he could be found to have violated S. 17 of the Ordinance in the impugned order.

iii. Moreover, as Chief Executive of Diamond Industries and Shafi Chemicals, the Appellant stated that he was bound to look after their interests and was responsible for operating their accounts. He subsequently resigned as Chief Executive of Diamond Industries, Shafi Chemicals and his other companies on June 14, 2000.

iv. The Appellant denied that he had ever defaulted to the LSE, he had only incurred a payment obligation to the LSE and was unable to discharge it at the appropriate time. He contended that being unable to meet exposure requirements does not amount to a default. In any event a member's exposure obligations end when his position is squared up by the Exchange.

v. He had submitted a number of complaints to the SEC against brokers of KSE and LSE following the May 2000 Crisis. These complaints are still on file with the SEC, and no action has been taken at all by the apex regulator to investigate them. After filing the complaints since he himself did not have access to KSE the concerned broker's trading records which he needed to substantiate his complaints, he had naturally requested the SEC to obtain the relevant records. Unfortunately SEC did not lift a finger to investigate his grievances. This he claimed was another example

of institutional bias against him.

vi. As regards the charge in the impugned order that he indulged in excessive use of 'badla, the Appellant (IS) stated COT are regulated by the Stock Exchanges through COT Regulations framed with the approval of the SEC. It was in fact the sudden, abrupt amendment to the Exposure Regulations by the KSE which unnecessarily tampered with the market and caused a crisis situation.

vii. He objected to the word "Group" and "associates" used in the Enquiry Report and submitted that the Enquiry Report does not specifically identify any members of the "Group". Whilst the Enquiry Report uses the expression "associates" in several places, nowhere have the individuals who comprise this Group been identified.

viii. It has been alleged in the impugned order that certain share transfers between him and other members of his "Group" were effected without consideration and as such violative of Section 17(e), namely, at (vii), (viii), (xiv), (xv), and (xvi) of paragraph 33 of the impugned order. Appellant (IS) submitted that all these transactions were in fact loan or return of loans borrowed from Appellant (TM) and other brokers.

ix. The witness statements obtained by SEC of various brokers including Shahid Nauman Rana and Iqbal Khawaja which were relied upon in the impugned order appear to be doctored as there was a commonality between all of them in terms of content, writing and transcription. With respect to Shahid Nauman Rana's statement, this was not even signed and therefore should not have been relied upon in the impugned order.

x. He concluded his arguments by elaborating on the elements required to establish price manipulation in terms of S. 17 of the Ordinance. According to the Appellant IS), a necessary element of violation of Section 17 was that the "fraud, manipulation and deceit" must have been practiced on some person. The impugned order fails to identify the person or persons upon whom he was alleged to have committed the fraud, deceit and manipulation. In support he referred to the definition of "price manipulation" in US Securities Regulations, which he claimed S. 17 of the Ordinance was based upon.

xi. He further submitted that in every crime, intention must be proved. He was not fearful nor hesitant in stating that the manifest intention of the impugned order appeared to be to "grab" the shares of Appellant (NE). Within only 5 minutes of the Crisis, LSE had begun to dispose of the Appellant (NE)'s shares and after the passing of the impugned order on April 9, 2001, his own assets. This according to him shows a pre-planned conspiracy by which the Appellant (NE)'s shares were even sold on "spot' basis. This also constitutes a clear violation of the Constitution of Pakistan by depriving the Appellant (NE), Appellant (TM) and himself of their property, including membership of the LSE outside due process of law.

xii. The claim of Iqbal Khawaja is pending before the Honourable Lahore High Court in W.P. 21621/ 2000 in which the respondents, LSE and the Appellant (IS) are respondents. The SEC, being a party to the case, has attempted to remove the burden of its own liability as well as the burden of the liability of the LSE on the

shoulder of the Appellant (IS). This act of SEC is mischievous, malafide and in self-interest and is intended to defraud the Appellant. The SEC has further attempted to pre-empt and prejudice the decision of the Honourable Court.

xiii. The claim of Naeem Anwar is pending before the Honourable Lahore High Court in W.P. 929/2001 in which the Respondents, LSE and the Appellants are respondents. The SEC, being a party to the case, has attempted to remove the burden of his own liability as well as the burden of the liability of the Lahore Stock Exchange on the shoulder of the Appellant. This act of the Respondent is mischievous, malafide and in self-interest and is intended to defraud the Appellant. The LSE has further attempted to preempt and prejudice the decision of the Honourable Court.

xiv. The claim of Shahid Nauman Rana pending before the Honourable Civil Judge Lahore in which the Respondents, LSE and the Appellants are respondents. The SEC being a party to the case, has attempted to remove the burden of its own liability as well as the burden of the liability of LSE on the shoulder of the Appellant. This act of the SEC is mischievous, malafide and in self-interest and is intended to defraud the Appellant (IS). Respondent has further attempted to pre-empt and prejudice the decision of the Honourable Court. He submitted that the alleged transactions have been dealt with in detail in his Appeal and his argument in this respect should be adopted from paragraphs 32 to 42 of the Grounds of Appeal.

Submissions for and on behalf of the Appellant's (TM) and (NE)

9. The learned counsel, Mr Faisal Naqvi, appeared on behalf of the Appellants (NE) and ™ in Appeals No. 19 and 27 respectively. He made the following submissions on behalf of Appellant (NE):

i. The counsel began by making certain preliminary submissions. Article 1 of the Qanun-e-Shahadat Order, 1984, was highlighted by the counsel who submitted that the rules of evidence are applicable not only to judicial but also to quasi-judicial proceedings. Relying upon 1997 CLC 160 at pages 163-164 (in which the Qanun-e-Shahadat Order was held applicable to proceedings before the Trademark (registrar), he contended that evidence laws were specifically made applicable to quasi-judicial proceedings by amendment in 1984, should leave no room for doubt about the intention of the legislature. This was specifically pleaded in paragraph G(ii)(c) of Appeal No. 28 and not denied in the Reply of Respondents Nos. 1 and 2. .

iii. On the question of the alleged violation of the principle of natural justice by the Respondent No. 2 in passing the impugned order, whilst he asserted that there was some merit in the contention of the Respondents 1 and 2 that this issue has become infructuous in these Appeals since the Bench has assumed jurisdiction over all aspects of the proceedings, nevertheless in his view it was still important for it to examine the issue because it is sitting in judgment not only on the Appellants' conduct but also the conduct of the Respondents. It was argued that it was clear from the manner in which the proceedings leading to the impugned order were conducted, that the Respondents Nos. 1 and 2 were not acting in fair play and in accordance with the rules of natural justice. He pointed out the following facts: the lack of time given to the Appellants following the service of the Show Cause Notice to prepare a reply to the charges leveled therein; the fact that the Enquiry Report, witness statements (which were recorded ex parte); LSE representation and trading

data relied upon in the impugned order were not attached, and the witness statements of Naeem Anwar and Iqbal Khawaja, the first 5 pages are word for word identical appeared coached and showed they were hostile witnesses. It was also argued relying upon 1994 MLD 178 and PLD 1966 Lah. 18 that even in quasi-judicial proceedings, witness statements which have not been cross-examined cannot be relied upon. Rebutting the justification for the lack of notice in the impugned order to the effect that the Appellant (NE) had already read the Enquiry Report and the impugned notice was basically an elaboration of the Enquiry Report, the counsel argued that most of the accusations in the impugned notice are not present in the Enquiry Report. Even if they were, the Enquiry Report cannot be considered a substitute for the impugned notice, which was conceded by the Respondents 1 and 2 in Paragraph 6 of their Reply. Furthermore, the information relied upon in the impugned order is not contained in the impugned notice. This he contended showed bias and malice in the mind of the Respondent No. 2. Relying upon PLD 1974 SC 151 (168) and PLD 1973 SC 49 (87-88), the counsel submitted that any proceedings tainted by mala fides cannot be validated.

vi. On the issue of criminal liability, the learned counsel stated he would like to adopt the arguments of Mr Irfan Qadir, counsel for Appellant (IS) to the extent that he has shown that the Respondent No. 2 did not have jurisdiction to pass that portion of the impugned order holding that the the Appellants violated S. 17 of the Ordinance. It was also argued that the standard of proof required for finding of price manipulation which he claimed was concurred with by Respondents 1 and 2 in their Reply was that the Commission must be “satisfied” that manipulation has occurred. Relying on judgment of the Supreme Court (reported in PLD 1976 SC 6 (at page 30), he submitted “satisfaction “ is synonomous with “convinced beyond a reasonable doubt”. In contrast, an “opinion” as to a finding stands on a lower pedestal than “satisfaction” as it lacks the element of finality and therefore need not be based on conclusive evidence. He also emphasized that the Bench had to determine two sets of charges, not one; firstly, those contained in the impugned notice; and secondly, those in the impugned order. He contended that since the Bench repeated that it has seized original jurisdiction of the case, this must mean jurisdiction to also adjudicate the impugned notice, and therefore, the Bench cannot go beyond the four corners of the impugned notice in coming to a decision on the merits and that no evidence can be relied upon which is not part of the impugned notice and explicitly mentioned therein.

ix. While going into the merits of the Appeal, the counsel submitted that there are essentially two findings in the impugned order which have to be adjudicated upon by this Bench, these are: (1) a finding of prima facie criminal liability; and (2) a finding of civil liability against the Appellant. He contended that the Respondents Nos. 1 and 2 have themselves conceded in Para. 69 of their Reply that there are two separate issues and they are entirely independent of each other. Each finding must therefore be taken separately and examined separately under distinct sets of legal principles, that is under the laws relating to criminal liability and laws relating to civil liability. On the issue of criminal liability, he proceeded to explain transactions in paragraphs 31(I) to 33(XVI)) of the impugned order which were alleged to support the finding that the Appellants acted as one entity:

<u>Transfers through Appellant (TM)’s brokerage house</u>

(a) Para. 31(I) of the Impugned Order; Nisar Elahi’s account with Iqbal Khawaja

claimed by Appellant (IS). This payment was part of the lifeboat funds arranged by LSE following the Crisis.

(b) Para 31(III) and (IV) of the Impugned Order; this represents a loan by the Appellant (NE) to Shahid Nauman Rana and return of that loan. The Appellant (NE) is not responsible for where the latter parked those funds.

Share Transfers between Accounts

(c) Para. 33 (III) of the impugned order represents a loan by Nisar Elahi to Waqar Shafi

(d) Para. 33 (IV) is irrelevant because Nisar Elahi has no connection to the "NI" account with Prudential Securities;

(e) Para. 33(VII) represents a return of loan by Nisar Elahi to Appellant (IS). 500,000 shares of KESC returned on February 9, 2000 via First Capital. Trading data is not on record and First Capital is obviously refusing to cooperate;

(f) Para. 33(VIII) represents a loan by Nisar Elahi to Appellant (IS). Annex E 28 of Appeal No. 27 of 2001 shows delivery to Naeem Anwar of 400,000 shares through Mazhar Hussain, (KSE-M) and Annex E 37 of Appeal No. 27 shows return of 395,000 shares of Appellant (IS) to Nisar Elahi

(g) Para. 33(ix) of the impugned order; the facts are being distorted. Diamond Industries purchased 5,705,000 shares of PTCL for week ending February 25, 2000 (printout at page 22 of the Additional Evidence). Nisar Elahi had sold 730,000 shares of PTCL for the same week (printout at pg. 20 of the Additional Evidence). Since Nisar Elahi and Diamond Industries were operating from the same house, therefore Nisar Elahi's shares were transferred to Diamond Industries in house instead of through LSE clearing house. 600,000 shares were subsequently transferred by Appellant (TM) to Shahid Nauman Rana as per Diamond Industries request from the latter's account (page 19 of Additional Evidence shows a delivery slip dated March 1, 2000 signed by Appellant (IS));

(h) Para 33 (XIV) of the impugned order represents a return of loan by Shaffi Chemicals to Nisar Elahi; the initial transfer of 600,000 shares through Mazhar Hussain is shown on Annex E-28 of Appeal No. 27. The return of 200,000 shares is on Annex E-34 of Appeal No. 27. The return of the remaining 425,000 shares is not on record;

(i) Para 33(XV) and Para 33 (XVI) represent a loan by Nisar Elahi to Diamond Industries and its return; Annex E-28 of Appeal No. 27 shows loan of 600,000 shares through Mazhar Hussain; Annex E-34 shows return of 125,000 shares and Annex E-35 shows return of 75,000 shares subsequently returned on January 27, 2000 through Ashraf Hussain Adhi, Member LSE but the documents for this transaction are not on record.

According to the learned counsel, all the above transactions were transfers and not trades being either loans or return of loans between or through the Appellants. Furthermore, these the Respondents 1 and 2 have even conceded in paragraph 90(j)

of their Reply that the share transfers are not relevant to establish criminal conduct of the Appellants but only support their argument that they formed one entity. The counsel also emphasized there is no finding in the Enquiry Report as against the Appellant (NE). The only references to Appellant (NE) are on pages 23, 30, 34 and 35 of the Enquiry Report. The reference at page 34 of the Enquiry Report which the Respondents 1 and 2 have repeatedly cited against the Appellant (NE) cannot be considered a "finding", but merely hearsay as to statements of other people. In particular, the Enquiry Report has nowhere mentioned that the so-called "IS Group" includes the Appellant (NE). Even otherwise, the Enquiry Report has made no findings against the Appellant (NE), and referred to the findings on price manipulation at page 68 of the Enquiry Report. The Respondents 1 and 2 are obviously wrong that the impugned notice is merely an elaboration of the Enquiry Report. This the counsel submitted showed the extent to which the Respondents have misunderstood the Enquiry Report. The counsel added that the issue of Group entity was raised so that the LSE and their brokers could get their hands on the Appellant (NE)'s money deposited in his account with Appellant (TM)'s brokerage house. He referred to Paragraph 11 of LSE's parawise Reply to Writ Petition 1344/2001 and the representations made by LSE members, Muhammad Iqbal Khawaja and Naeem Anwar that appeared in W.P. 1344/2001 in which they admitted that they wish the Commission to adjudicate that the money lying in Appellant (NE)'s account belonged to Appellant (IS). The counsel also contended that subsequently when WP 1344/2001 was disposed of by Order dated February 21, 2001 by the Hon' able Lahore High Court, a representative of the brokers appeared ex parte and persuaded the Hon'ble Judge, Malik Muhammad Qayyum by his order dated February 23, 2001 to refer the matter to the Commission. This Order was subsequently challenged in appeal in ICA No. 166/01 whereupon the Hon'ble Justice Malik Muhammad Qayyum declared that he had not directed the Commission to adjudicate upon civil liability but merely to examine the issue of liability (he referred to page 114 of Appeal No. 27). This Order was set aside subsequently by the Supreme Court (he referred to the Order annexed at page 122 of Appeal No. 27/2002). He further submitted that the Appellant (NE) was a badla provider. Providing of badla was proven by the trading data on record and the additional evidence submitted by the learned counsel to the Bench, and referred to Pages 8-12 of the Additional Evidence. The Appellant (NE) had earned Rs. 14.43 million by providing 'badla' to Diamond Industries in three months. He emphasized that since his role was limited to providing 'badla to Diamond Industries and making money off of that, he obviously did not have a proprietary interest in the DIL account with Appellant (TM). He pointed out that the reason the Appellant (NE) and Appellant (IS) were asking for information about each others' accounts (as referred to in pages 43-44 of the impugned order) was because they were accused of being one party. The conclusions arrived at in the cited paragraphs of the impugned order are mere speculation and highly unjustified.

xv. While addressing the issue of violation of Section 17 of the Ordinance, the counsel submitted that as with any criminal offence, two elements must be established, namely, the actus reus, the criminal act, and the mens rea, the criminal intent. With respect to the actus reus, the basic act the Respondents are required to prove in the context of S. 17 is price "manipulation". However, he contended that every trade to buy or sell affects or "manipulates" the market, but obviously not every trade is an illegal manipulation. He proceeded to explain certain activities and transactions of the Appellant (NE) referred to in the impugned orders price

manipulative:-

(a) Excessive use of 'badla by the Appellant (NE) was not illegal. Credit risk is taken by the financier and is merely a transaction between the badla provider and the buyer of securities. Since there is no illegal act the perquisites of criminal offence, the actus reus has not been established. In any case he submitted, 'badla is not relevant because it is not a trade which is what S. 17 of the Ordinance is aimed at;

(b) Buying of large quantities of shares: This the counsel submitted was not illegal per se and referred to paragraph 46 of the Appellant (NE)'s Appeal. He drew the Bench's attention to paragraph 109 of the Reply of Respondents 1 and 2 in which he asserted that they effectively conceded buying of large quantities of shares without intent/ motive to manipulate share prices is not in itself price manipulation. The Respondents had failed to produce evidence of the intent of his client. In any case, if the maximum shareholding of the so-called Group was 34% of AICL shares and 28.5% of BOP shares, then how could his client be accused of cornering the market when they had less than two-thirds of the total issued shares in each company;

(c) Appellant (NE) opened numerous accounts with different brokers (paragraph 20 of impugned order): the counsel submitted that by doing so the Appellant (NE) had not done anything illegal. He denied that the Appellant (NE) had opened fictitious accounts, and contended that this had not been substantiated by the Respondents. Their argument that these were benami accounts was not sustainable under the laws of Pakistan, since it is not permissible under S. 4(5) of the Central Depositories Act, 1997 to have benami accounts and the account holder would always be deemed to be the actual owner;

(d) Inter se trading without change in beneficial ownership by the Appellant (NE): the counsel reiterated that to constitute manipulation the transactions must be trades. The requirements of fraudulent trading he asserted was that the transaction must have occurred at the same time and place and be of the same amount. Thus, transactions by the Appellant (NE), which occurred during the same clearing week do not constitute such a transaction because a clearing covers a whole week. In any event, some transactions alleged to be price manipulative which occurred in the same clearing week were actually 'badla transactions. He gave the following explanations for the transactions mentioned in the impugned order: Para 46(e)(xi)(a) is a 'badla transaction; Para 46(e)(xi)(b) has no relevance to Appellant (NE); Para 46(e)(xii)(a) and (c) has no relevance to Nisar Elahi; Para 46(e)(xii)(b) shows genuine trades of Nisar Elahi who had no knowledge as to who was purchasing the shares. The learned counsel referred to detailed explanations of these transactions given on pages 13-16 of the Additional Evidence, which he claimed showed that these were genuine trades and hence there was no question of fraud or misrepresentation;

(e) The learned counsel drew the Bench's attention to the transactions cited in paragraph 46(e)(x) of the impugned order. According to him these were all transfers which took place from Diamond Industries account with Appellant (TM)'s Brokerage house to Diamond Industries Account with Appellant (IS)'s brokerage house when the latter opened his own brokerage house. No evidence has been produced by the Respondents showing that his client, Mr Elahi actually operated this account. He categorically denied the statement imputed to Appellant (TM) alleged to have been

made to LSE that Appellant (NE) operated this account. In any case, Appellant (TM) could not speak English and had been coerced by LSE into signing this statement. The learned counsel referred to Appellant (TM)'s brother, Tauquir Malik's coercive role in forcing his client to sign the statement. Even otherwise, this statement could not be relied upon because it was an extra-judicial confession. Such a confession could not be admitted in evidence under Article 37, Qanun-e-Shahdat, because it was induced/ threatened by another person (1917 IC Sind 42, AIR 1954 SC 42). Even if the statement was admissible, it has been held that an extra-judicial confession was the worst type of evidence and generally should not be relied upon; 1997 P. Cr. L. J. 139, 1999 P. Cr. L. J. 381, 2000 SCMR 683. In any event the allegation that his client, Mr Elahi, operated this account is nonsense as proven by the fact that his client was just a 'badla' provider to DIL. He drew the attention of the Bench to 'badla table at page 12 of the Additional Evidence and submitted that obviously if Mr. Elahi earned such substantial sums from providing 'badla' then there has to be an arms length relationship between him and the DIL account.

xvi. With respect to criminal intent or mens rea the counsel submitted that even if it could be proved that the Appellant (NE) had acted as one entity together with Appellant (IS) and his associates, this is not relevant to proving mens rea. In fact, even if the two had a formal partnership, Mr Elahi could not still automatically be liable for the criminal acts of the other partner. It is necessary to prove actual commission of criminal acts by each person independently. The only way the acts of Appellant (IS) could be attributed to Appellant (NE) is by proving a criminal conspiracy. Referring to paragraph 9 of their Reply to Appeal No., 27, he contended that the basic assertion of the Respondents is that intent is deducible from circumstantial evidence. However, they have failed to produce any. Even otherwise, in law circumstantial evidence is the weakest form of evidence and inherently unreliable; PLD 1963 Kar. 242 (at 255) and AIR 1956 SC 316 (at 318). He stated that the only other example given at paragraph 152 of the Reply, relating to Mr. Elahi's alleged motives, he dismissed as being facetious. What the Respondents should have done was to show that the Appellant (NE) authorized these particular transactions with knowledge of their illegality, i.e. show that he knew of both ends of the transaction, however, no proof to this effect is on record.

xvi. On the issue of civil liabilities, the counsel argued that there was no statutory basis for the Commission to assume jurisdiction to decide civil liabilities between an investor and his broker. He referred to statements made by various brokers before the Bench and during the impugned proceedings, including those made by Naeem Anwar, respondent No. 5 and Iqbal Khawaja, Respondent No.4 that Ss. 20 and 21 of the Act, 1997 and the Schedule, together with Ss. 17, 20, 21 and 23 of the Ordinance, 1969 do confer jurisdiction. However, in his view none of these provisions provide the Commission with any specific power to regulate civil disputes. Justification on the basis of S. 20 of the Ordinance, 1969 which confer upon the Commission the power to pass prohibitory orders is misconceived because the said Section does not empower the Commission to take the brokers' shares. Even powers pertaining to findings of criminal liability contained in Ss. 17, 24 and 25 of the Ordinance are confined to charging the accused with the offence and passing the challan for trial by the criminal courts. He also emphasized that the Commission is empowered to merely regulate the market and not act like a court. With respect to S. 23 of the Ordinance even the Respondents 1 and 2 have conceded in their Reply that this is irrelevant as they are not dealing with damages for fraud, and the issue of civil liabilities is separate. Even if the Commission was explicitly granted

jurisdiction to adjudicate upon disputes relating to civil liabilities, in his view, such provision would have been unconstitutional and as such liable to be struck down by the courts for violating the principle of the separation of powers, i.e. the executive cannot exercise judicial powers. Relying on PLD 1984 Lah. 69, the learned counsel submitted that executive bodies can only exercise judicial powers under a regulatory scheme whereby the regulatory provision also creates the said quasi- judicial body. Furthermore, the Constitution of Pakistan differs from the Constitution of India, and, therefore, any adjudicatory powers exercised by the Securities and Exchange Board of India under the SEBI Act which have been recognized by the Indian courts, cannot be a precedent for Pakistan. Furthermore, the SEC is self –evidently not a "court" as set out in Mehram Ali's case in PLD 1998 SC 1445. Every court is required to be appointed by the High Court. The learned counsel drew notice to the fact that even the LSE has in Aslam Motiwala's case taken the position before the Commission that the Commission lacks jurisdiction to award damages. Even if it is conceded that the Commission has civil jurisdiction, under S. 10 of the Civil Procedure Code, 1908, the Commission is required to decline to exercise jurisdiction in this matter since the same issue was pending adjudication prior to the initiation of the impugned proceedings before the civil courts. Moreover, the impugned notice and impugned order with respect to the Appellant (NE)'s civil liability was fatally vague. No detail of evidence as to quantum of liability has been provided. Even if it is assumed that SEC had powers to adjudicate upon civil liabilities, by delegating this power to a Joint Committee (which was to include representatives of Respondent No. 3, LSE) was in effect delegating its adjudicatory powers to one of the parties to the proceedings. As LSE had a very great interest in the outcome of such adjudication, they should not be delegated such powers. He referred to the well-settled principle of "nemo iudex causa sua" or no one can be a judge in his own case.

10. Mr. Faisal Naqvi proceeded to make the following additional submissions for and on behalf of the Appellant (TM):

i. He submitted that to the extent the same allegations have been made against the Appellant (NE), he would like to adopt the arguments made for Appellant (NE) in defence of the Appellant (TM) also. These are: (a) Use of various accounts held in different brokerage houses for trading by Group (Para 20 of impugned order); (b) holding of various accounts of group in Appellant (TM)'s brokerage house (para 22 of impugned order); (c) Appellant (TM) shifted the liabilities of Nisar Elahi and Appellant (IS) to Diamond Industries account (Para 29 of impugned order); (d) Appellant (TM) made payments to other brokers and received payments from other brokers (Para 23 of impugned order); (e) Appellant (TM) transferred shares without consideration (Para 24 of impugned order); (f) Group cornered the market in shares of AICL and BOP (Para 19 of impugned order).

ii. The underlying consideration in respect of the Appellant (TM) should be that he operated a brokerage house. As the Appellant (TM) was required by law to act in accordance with his client's instructions, he should not be held liable for doing what is legal and what he was or was not required to do. For example, the Appellant (TM) was under no legal obligation to ask his clients whether consideration for the transfers effected in his house had been supplied. He then turned to certain other allegations separately imputed to Appellant (TM) in the impugned order:

iii. Paragraph 11 of the impugned notice alleges that the Appellant (TM) issued two cheques despite a debit balance in his account. No finding on this issue was

made in the impugned order, therefore this issue cannot be examined now. In any case, the payment was made out of the lifeboat funds. Essentially, this is an issue between Appellant (IS) and DIL.

iv. Paragraph 26 of the impugned order alleges that the Appellant (TM)'s brokerage facilitated the "IS Group" in acquiring 'badla. The learned counsel submitted that as a broker, the Appellant (TM)'s job was to facilitate the securing of 'badla by his clients. He himself was not a 'badla provider, which is given by other investors in the market and is perfectly legal transaction. Since he was merely arranging 'badla for his clients, he should not be prosecuted for providing a legal service which all brokers provide.

v. Paragraph 32 and 33 of the impugned order alleges that the Appellant (TM) allowed the Appellant (NE) to operate the Diamond Industries Account. The learned counsel vehemently denied this allegation, and referred to his earlier submissions on behalf of Appellant (NE) regarding the invalidity of the "confession" alleged to have been made by the Appellant (TM) to LSE.

vi. Paragraph 25 of the impugned order alleges that the Appellant (TM) operated the terminal of Appellant (IS)'s brokerage house. The learned counsel also vehemently denied this allegation. According to him the sole basis for this finding was the witness statement of Umer Khawaja, the son and representative of Respondent No. 6, Iqbal Khawaja, which the counsel stated he had earlier argued to be inherently unreliable and should not be admitted in evidence by the Bench.

vii. Paragraph 4 of the impugned order alleges that the Appellant (TM) defaulted to the LSE clearing house on May 31, 2000 and 7. 6.00. The learned counsel drew the attention of the Bench to pages 17 and 18 of the Additional Evidence which records the payment by the Appellant (TM) of Rs. 30,922,091 on 31.5.00, and a second payment of Rs. 40,872,176 on 7.6.00 to the LSE clearing house. This the counsel contended goes to prove that his client, the Appellant (TM) is not a defaulter of any amount to the LSE.

Submissions for and on behalf of the Respondents Nos. 1 and 2

11. Respondent No. 1 appeared personally and on behalf of Respondent No. 2 and made the following submissions:

i. At the outset, Respondent No. 2, Mr Aamir Masood gave a general overview of regulatory framework governing the Commission and submitted that the Commission regulates the corporate sector primarily through the Companies Ordinance, 1984. Whilst the Companies Ordinance, 1984 is general and all encompassing in its application to every type of corporate entity and association, it does recognise by virtue of Section 503 thereof, that companies in certain sectors of the economy may require specific laws and regulations to govern them. In the context of the securities market, the special enactments are the Ordinance and the Act. The primary purpose of the Ordinance, 1969 is to regulate the securities market – the market place through which companies can tap into the resources of the public for their business purposes. In this respect, the powers of the regulator found in the Act and Ordinance must viewed in light of the nature of the securities markets, its dynamism and maintenance of thousands of investors' wealth. Because of this, it is

vitally important that the workings of the securities markets remain free, fair and transparent. The preamble to the Ordinance, 1969 specifically lists the protection of investors as one of the principal objects of the law, and recognises and prescribes punishments for certain securities related offences, such as insider trading and fraudulent trading defined in Section 17 of the said Ordinance.

ii. Section 20(4) of the SECP Act, 1997 lists the registration and regulation of the business in the stock markets as one of one the duties and functions of the Commission. In Section 20(6)(g) of the SECP Act, 1997, the Commission is required to "strive to take whatever action it can take, and is necessary to give effect to the SECP Act, 1997 and the Companies Ordinance, 1984 or any other law". Whenever there is any unlawful tampering with the natural forces of demand and supply in the securities market, the Commission is under an obligation to step in and take such action as is necessary in accordance with its powers under the Act and the Ordinance to control such tampering and prosecute those responsible. To this end, the offences of insider trading and price manipulation, the latter being the subject-matter of these Appeals, have been defined in Sections 15-A and Section 17 of the Ordinance, 1969 respectively and punishments for commission thereof have been stipulated.

iii. Mr Aamir Masood then discussed the requirements of Section 17 of the Ordinance, 1969. He submitted that in terms of Section 17(e)(ii) of the Ordinance, 1969 in order to prove the commission of the offence of price manipulation by "creating a false and misleading appearance of active trading" in any security, the Honourable Bench is required to make a distinction between "active trading" and "the appearance of active trading". According to Respondent No. 1, Section 17 of the Ordinance, 1969 is based upon its corresponding provision in US legislation, Section 9 of the Securities Exchange Act, 1934, which can be used to elucidate the interpretation and application of Section 17 of the Ordinance, 1969. He further added that by the use of the word "in particular" in Section 17(e), it is obvious that the legislature has intended that the activities/ practices listed in Section 17(e) (i) to (vi) of the Ordinance, 1969 which are stated to be fraudulent, deceitful or manipulative to be exhaustive.

iv. Mr. Masood referred argued that it was a well established principle that bias must be seen from the record and that the correctness of an order rejected the allegation of bias. In this regard, Mr. Masood pointed out that the Appellant (IS) had been provided the Enquiry Report in September, 2000 and had been provided opportunities to put forward evidence in rebuttal. However, the Appellant completely failed to produce any record in rebuttal in both hearings given on September 27, 2000 or October 18, 2000 (at which he did not even appear without intimation to the SEC). Furthermore, it was argued that to this day the Appellant IS had willfully withheld records of his trading which are in his possession. This clearly established the mala fide of the Appellant (IS).

v. In so far as Appellant (TM) was concerned when required to do so, Appellant (TM) provided a comprehensive answer to the allegations made in the Enquiry Report in September, 2000. However, Appellant (TM)'s submissions in Appeal No.27 are contradictory to those submitted previously. Furthermore, Appellant (TM) was in a position to generate records from his computer within a matter of minutes.

vi. As for the Appellant (NE), Mr. Masood vehemently argued that the

submissions of the Appellant (NE) with regard to the non-provisioning of the Enquiry Report (recorded in the impugned order) were shown to be a false statement in light of the Appellant (NE)'s letter dated March 8, 2001 wherein the Appellant (NE) admitted to not only having a copy of the said report but having analyzed it as well. Furthermore, the Appellant (NE) had stated before the Commissioner (Enf) (which is recorded in the impugned order) his attempt to gather information from First Capital ABN AMRO. However, it is proven on record that the Appellant (NE) maintained no account with First Capital ABN Amro over the relevant period. Therefore, such a submission was clearly done with the intent of misleading the Commissioner (Enf). Therefore, the decision to not provide an adjournment was well justified and correct and, therefore, refuting bias.

12. Mr. Aly Osman, of the Securities Market Division appeared on behalf of the Respondents Nos.1 and 2 and made the following submissions:

i. At the outset he informed the Bench that he would confine his arguments to two major factual issues arising out of the findings in the impugned orders which have been challenged by the Appellants in these Appeals. These are classified into the following two categories, (i) Group entity; and (ii) Price Manipulation.

ii. Mr. Osman submitted that he would reinforce the group entity finding in the impugned order during the course of his arguments through the following (i) the establishment and operation of the accounts of the group through various brokers of KSE and LSE; (ii) pooling of resources (both funds and shares) between the accounts of the group; (iii) correspondence/agreements and submissions to show linkage between the various elements of the group entity; and (iv) findings of the Enquiry Report with respect to the IS Group.

iii. With respect to the first issue, namely how the Appellants established and operated accounts of the group through various brokers, Mr. Osman submitted that Appellant (IS) has admitted that accounts named Iftikhar Shafi, Usman, SS, NI (Joint Account of Appellants (NE) and (IS), DIL, Shaffi Chemicals Limited (SCIL) were under his control and are a "group". He has explicitly stated in arguments that "I don't mind seeing Iftikhar Shafi, SCIL and DIL as one entity". Furthermore Appellant (IS) and other members of the Group opened fictitious or benami accounts in names other than their own. In IS's case, these included "Usman" with Naeem Anwar, "SS" with First Capital ABN Amro and with respect to the Appellant (NE), "Mustafa" with Mr. Hanif Moosa. In the latter case Mr. Osman drew our attention to the existence of a letter on record signed by some person on behalf of Appellant (NE) to Hanif Moosa requesting information in his account. Appellant (NE) has already admitted this in his Appeal No.27. Other accounts opened and operated by Appellant (IS) *inter alia* include Diamond Industries and Shafi Chemicals. In paragraph 34 and 35 of Appeal No.28, Appellant (IS) has admitted maintaining a personal account with DIL and SCIL and channeling his personal trades through accounts in the name of DIL and SCIL. There is also evidence of the joint use by the group of an account titled "NI". This account was maintained with Appellant (TM), M. Iqbal Khawaja, Prudential Securities and Mr. Hanif Moosa. Transactions through this account highlighted in the table on page 19 of the Reply of Respondents 1 and 2 to Appeal No.28 disclose evidence of an explicit partnership arrangement between Appellant (NE) and IS.

iv. Evidence of the second fact, namely that of the pooling of resources (funds and shares) between accounts of the group which establishes linkage or commonality

of operations between Appellant (IS) and Appellant (NE), is evident from the following types of transactions between the accounts of group. There are many instances of share transfers without consideration between accounts of the group. He referred to pages 24 and 29 of the Reply of the Respondents 1 and 2 to Appeal No.28 which contained a detailed explanation of the shares transfers involved. He briefly summarised the salient features of these as follows: (i) Share transfers in and out of the account of DIL, which are not a result of trading/ settlement between the respective accounts shows misuse of the account of DIL for the Appellant (IS) group; (ii) Shares transferred from the account of DIL to joint account NI clearly shows pooling of resources between Appellant (IS) and Appellant (NE) and DIL; (iii) Pooling of funds between the accounts of Appellant (NE) and WS; (iv) Pooling of funds of Appellant (NE) and Appellant (IS) with respect to joint account NI with WS (group entity of MNE, Appellant (IS) and WS); (v) Pooling of funds between the accounts of SCIL and DIL; (vi) Pooling of funds between the accounts of SCIL and DIL; (vii) Pooling of funds between the accounts of Appellant (NE) and IS; (viii) Pooling of funds between the accounts of SCIL and Appellant (NE); (ix) Pooling of funds between the accounts of Appellant (NE) and DIL / Use of account of Appellant (NE) and DIL for group entity; (x) Accumulation of shares in the house of Appellant (TM) / share transfers between group accounts; (xi) Accumulation of shares in the house of Appellant (TM) / share transfers between group accounts; (xii) Accumulation of shares in the house of Appellant (TM) / share transfers between group accounts; (xii) Clear proof of use of the account of DIL for the IS Group/ transfer of shares to Appellant (IS) from the account of DIL; (xiii) Transfer of shares from the account of SCIL to Appellant (NE). / Proof of group entity of such accounts / Link of Appellant (NE) with account of SCIL and Appellant (IS) operating SCIL; (xiv) Shares transferred out of the account of DIL to Appellant (NE) / pooling of resources / Link of Appellant (NE) with DIL and Appellant (IS) operating DIL; (xv) Shares transferred from the account of DIL to MNE/ group entity / pooling of resources / link of Appellant (NE) with DIL and IS.

v. Mr Usman submitted that Appellant (IS) has not denied the share transfers but has only tried to explain them. In addition, the Appellants have not shown documentary evidence to prove loaning of shares between group accounts. Although loaning of shares is normal practice in the stock market, which usually takes place for maybe one, two or more clearings, however, the period of the loans claimed by the Appellants extending to many months is unrealistic and against market norms. This fact supports the Respondents submission of the group entity nature of the accounts.

vi. The second type of transaction which supports the Respondents findings in the impugned orders to group entity are the many instances of payment/receipts between accounts of the group. He referred to pages 30 to 32 of the Reply of Respondents 1 and 2 to Appeal No.28 which he stated contained a detailed explanation of the transactions involved. He summarised the salient features of these transactions, as follows: (i) Channelling of payments through Mr. Appellant (TM)/ pooling of resources of the group through various accounts / Debit to DIL with beneficiary credit in favour of both Appellant (NE) and Appellant (IS) vide joint account NI; (ii) Channeling of payment through Mr. Appellant (TM) / share transfer and the corresponding payment relate to different accounts DIL and Appellant (NE) showing pooling of resources; (iii) Pooling of funds between Appellant (NE) and Appellant (IS) in their joint account NI and account of DIL / proof of group entity; (iv) Pooling of resources between MNE, Appellant (IS) and DIL / Debit to DIL and

beneficiary credit to NI (MNE and IS); (v) Routing of personal transaction of Appellant (IS) through the accounts of DIL and SCIL;

vii. Mr. Usman stated that on page 32 of IS's Appeal No.28, Appellant (IS) has admitted maintaining a personal account with DIL and SCIL rendering such accounts fictitious and misused for promoting the interests of the group/sharing of resources of both Appellant (NE) and Appellant (IS) in account NI with SCIL. This he submitted was further proof of the finding in the impugned orders to Group Entity nature.

viii. Another transaction used by the Group are debit transfers taking place between accounts. Details of these have been given on pages 32 to 34, parenthesis (o) to (r) of the Reply of the Respondents 1 and 2 to Appeal No.28. Mr. Usman drew the attention of the Bench to the following facts disclosed by these debit transfers which point to commonality of interests between IS, Appellant (NE) and other members of the Group: (i) Account of DIL with Mr. Appellant (TM) is debited with corresponding credit in the account of Mr. Iftikhar Shaffi and joint account NI of Appellant (NE) and IS; (ii) Transfer of debit to account of public listed company / channeling of personal trades of Appellant (IS) through the said account / use of account of DIL for the group; (iii) Payment of Rs. 31 million to Appellant (IS) from the account of DIL, which was already showing a debit balance; (iv) No documentary evidence (ledger statements) of the reversals of the debit transfers have been provided or attached with the appeal; (v) Appellant (TM) provided ledger statement of DIL and Appellant (NE) to the SEC on 25 July 2000 duly received by Mr. Javed Panni (the then Chief Securities) showing Dr. of Rs. 565m and Cr. of Rs. 553m respectively (no mention of the reversals therein); (vi) Appellant (TM) has provided the ledger statements of DIL and Appellant (NE) to LSE vide letter dated 12 July 2000 (as appended with the appeal of TM) on request of LSE vide letter dated 12 July 2000 with no such reversals or any statement to that effect; (v) The copies of the ledger statement as provided by Appellant (TM) himself on which the fact-finding committee of the LSE is based (no reversals are being shown in the ledger statement).

ix. The link between the various elements of the Group is also shown through correspondence / agreements and submissions to show linkage between the various elements of the group. On page 20 of Appeal No. 28, Appellant (IS) has referred to Appellant (NE) as an "associate investor". In Appellant (IS) letter dated October 2, 2000 to 28 brokers he has also requested for information in the accounts of Appellant (NE) among others. Mr. Appellant (IS) stated in his verbal arguments that he traded with only 5 or 6 brokers, which is not true. Trading data on record shows that he traded in various group accounts through 10 brokers (including his own membership at LSE) and if brokerage house of Mr. Hanif Moosa is included, the number becomes 11. According to Mr Usman Mr. Appellant (IS) was operating so many accounts with such a high number of brokers, that he did even remember which brokers he was operating through. He further cited the following facts which according to him showed the common interest and group relationship between Appellant (IS) and MNE: (i) The letter dated April 26, 2000 (which is annexed at page 128 of Appeal No. 28), shows a joint filing of directorship on the Board of BOP has been made by IS, Appellant (NE) and WS; (ii) Appellant (IS) has given his proxy for voting to Mr. Anjum Nisar s/o Appellant (NE) in a general meeting of shareholders of BOP which clearly shows common interest of Appellant (NE) and Appellant (IS) and their joint operations in the market (the proxy is mentioned on

page 140 of the Appellant (IS) Appeal); (iii) Mr. Appellant (TM) has made submissions on single entity of Appellant (NE) and IS, before the fact-finding Committee of LSE. This is contained on page 21 of Appeal No. 28. (iv) In their signed written statements / submissions to LSE/ SECP of Mr. Shahid Nauman Rana, Mr. Omer Iqbal Khawaja on behalf of M. Iqbal Khawaja and Mr. Naeem Anwer have submitted that Appellant (NE) and Appellant (IS) are a single entity.

x. Lastly, Mr Usman submitted that the Enquiry Committee has made several findings with respect to the existence of the IS Group. Some of these instances are referred to on pages 61,62,64, 65 and 66 of the Enquiry Report. An excerpt of the last paragraph on page 34 of the Enquiry Report is as follows:

The Committee is of the opinion that the Management and Board of LSE operated the Exchange with less prudent exposure regulations and held a favorable bias towards the ***group of investors known as Mr. Iftikhar Shaffi and Appellant (NE)*** and their stockbrokers…

xi. Mr Usman proceeded to submit his arguments on price manipulation, stating that he would be dealing with elements of the offence contained in Section 17 of the SEO, namely that intent to affect price/ manipulation, and explanation of the term "manipulation upon any person, influencing or turning to his advantage" which have according to him misconstrued by the Appellants.

xii. He began by stating that price manipulation can be classified broadly into two categories; (a) General Classification; and (b) Specific Classification. General classifications is that market manipulation is a deliberate attempt to interfere with the free and fair operation of the market. In essence, manipulation is intentional interference with the free forces of supply and demand. It may be exercised by domination and control of Trading or Control of Float through significant accumulation of shares. This method is known in financial jargon as "warehousing" where the securities are warehoused or parked in the name of one person or company with an arrangement to sell or to vote at the direction of another person or otherwise. The specific classifications of manipulation are those contained in Section 17 (e)(i) to (v) of the SEC Ordinance 1969. It is evident from the use of the word "in particular" which precede these sub-clauses that they are not intended to override any other form of manipulation which may be general or otherwise.

xiii. Section 17 (e) (ii) refers to matched Orders (shifting of positions): (ii) create a false and misleading appearance of active trading in any security. Matched orders occur when a customer enters a purchase order and a sale order at the same time, at the same price. In the case of matched orders the customer generally places the order through different broker/dealers. Matched orders may also occur using more than one customer and the same broker/dealer. Matched purchase and sale transactions for the purpose of creating the false appearance of active trading are manipulative.

xiv. Section 17 (e) (iv) refers to a Wash Sale: "enter into an order or orders for the purchase and sale of security which will ultimately cancel out each other and will not result in any change in the beneficial ownership of such security". A Wash Sale is a trade in which there is no change in beneficial ownership of the securities – the buyer is, in reality, also the seller. A wash sale occurs when a customer enters a purchase order and a sale order at the same time through the same broker/dealer.

The ownership of the stock does not change. This would normally be done to create the appearance of activity in a security.

xv. Section 17 (e) (v) refers to placing of buying or selling orders into the trading system to change or maintain the price of a security. (v) directly or indirectly effect a series of transactions in any security creating the appearance of active trading therein or of raising of price for the purpose of inducing its purchase by others or depressing its price for the purpose of inducing its sale by others. The motive for this vary, one may be to cause such a price rise that other investors are attracted to the share, creating demand that the manipulator can sell into (called "Pump and dump").

xvi. Section 17 (e) of the Securities & Exchange Ordinance 1969 clearly states:

" do any act or practice or engage in a course of business, or omit to do any act ***which operates or would operate*** *as a fraud, deceit or manipulation upon any person, in particular…"*

According to Mr Usman it is apparent from the above portion of Section 17(e) that even the actual act of manipulation does not necessarily have to take place/ proved for violation of the said section. Any act intended for manipulation and which would operate as fraud, deceit or manipulation would fall under the violation of Section 17 (e) of the Securities & Exchange Ordinance 1969.

xvii. As regards intent to manipulate, this he submitted is usually shown through circumstantial evidence. Manipulative purpose is the intent to affect prices (through a series of transactions) for the purpose of inducing others to buy or sell. Citing an authority on the subject he stated:

"Since it is impossible to probe into the depths of a man's mind, it is necessary in the usual case ... that the finding of manipulative purpose be based on inferences drawn from circumstantial evidence."

According to Mr Usman a motive to manipulate may infer the requisite intent to affect prices. A prima facie case of manipulative purpose (intent to affect prices) exists when evidence of a series of transactions is coupled with a motive to manipulate. Purpose of fraudulent conduct/ manipulation can be "to lend a fictitious appearance of worth to a share and unload large inventory position at a profit"- one of the motives to manipulate. In the case of the Appellants, the use of so many brokers and accounts by the IS group shows clearly an intention to manipulate / create false and misleading appearance of active trading; the intention to control and dominate the market forces of demand and supply; the intention to shift positions between various brokers.

xviii. As regards the term "*manipulation upon any person*, *influencing* or *turning to his advantage*." He stated that the Appellant had taken the plea that person(s) who have been defrauded by the manipulation of the Appellant has not been identified, where are the group of people or persons. Rebutting this argument, he cited the definition of the term "Person" in the Black's Law Dictionary which provides:

" In general usage, a human being (i.e natural person), though by statute term may

include a firm, labour organization, partnerships, associations or corporations, legal representatives and so on …"

According to Mr Usman, the impugned order clearly specifies the "persons" in paras 48 to 50 of the impugned order which are the investors of LSE and KSE and the securities markets (LSE and KSE). Further, it Appellant (IS) highlighted that exact determination of losses and thus the parties who are simultaneously trading and holding on to the positions in the relevant scrips are not precisely determinable because of the dynamics of the market. He cited pages 65 & 66 of the Enquiry Committee Report as authority. Influencing and turning to advantage are key terms, which inherently form part of the definition of manipulation as generally or specifically, classified. The deliberate influencing of free and fair demand and supply is an interference with the normal operations of the market.

Submissions for and on behalf of the Respondent No. 3

13. Counsel for LSE, Mr Muhammad Arif Saeed, made the following submissions:

i. He began by stating that he IS Group's cooperative venture or "pooling", their cornering and their market manipulation as identified in the Enquiry Report, constitute the main causes of the Crisis at LSE. The Appellant's (IS) huge default in making payment for his long positions in COTs at LSE and default of other brokers of IS Group, namely Muhammad Iqbal Khawaja, Shahid Nauman Rana and Naeem Anwar, with whom the Appellants (IS) and (NE) were working as investors, the LSE Clearing House and resulted in the Crisis at LSE. The Appellant's (IS) default at LSE (and that of the said brokers) was a result of IS Group's own investment decisions. Appellant (TM) and Appellant (NE) were the main actors of the pool (IS Group) who played active roles in IS Group's cornering, manipulation and unfair trade practices and, therefore, are also liable for violation of the Ordinance as much as the Appellant (IS) which have also made the investing public and stock exchanges suffer. As pointed out by Respondents No. 1 and 2 in their Reply, KSE's alleged change in its Exposure Regulations in April 2000 is currently the subject matter of a pending inquiry by SEC. He argued that even though KSE has not been impleaded by Appellants as a party to the Appeals, they have made allegations against its management and sought relief against it. For this reason KSE should be impleaded as a necessary and proper party for a complete decision or, otherwise, the portions in the Appeals concerning KSE should be expunged as irrelevant. The counsel argued that the IS Group's cornering and manipulation existed prior to the said change in the Exposure Regulations of KSE, and referring to Chapter IV of the Enquiry Report, submitted that these transactions between the members of the IS Group were without any consideration and actual change in the beneficial ownership of the securities, and created artificial volumes in the market through shifting of trading exposure. Appellant (IS) and Appellant (NE) continued to carry over IS Group's huge long positions which increased after April 2000 till the very verge of the Crisis, which he contended is reflected on page 45 of the Enquiry Report. In this way, also COT was used as a vehicle to keep large holdings with marginal investments. The argument of the Appellants that changes in exposure regulations were the cause of the Crisis is of even less relevance when it is remembered that LSE did not make any change in its Exposure Regulations during the period.

ii. While going into the merits, counsel for LSE submitted that the material issues of fact and law which have to be adjudicated upon by the Bench,

which he will deal with one by one, are:

(1) IS Group's default at LSE,

(2) IS Group's cornering and manipulation in the scrips of BOP and AICL and its violation of Section 17 of the Ordinance;

(3) cooperative venture or "pooling" of Appellant (IS) and Appellant (NE) (and other members of IS Group) and their accumulation of wrongful gains;

(4) recovery of losses from the IS Group; and (5) punishment.

iii. The counsel proceeded to narrate the sequence of events in minute detail which in his view were the direct cause of the default of the Appellant (IS) and other members of the IS Group to the LSE clearing house following the Crisis. These have been scrutinized by the Bench and it appears that the main reason for the counsel's narration of these events in such detail is so that the LSE can make its submissions on two crucial aspects. These are:

(a) Should LSE have squared up Appellant's (IS) position after his written request on May 30, 2000 ?

(b) In not doing so, did it fail to comply with its own Exposure Regulations ?

iv. With respect to the first issue, the counsel referred to the fact that after the Appellant (IS) had been verbally requesting LSE to square up his positions, he was himself buying shares and in full control of his trading terminals. He also contended that squaring up is not possible during the Accounting Period. Where a member's trading rights are temporarily suspended for his failure to meet his exposure/loss obligation to the clearing house, he may request the management to allow him to trade temporarily to reduce his exposure by taking advantage of favourable market conditions. In such an eventuality, the management of LSE may permit him so under its own supervision to check that only such transactions are executed by the member as would result in reduction of his exposure. Even if it is assumed (without conceding) that LSE is required under its Regulations to square up IS's positions at his request, it was not practically possible for LSE to do so at that point of time for the following reasons:

(a) Appellant (IS) could himself have squared up his positions as at all times during this period he was in full control of his trading terminal and his trading rights had not been suspended. This is the admitted position of Appellant (IS) that on 1 June 2000 his trading rights were suspended. Appellant (IS) has changed his stance before this Bench. LSE could not have, therefore, acted at IS's unreasonable request to square up his positions under these circumstances;

(b) squaring up has to be done in the open market only. The markets at both LSE and KSE were closed on May 30, 2000;

(c) in IS's case, deliveries against his huge purchase positions were not going to be available before the settlement day of June 7, 2000, thus rendering his request unreasonable, unworkable and illegal. To make things clearer, squaring-up at

involves receipt of cash through prompt delivery;

(d) squaring-up is only to be in open market and as per the Procedure of Squaring-up of the Deliveries, its settlement time is only sixty (60) minutes. Clause No.6 of the said Procedure stipulates that when squaring up of transactions is executed, the sale by the member/agent shall be considered "hand delivery transaction" which must be settled within sixty (60) minutes of such transactions. This implies prompt delivery of the stock by the selling member;

(e) even if it is assumed (without conceding) that there were any buyers of these shares in the market, again the deliveries were not available with Appellant (IS) or the Clearing House (as IS's positions were long). On spot sale or purchase deliveries and payments are to be made within sixty (60) minutes. LSE was neither bound nor would it have able to arrange the deliveries against the squaring up of IS's purchases;

(f) sale of IS's purchase positions required buyer(s). There was no buyer of AICL and BOP shares in the market at that time because of the artificially inflated prices and the dominance of IS Group's holding of these shares in the market. Even otherwise, the market was falling sharply. In the given market conditions squaring up could not have been possible without deteriorating the prices to an extreme extent. This would have aggravated (IS) Group's losses to a great extent. Knowing he could have sued LSE for damages resulting out of squaring up his positions;

(g) IS's shares lying in pledge could only be sold in the market upon his failure to meet the Clearing House liabilities on the settlement day of 7 June 2000 and subsequent to him having been declared a defaulter by LSE

(h) the intention of IS Group was obviously to engineer a situation where Appellant (IS) and other member brokers of the IS Group could have gotten rid of their positions/shares without them having been declared as defaulters and to shift the responsibility to LSE;

(i) default situation and the possibility of determination of the original counter party arises only on a Settlement Day. In order to determine the original counter parties, so that burden of losses could be shifted to them, it is essential to wait for the Settlement Day. In the instant case, the situation was peculiar because of (i) the nature of the outstanding positions of the IS Group (all positions were COT) and (ii) the settlement date which was due on 7 June 2000. In the Appellant (IS)'s case it was not practically possible to even determine the original counter parties as all of his positions were COT, which Appellant (IS) had been carrying over for months. An examination of the transactions of IS Group reveals that with his shifting of the trading exposure from the brokerage houses of other brokers of the IS Group (Appellant ™ for example) IS Group members had become the sellers or the counter-parties. Even otherwise, the *badla* providers could not be treated as the original counter parties because *Badla* providers are not real investors.

iv. With respect to the LSE Exposure Regulations, he drew the Bench's attention to the fact that they do not prescribe any remedy in case of a member's failure to meet exposure demand of the clearing house. In practice LSE serves an exposure report on a member as soon as he exceeds his exposure limit requiring the

member to deposit cash or readily realizable securities within twenty-four (24) hours to meet the exposure demand. In case of his failure to meet the exposure demand within 24 hours he is then served a notice to meet his exposure demand within thirty (30) minutes, failing which the exchange has the right to suspend his trading rights without any further intimation to such member. Normally, if a member meets the exposure demand of Clearing House subsequently, his trading rights are resumed. During the suspension of trading rights on account of non compliance with exposure/loss requirement, the member may request LSE for allowing him to reduce his exposure in the market. In such an eventuality LSE may allow the member to do so and as an abundant caution sometimes Clearing House representative may supervise such transactions to ensure that the member may only reduce his exposure He referred to the example of Hanif Moosa given at page 33 of the Enquiry Report. He argued in this process, squaring up is not a normal procedure to follow in case of a member's failure to meet exposure demand. Squaring up is done only when a member fails to meet his liability towards the Clearing House on a particular settlement day and, therefore, commits default. In IS's case however, this stage never came. Before the settlement day of 7 June 2000, Appellant (IS) entered into the Agreement of 5 June 2000 and gave two (2) post-dated cheques of Rs. 5 crore each. As per the Agreement, placement of his shares was done and after squaring up of his positions by the CH, IS's total loss was determined. The final losses of LSE and others has been determined lawfully after the placement of the shares of IS Group members as represented in Annex H of Reply and Annex G 14, 15, 16 of SECP Documents. Thus, the total amount due from the IS Group to LSE:

IS	152,100,990
MIK	12,999,802
SNR	19,088,651
NA	8,000,000
Total:	**Rs. 192,189,443**

In the counsel's view, by entering into the Agreement the Board of LSE, in the best of its wisdom, and with the assistance of SECP in placement of the IS Group's positions, managed to avert the biggest crisis even faced by LSE. The Agreement and other steps taken by LSE facilitated and ensured the smooth sailing of the settlement of 7 June 2000, the protection of investors, preserved the investors trust in the market, and saved the clearing house from the disaster it faced due to the huge default of IS Group members and an imminent chain reaction leading to further defaults by other members of LSE which could have resulted into a complete crash of the market. By making this financial arrangement the clearing house assumed the responsibility of the loan extended by the 'badla financiers to the defaulting members on the basis that Appellant (IS) undertook to make payment under the Agreement. However, IS having obtained the benefit of time for arranging the payment under the Agreement, instead of fulfilling its promise Appellant (IS) took to reprobation, and when just a day before the due date of the first of the two cheques, the IS Group filed a civil suit, it's malice and fraudulent intentions surfaced. The contents

of his letter of 6 June 2000 (just one day after the Agreement) are sufficient to prove that the Agreement was executed by Appellant (IS) out of his free will. Even otherwise, the question of enforceability of the Agreement is *sub judice*, and in any event, Appellant (IS) had already admitted liability to the extent of Rs. 120 million before the Lahore High Court, Lahore in his civil suit filed against the LSE.

v. Moving on to the issue of price manipulation, he referred to the definition of price manipulation at pages 316 & 317 of the book **The Stock market**, by Dr. Richard j. Teweles, Edward S. Bradley and Dr. Ted M. Teweles:

"Manipulation is an artificial control of security prices; it is an attempt to force securities to sell at prices either above or below those that would exist as a result of the normal operations of supply and demand. The manipulator hopes to make a profit or avoid a loss by creating fictitious price that might be at the expanse of the trading public...Manipulation has three possible objectives: (1) the first is to raise the price, the manipulator then unloads on the buyer. This is the most common type. (2) The second may be to stabilize the prices. The net result is usually that the security sells at a better price than it would if it were allowed to seek its own level...(3) The third objective is to force prices down; this type of manipulation is rarely found except in the activities of the so-called bear raiders who hope to obtain short selling profits in this way....Manipulative activities are difficult to classify in that there are so many different forms and so many diverse devices by which they can be carried on such as "wash sales, corners and pool operations.

He also highlighted the provisions of Clause 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 1995 (the "SEBI Regulations"), which he argued treat the activities amounting to "manipulation" separately and distinctly stipulated in clause 4 from fraudulent and unfair trade practices under clauses 3 and 6 respectively. Clause 4 states:

No person shall:

(a) effect, take part in, or enter into, either directly or indirectly, transactions in securities, with the intention of artificially raising or depressing the prices of securities and thereby inducing the sale and purchase of securities by any person;

(b) Indulge in any act, which is calculated to create a false or misleading appearance of trading on the securities market;

(c) Indulge in any act which results in reflection of prices of securities based on transactions that are not genuine trade transactions;

(d) Enter into purchase or sale of securities not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or cause fluctuation in the market price of the securities;

(e) Pay, offer or agree to pay or offer, directly or indirectly, to any person any money or money's worth for inducing another person to purchase or sell any security with the sole object of inflating, depressing or causing fluctuations in the market price of securities.

The counsel further argued that there can be numerous ways and activities by which market could be manipulated. Like the Ordinance, the SEBI Regulations also prohibit any such activity which causes manipulation. This is reflected in the non-exhaustive list of acts which may constitute "manipulation" contained in Section 17 of the Ordinance, which section itself is wide and non-exhaustive in its scope. Furthermore, it is evident from a reading of Section 17 that the reference to "fraudulent acts" in the title or heading of Section 17 is not relevant. Therefore, the Appellant's argument that any act constituting a violation of Section 17 must involve fraud is misconceived. The scope of Section 17 extends to every person, which includes an "investor" like MNE. Clause (e) includes both acts as well as omissions. Such acts "operate and would operate" implies that the act or omission may operate and show results in future. The clause "fraud, deceit or manipulation upon any person" is disjunctive, therefore, this includes any manipulation (with or without involving the element of fraud) caused or expected to be caused. Upon any "person" would include a company or a body corporate. It is also clear from the use of the expression "In particular" before the specific acts mentioned in sub-clauses (i) to (iv) of clause (e) that the instances of the acts that operate or would operate as set out in those sub-clauses are non-exhaustive and may include other instances producing the same result.

vi. According to the counsel, what is clear from the foregoing authorities is that the characteristic of an activity that makes it manipulative is the artificial control of prices, not its illegality. The acts or instances of manipulation as set out in clause (e) of Section 17 cover the characteristic of artificial control of price and interference with the normal operations of supply and demand which manifested themselves in the following activities of the IS Group: The IS Group were "bull raiders" and their activities fall in the classical example of manipulation which involves price hiking. The IS Group in their cooperative venture through various brokers managed to: (a) accumulate the stock of AICL and BOP and therefore corner the short sellers and the market and (b) raise the prices of AICL and BOP without actually taking the delivery of the stock. In fact, the IS Group hardly ever picked up delivery of the shares. They preferred to extensively carry over their purchase (long) positions by accessing the "badla" market, which again historically has been a typical feature of this kind of manipulation. A second kind of manipulation which involves stabilization of prices is also applicable in case of IS Group's trading activities. From 20 March 2000 till 26 May 2000, Appellant (TM) and Appellant (IS) had been periodically entering into transactions which effectively resulted in recording of high volumes at inflated/abnormal prices without any actual change in beneficial ownership. Specific transactions during the period upto May 2000 Crisis of the IS Group which manifest the IS Group's cornering and manipulation in AICL and BOP shares, included:

(a) Increase in IS Group's holding of AICL shares between 5 January 2000 to 28 January 2000 from 1.887 million to 6.431 million, which peaked at **14.56 million** by 28 April 2002 (34% of the total issued shares of AICL at the time), with the price of AICL shooting up from Rs. 55.85 as on 4 January 2000 to Rs. 151.15 on 13 April 2000.

(b) During the same period, excessive use of *badla* was witnessed in AICL – COT volume of AICL shares peaked at 23.3 million on 7 April 2000 – the COT volume of Appellant (IS) share was approx. 50% of the consolidated COT volume at KSE and LSE. The result was that IS Group was able to heavily trade in AICL shares on

margin financing and in the process manipulated the price of AICL. Similarly, from end April throughout May 2000, the IS Group managed to manipulate the prices of AICL shares by holding carry over positions. This had imposed a high degree of risk on the brokers of IS Group as well as the LSE clearing house and the market generally. IS's carry over positions in AICL at LSE were all long (purchase) positions, which explains the upward manipulation of the prices of AICL shares during the subject period.

(c) Trading in BOP Shares also shows a similar pattern of cornering and manipulation in the scrip. Between 4 January 2000 and 18 February 2000, the IS Group purchased over 7 million shares of BOP. The IS Group held almost 17.3 million share of BOP i.e. 20.3% of total issued shares of BOP. The prices of BOP during this time shot by 39%. The total rise in BOP was 161% Price. COT of IS Group in BOP share between January 2000 to end May 2000 reflects excessive badla financing.

(d) The IS Group's activities as investors also disclose attempts to manipulate and corner the market in the scrips of BOP and AICL. The Appellant (IS) himself has admitted that he worked as an investor/client with various brokers at LSE and KSE since 1994. Appellant (IS) was operating several accounts through various brokers, including the Appellant (TM), Shahid Nauman Rana, Naeem Anwar, Muhammad Iqbal Khawaja and others out of a total of at least 11 brokers at LSE and KSE. The counsel referring to pages no. 63, 64, 69, 70 of the Enquiry Report, submitted that the Appellant (IS) has assumed the responsibility of several of these accounts, including the accounts titled DIL, SCL, Usman, N.I, I.N. and Mustafa. Appellant (TM) acted as IS Group's main broker at LSE. His brokerage house was the hub of the trading activities of Appellant (IS) and MNE. Furthermore, all the trading decisions of the IS Group and transactions carried out pursuant thereto were with full knowledge of TM.

(f) As to why the IS Group had so many accounts under different names with so many brokers, the only explanation he contended was because this provided Appellant (IS) with the ability to spread his positions over several brokerage houses and, therefore, have the flexibility to create a false impression of active trading and the ability to tamper with the regular market forces of demand and supply. Multiplicity of accounts of the same client in the same house could only be for the purpose of fraud or deceit. Similar client codes were used in different houses. In case of a member's default the responsibility of the fictitious accounts in his house would be a serious question. In the instant case, the Appellant (IS) has assumed the responsibility of various accounts he opened and maintained with the Appellant (TM), Muhammad Iqbal Khawaja, Naeem Anwar and Shahid Nauman Rana, which must be relief for these members.

(g) He contended that since the transactions in paragraph 45 to 48 of the impugned order which manifest the violations of Section 17 by the IS Group have been ably dealt with by Aly Osman for Respondents No.1 & 2, he would like to adopt his arguments to the extent that he has shown how these transactions are price manipulative and violative of Section 17 as well as how they reflect the one entity nature of Appellant (IS) and MNE. In addition, he argued that these transactions are marred by: (1) Debits in the account of DIL with the Appellant (TM) of which the beneficiary is NI account with Muhammad Iqbal Khawaja and with the Appellant (IS); (2) Payments mostly routed through TM; and (3) Utilization of cash/ securities. He also contended that excuses given by the Appellants that these transactions were

either loan transfers or returns of loans or represented the entries having been made by Appellant (TM) by mistake amid the confusion of the Crisis were absurd and nonsensical, as the transactions do not represent a single entry but a series of transactions over a period of time.

vii. While addressing the issue of whether the SECP had the jurisdiction to direct that the benefits of manipulation accumulated by the IS Group be disposed of to make good the losses caused by the IS Group, the counsel argued this essentially requires the Bench to adjudicate if the shares lying in the CDL sub-account No. 577 titled Mian Nisar Elahi belong to Appellant (IS) and other members of the IS Group and if so, whether those shares may be handed over to LSE because of the default of IS Group members. He contended that in his view the answer to both questions is in the affirmative, and that the exercising of such jurisdiction by the SEC was not tantamount to awarding damages.

vii. It was contended that this was because the Stock Exchanges being the front line regulators have the power under their Rules and Regulations to determine default of a member, the extent of such default and to recover the amount due as per the Default Regulations of the LSE. Even the Courts have normally declined to interfere in the working of the stock exchanges, particularly in declaration of default. He cited the case of **Lahore Stock Exchange Limited vs. Asmatullah Sheikh, PLD 1996 Lahore 602** as authority. This is an area which clearly falls within the domain of the stock exchanges.

xi. Sections 7 and 17 of the Ordinance and Section 20 of the Act were highlighted by the LSE counsel as providing the statutory basis for SEC's jurisdiction over the issue. Section 20 confers upon the SEC the power to issue "any direction" to any person. He also referred to clause 12 of the SEBI Regulations which empower SEBI to issue directions (a) prohibiting the person from disposing of any of the securities acquired in contravention of the SEBI Regulations (e.g., through manipulation), and (b) directing the person(s) concerned to dispose of any such securities acquired in contravention of the SEBI Regulations in such manner as SEBI may deem fit, for restoring the status quo ante. He contended that this stand is consistent with the order passed on 27 June 2002 by the SEC in disposing of the Appeal No. 2 of 2002, in which the extent of SEC's jurisdiction became subject of discussion. The Appellant's counsel in the course of his arguments has raised the point the LSE took a stand in that Appeal that SEC lacks the power to award damages as this power is in the domain of the civil courts. That Appeal, however, LSE's counsel argued was regarding private dispute between two members of LSE and the scope of SEC's jurisdiction was restricted to its powers under section 7 of the Ordinance in that case. Nevertheless, in his view, had the SEC ruled to restore status quo ante by directing the parties to the transaction to honour the disputed transactions and directing LSE to let the parties carry out their transactions at the original price, such a decision was within the scope of the jurisdiction of SEC and would not have amounted to awarding damages. In the instant case also, he contended the securities acquired and accumulated by the IS Group in the CDC Sub-Account No.577 as a result of their manipulation and unfair trade practices can be ordered/directed by SEC to be disposed of to make good the losses resulting due to the default of Appellant (IS) and other members of the IS Group in contravention of Section 17 of the Ordinance so as to restore the position as it would have been had no manipulation and unfair trade practices by IS Group and the resultant default of its members. He drew the attention of the Bench to the case of the Indian Gujrat

High Court cited as Securities and Exchange Board of India v. Alka Synthetics Ltd., AIR 1999 Gujrat 211 which was referred to in the said order as providing the authority to clothe the SEC as per the conclusion in paragraph 15 of the said order with the "authority under law to take necessary actions under the provisions of the Act independent of the Ordinance." Furthermore, he argued that SEC's powers under the Act are to be exercised in order to protect investors from acts of other players of the market who indulge in activity that may result in manipulation of the market. He argued for this purpose Section 20 of the Act read with Section 20 of the Ordinance gives ample powers to SEC to perform its functions under the Ordinance. Furthermore, he contended that the SEC without any power to undo a wrong and to retrieve the wrongful gains from the manipulators in the market, would be crippled. This, in his view, could not be comprehended from the schemes of the Ordinance and the Act.

viii. He concluded by stating that as there is sufficient evidence on record which establishes that the IS Group, in particular the Appellants (IS), (NE) and (TM) as well as their brokers Muhammad Iqbal Khawaja and Naeem Anwar have violated the provisions of Section 17 of the Ordinance, there is no need to determine criminal intentions or mens rea as the same is irrelevant as far as the violation of section 17 is concerned as "manipulation" is not a "crime" in the strict sense of the word. The punishment prescribed under section 24 of the Ordinance for violation of Section 17 does make it an offence. SEC has to act with minimum of technicalities. Highlighting Sections 24 and 25 of the Ordinance read with Section 38 of the Act, he contended that prosecution of this offence, like any other under the Ordinance and the Act has to be with the consent of two commissioners on a report in writing of the facts constituting the offence.

Submissions made on behalf of Mr. Iqbal Khawaja Respondent No.4 and Respondent No.5

14. Although not much arguments were made by the above Respondents at the time of the hearing, however, the Bench had allowed them to give their written arguments in writing latest by the next day from the date of hearing. These arguments were received from Respondent No.4 which can be summarized as follows:

i. It has been contended by the answering Respondent that the IS Group hatched and executed a highly sophisticated conspiracy to defraud its creditors. In order to exploit the securities markets, IS Group pooled their resources together for the ultimate purpose of sharing in profits derived from investing in securities listed on the stock exchanges.

ii. The prices of favorite scrips of IS Group were artificially manipulated for the specific purpose for playing fraud on deceiving the creditors of the IS Groups. It used to keep complete secrecy of the positions it was taking in the market. This is evident from the fact that Iftikhar Shafi, being the dominant player of the IS Groups.

iii. It has been contended in the claim that the said persons in fact are one entity i.e. Iftikhar Shafi Group, regardless of the fact as to under what names various accounts were opened and operated. As per the answering respondent NE shares in fact belong to the IS Groups and are liable to be adjusted towards the

losses sustained by the above brokers/claimants.

iv. During the course of arguments, the counsel for LSE raised some objections to the transactions conducted by answering Respondent brokerage house and asserted that these transactions were done for IS Groups and answering Respondent was also part of IS Groups. In this regard the counsel of LSE alleged some spot transaction of May 26, 2000 as manipulation. Whereas the fact is that the alleged transactions mentioned therein were spot purchase for some other client as that can be verified from the client code mentioned thereon in the LOTS transaction statement annexed with his written arguments. The code of alleged transactions statement as mentioned by the counsel is "0" and code used for the Iftikhar Shafi Group Accounts maintained in the answering Respondent brokerage house are entirely different and are available with the Securities and Exchange Commission of Pakistan. It is submitted that code "0" has never been used for the transactions of IS Group.

v. The approached of LSE in accommodating one investor and his associates by assuming their liabilities is not understandable. It is an admitted position that these transactions were completed and transacted in connivance of LSE management and it was LSE who facilitated the IS Group.

vi. The answering Respondent, who was used by the IS Group as a tool in their conspiracy, also got exposed to huge losses due to the Group's positions taken in their various accounts titled "NI" (i.e. Nisar Iftikhar), "Waqar Shafi, "Aftab Waqar", "Waqar Khan", "Nargas Saeed" and "Yousaf Waqar".

vii. That pursuant to the understanding arrived at between LSE and Iftikhar Shafi placement of shares of IS Group through LSE officially took place. After the placement of said scrips, Iftikhar Shafi's (IS Group) net loss was transferred to the membership of Iftikhar Shafi. As had already been agreed amongst the Respondents, since all the outstanding positions of Iftikhar Shafi (IS Group) were placed by LSE. The entire ensuing loss stood transferred into the membership account of Iftikhar Shafi.

viii. That once all the prerequisites envisage in the understanding were fulfilled, Respondent was suspended without even being heard. That by then it had been established beyond the shadow of a doubt that all outstanding positions of IS had been transferred into his own account membership and, consequently, the terms of the understanding, and, subsequently the Agreement, were in full force.

ix. IS, NE and Waqar Shafi etc. operated in the Stock Markets as one entity. This fact has been acknowledged/recognized by the national media as well as this esteemed office i.e. the Securities and Exchange Commission in its report.

15. Having heard all the parties at length and appreciating that the matter before us involves serious and complex issues relating to both legal as well as factual aspects, we deem it appropriate to take up these issues one by one to avoid any confusion and resolving the same with clarity.

16. The preliminary issues pertained to the Appellants' being condemned unheard by Respondent No. 2 and his bias towards the Appellants. These allegations

or charges are manifestations of violation of the principle of natural justice. While it is true that over the years there has been a steady refinement as regards this particular doctrine precedent on the points suggest that it has not been attributed a specific definition nor has there been prescribed a straight-jacket formula. Perhaps, for the simple reason that its application is solely dependent upon the facts and circumstances of each case and attributing a specific meaning to it would limit its application. Thus the totality of the situation where there is breach of the principle of natural justice must be taken into account and if on examination of the case in its entirety, it comes to light that the action suffers from the vice of non-compliance of the doctrine, the wrong inflicted upon the concerned persons ought to be redressed. As a matter of fact the doctrine is now termed as the "synonym of fairness in the concept of justice" and stands as a pivot of judicial or quasi-judicial exercise of authority and discretion.

17. In view of the foregoing, where the Appellants have conceded and admitted that the issue of violation of principles of natural justice has become infructous since the Bench has given them ample opportunity not only to argue their case on merits but have also provided all the documents relied upon by the Respondents without going into the issue whether they had possession of such documents or not, and given them abundant opportunity for bringing any evidence in support of their defense, and more so have adjudicated upon the matter as a forum of original jurisdiction on the request of the Appellants, dilating on the issue itself would only become an academic exercise and is uncalled for. As for the argument that the Bench is not only sitting in judgement against the Appellants but also the Respondents, it needs to be appreciated that adjudication on this issue would be required on merit. As stated above, despite the admission of the parties regarding the issue becoming infructuous, this would still require examination of the facts and conduct of both the Appellants and Respondents in its entirety. Getting into the nitty gritties of this issue will unnecessarily entail the time of the Bench in adjudicating a matter which does not require determination. With respect to bias as argued by the Appellants, it is noted that the word bias in its broader purview of the word involves the attributes of malice which in common acceptance implies spite or ill will. Firstly, taking the main objection of the Appellant (IS) is that the recommendation of Respondent No.2 to place his name on the Exit Control List ("ECL") was premature. In his view the letter written by the Respondent No. 2 states the allegation against the Appellant (IS) as conclusive finding of the Commission, and it is maintained that while adjudicating the matter the Respondent No. 2 was not capable of having an impartial and unbiased view of the matter. We have examined the said letter and are in agreement with the submissions of the Respondent No. 1 that the letter was written by the Respondent No. 2 in an administrative capacity and that the placing of the name of the Appellant on the ECL was in the discretion of the Ministry of Interior, and in any event this has no bearing on the present case. The steps taken by SEC were on balance precautionary and appear to be essential in view of the alleged contraventions and wrongful gains made by him. Furthermore, the counsel for the Appellant (IS) has admitted that the alleged haste in concluding the proceedings was due to the misapplication of the prescribed time limit of 44 days given by the Lahore High Court in W.P. 1344/2001. Thus, it will not be appropriate to attribute malice and ill will to Respondent No. 2 as there appears an honest misunderstanding relating to a point of fact, which was subsequently clarified by the Superior Court. From a reading of the impugned order, in particular paragraph 14, there appears to be an honest apprehension in the mind of the Respondent No. 2 that the 44 days time limit was also applicable through necessity to the finalisation of

enquiry as against Appellant (IS) and Appellant (TM), and that its contravention could entail contempt proceedings against the Respondent No. 2. It was for this reason that Mr. Nisar Elahi was asked to give an undertaking that he will not file any contempt proceedings failing which Respondent No. 2 proceeded to decide the matter within the prescribed time. We would not like to get into the debate that had the Appellant (NE) not refused to provide such assurance he could have availed a fuller and complete opportunity of hearing, however, the above facts are only stated to reflect that there was no malice and ill will directed against the Appellants. Accordingly, all arguments on behalf of the three Appellants alleging "improper conduct" and "unnecessary haste" and "lack of fairplay" on the part of Respondent No. 2 when seen in the above context appear untenable and in any event perhaps no more relevant where parties have been given full opportunity and they have expressed full confidence in the Bench.

18. We shall now consider the material issues of "group entity" and "price manipulation" by first considering as to what does one mean by the term "group entity" and "price manipulation"? In the present case the term "group entity" has evolved from the expression "IS Group" which has been derived from the Enquiry Report. In our view it can be identified as a term connoting participants who have been pooling their resources, assets, accounts and expertise or any combination of the foregoing with the object of executing or facilitating a common strategy. The term "group entity" therefore has to be similarly interpreted and understood in its application.

19. In this regard the main objection raised by the Appellants is that nowhere the term "IS Group" is defined in the inquiry report and nowhere the Appellant NE is referred to as a part of the said group. With respect to this issue Respondent No. 2 has contested that since maintenance of various accounts has been admitted by the Appellant (IS) nothing is left to be proven in this regard. He referred to the statement made by the Appellant (IS) during the proceedings as well as in his Appeal admitting that the accounts named IS, Usman, SS, NI (Joint Account with Appellant (NE)), DIL and Shafi Chemicals Industries Limited ("SCIL") were under his control and are a "group". The Appellant (IS) was also said to have expressly stated that he did not mind seeing "IA, SCIL and DIL as one entity". Furthermore, the fictitious accounts opened by the Appellant (IS) were also pointed out such as the account of "Usman" with Naeem Anwar, "SS" with First Capital ABN Amro, "Mustafa" with Mr Hanif Moosa. He pointed out to the letter on record by a person signing on behalf of Appellant (NE) addressed to Hanif Moosa requesting information relating to the account "Mustafa", which has been admitted in Appeal No. 27.

20. Now coming to the term "price manipulation" as eloquently argued by the counsel of LSE, reference was made to the book by Richard J. Tweles, Edward S. Bradley and Ted M. Teweles "The Stock Market" 6th Edition

"Manipulation is an artificial control of security prices; it is an attempt to force securities to sell at prices either above or below those that would exist as a result of the normal operations of supply and demand. The manipulator hopes to make a profit or avoid a loss by creating fictitious prices that might be at the expense of the trading public. Some manipulation even today is legal. The characteristic of an activity that makes it manipulative is the artificial control of price, not its illegality".

21. Definition of manipulation under Section 17 of the Ordinance for ease of reference reads as follows:-

Prohibition of fraudulent acts, etc. No person shall, for the purpose of inducing, dissuading, effecting, preventing or in any manner influencing or turning to his advantage, the sale or purchase of any security, directly or indirectly,--

.....

(e) do any act or practice or engage in a course of business, or omit to do any act which operates or would operate as a fraud, deceit or manipulation upon any person, in particular—

(i) make any fictitious quotation;

(ii) create a false and misleading appearance of active trading in any security;

(iii) effect any transaction in such security which involved no change in its beneficial ownership;

(iv) enter into an order or orders for the purchase and sale of security which will ultimately cancel out each other and will not result in any change in the beneficial ownership of such security;

(v) directly or indirectly effect a series of transactions in any security creating the appearance of active trading therein or of price for the purpose of inducing its purchase by others or depressing its price for the purpose of inducing its sale by others;

(vi) being a director or an officer of the issuer of a listed equity security or a beneficial owner of not less than ten percent of such security who is in possession of material facts omit to disclose any such facts while buying or selling such security.

22. It is evident from the definition of manipulation and development of research into the concepts and practices of manipulation exhibited in the book titled “The Stock Market” that the definition cannot be given a restrictive and definitive meaning. In fact Section 17 of the Ordinance appears to have been drafted to reflect such interpretation. Indeed experts around the world have appreciated the dynamic nature of securities market and in this regard have acknowledged that the practice of manipulation can and will take new forms over time. As such law makers around the world and in particular in Pakistan appear to have drafted the relevant provision in our case Section 17 in as general and wide a manner so as to envisage any such new acts of manipulation. This is seen by the language and wording of the said provision for instance the use of the term “in particular” in the said provision under the Ordinance clearly contemplates that there are more possibilities in addition to the acts or practices particularly contemplated under law. Clearly the intention of Section 17(e) is to prevent any mischief in this regard. Therefore, acts of manipulation include those stipulated under Section 17 and as well as the general instances of manipulation for which a person accused of manipulation would also be charged under Section 17, so far as it can be established that the alleged acts constitute

manipulative practice(s).

23. It is evident from the arguments submitted and the facts on record that the existence of a "group entity" in and of itself does not constitute an illegality. However, in the present case the issue of group entity is relevant in the context of price manipulation. It has been alleged that it was the combining of accounts, finances, services, contacts and expertise which provided the means to commit the act of manipulation. Since the common objective and common strategy employed by the group entity was unlawful, therefore, issues pertaining to the existence of the group and its acts of manipulation are inter-related and the facts and conclusions arrived at on the one issue are relevant for the purposes of the other and vice versa.

24. With respect to the issue of group entity Respondent No. 2 has contested that since maintenance of various accounts has been admitted by the Appellant IS no further proof is required. It was argued that Mr. Iftikhar Shaffi had made a statement during the proceedings admitting that the accounts named IS, Usman, SS, NI (Joint Account with Mian Nisar Elahi), DIL and Shafi Chemicals Industries Limited ("SCIL") were under his control and are a "group". Furthermore, the Appellant (IS) was also said to have expressly stated that he did not mind seeing "IA, SCIL and DIL as one entity". The fictitious accounts opened by the Appellant (IS) were also pointed out as the account of "Usman" with Naeem Anwar, "SS" with First Capital ABN Amro, "Mustafa" with Mr Hanif Moosa. There is letter on record by a person signing on behalf of Mian Nisar Elahi addressed to Hanif Moosa requesting information relating to the account "Mustafa", which has been admitted in Appeal No. 27. Other accounts opened and operated by Iftikhar Shafi include Diamond Industries and Shafi Chemicals. In paragraphs 34 and 35 of Appeal No.28, Appellant (IS) has admitted maintaining a personal account with DIL and SCIL and channeling his personal trades through accounts in the name of DIL and SCIL. There is also evidence of the joint use by the group of an account titled "NI". This account was maintained with Appellant (TM), M. Iqbal Khawaja, Prudential Securities and Mr. Hanif Moosa. Transactions through this account highlighted in the table on page 19 of the Reply of Respondents 1 and 2 to Appeal No.28 disclose evidence of an explicit partnership arrangement between Appellants (NE) and (IS). Moving on to the fact of pooling of resources (funds and shares) between account of groups to establish linkage and commonality of operations between the Appellant (IS) and (NE), it has been argued by Respondent No. 2 that there are many instances of share transfers without consideration between the accounts of the group. He referred to pages 24-29 of the Reply of Respondents 1 and 2 to Appeal No. 28 which contained a detailed explanation of the share transfers involved. These briefly include share transfers in and out of the account of DIL which are not a result of trading or settlement between the respective accounts, transfer of shares from the account of DIL to joint account NI, pooling of funds between NE and IS with respect to joint account WS (group entity of IS, NE and WS), pooling of funds between accounts SCIL and DIL, pooling of funds between the accounts Appellants NE and IS, use of account of Appellant NE and DIL, accumulation of shares in the brokerage house of the Appellant (TM), clear proof of use of the account of DIL for IS Group and transfer of shares to IS from the said account.

25. What has been asserted vehemently by the Respondent is the fact that the Appellants have not denied the transactions or the share transfers but have only tried to explain them and in support of their argument they have not produced any documentary evidence to prove the defence taken that it was loaning of shares

between group accounts. He also argued that though loaning of shares is normal practice in stock market however, the period of loan claimed by the Appellants extending over a period of few months to a period of years is against market norms and even otherwise such conduct, in fact, reinforces the group entity nature of the accounts. The counsel for LSE opted to adopt the arguments rendered by Mr Aly Osman as in his view these were most ably presented before the Bench. He added that excuses were being given by the Appellants that these were either loan transfers or return of loans or represented the entries having been made by Appellant (TM) by mistake amid the confusion of the Crisis. It is his contention that the transactions do not represent a single entry but a series of transactions over a period of time.

26. As to why the Group Entity had so many account under different names with so many brokers, the counsel for LSE argued that the only possible explanation is that it provided the Appellant (IS) to spread his position over several brokerage houses and therefore have the flexibility to create a false impression of active trading and the ability to tamper with the regular market forces of demand and supply. In his submission, multiplicity of accounts of the same client in the same house could only be for the purpose of fraud and deceit. According to him, similar client codes were used in different houses and in the instant case it is interesting to note that the Appellant (IS) had assumed a responsibility of the various accounts that he had opened and maintained with the Appellant TM, Muhammad Iqbal Khawaja, Shahid Nauman Rana, and Naeem Anwar which must be of relief for these members.

27. The contention of the Counsel for the Appellants Appellant TM and NE as provided in this regard in paragraph 9 at pages 24 and 25 of this order has been carefully scrutinized in detail discussed hereunder:-

Transfers through Tanveer Malik's brokerage house

(a) Para 31(i) of the impugned order relates to a transaction on May 31st, 2000 where Rs 2.5 million was received by Mr. Iqbal Kalama's brokerage house vide cherub No.25732168 against the loss accruing in the account name N.I. from the Appellant (TM) where the amount was debited to account name Diamond Industries Limited. The counsel has referred to this payment as part of the lifeboat funds arranged by LSE following the crisis. The transaction shows that the joint account N.I. and account of DIL were actively used by the IS group to meet their obligation in the respective account through use of funds pertaining to the group (Reference annex H32 and I1).

(b) Para 31 (iii) and (iv) of the impugned order relates to transaction of March 30, 2000 of Rs 900,000/- which was paid by Mr. Tanveer Malik on behalf of the account named N.I. to Shahid Nauman Rana who credited such payment into the account named Diamond Industries Limited (Annex G74 and B28) and on April 6, 2000 Rs 1.060 million was paid by Shahid Nauman Rana on behalf of the account name DIL to the Appellant (TM) with ultimate credit being made in the account N.I. The Appellant has referred these transactions as representing loan by the Appellant (NE) to Shahid Nauman Rana Return of that loan. These payments reflect pooling of funds by the group though accounts of DIL and N.I. thus showing commonalty of interest of the respective account. Even if it were to be considered as a loan it further proves group entity nature of such account.

(c) Para 33 (iii) of the impugned order relates to a share transfer on September 1, 1999 when 765000 shares of PTCL were transferred from the account named Mian Nisar Elahi held in the Appellant (TM)'s brokerage house to account for Waqar Shafi held in Iqbal Khawaja's brokerage house. The counsel has referred to this share transfer as a loan by the Appellant (NE) to Waqar Shafi. Here no evidence has been shown for the loan. The share transfer shows a link between account of Mian Nisar Elahi and Waqar Shafi.

(d) Para 33 (iv) of the impugned order relates to a transaction on February 8, 2000 when 374900 shares AICL were transferred from the account name N.I. held in Prudential Securities House to account of Waqar Shafi held in Iqbal Khawaja's brokerage house. The Appellant has referred to this transaction as irrelevant alleging that the Appellant (NE) has no connection to the account N.I. with Prudential Securities. Reference is made to CDC statements as annexure D24 which shows the account N.I. which is clearly a joint account of Mian Nisar Elahi and Mr. Iftikhar Shafi. The transaction further shows sharing of shares through account N.I. and Waqar Shafi.

(e) Para 33(vii) of the impugned order relates to a transaction on May 1, 1999 when 600000 shares of KESC were transferred on behalf of the account name Mian Nisar Elahi held in the Appellant (TM)'s brokerage house to the account named Mr. Iftikhar Shafi held in Naeem Anwar's brokerage house. The counsel has referred to this transaction as a return of loan by the Appellant (NE) to the Appellant (IS). Evidence of loan is not shown even otherwise the period of loan extending from May 1, 1999 to February 9, 2000 is unrealistically lengthy which is against the normal market practice and which shows that group members favoured each other to such an extent and thus showing some commonality of interest.

(f) Para 33(viii) of the impugned order relates to a transaction on March 13, 2000 when 39500 shares of Askari Leasing were transferred from the account Shafi Chemicals held in Naeem Anwar's brokerage house to the account named Mian Nisar Elahi held in the Appellant (TM)'s brokerage house. Once again the Appellant has referred to this transaction as loan by Mian Nisar Elahi to Mr. Iftikhar Shafi. This transaction proves Mian Nisar Elahi's close link with these account.

(g) Para 33(ix) of the impugned order shows share transfer on March 1, 2000 when 600000 shares of PTCL were transferred from the account named Mian Nisar Elahi held in Mr. Tanveer Malik's brokerage house to the account named Diamond Industries Limited held in Shahid Nauman Rana's brokerage house. The Appellant has stated here that Diamond Industries Limited purchased 5705000 shares of PTCL for week ending February 25, 2000 and that Mian Nisar Elahi had sold 730000 shares of PTCL for the same week and since Appellant (NE) and DIL were operating from the same house, therefore, the Appellant (NE)'s shares were transferred to DIL in-house. The Appellants assertion has no bearing to the said transactions and even appears to be incorrect in so far as DIL account instead of the account named Mian Nisar Elahi with Mr. Tanveer Malik's brokerage house is being credited for the sum of Rs 19.5 million

(h) Para 33 (xiv) of the impugned order shows the shares transfer on February 3, 2000 when 200000 share of Suit Southern Gas Company were transferred from the account named Shafi chemicals Limited with Naeem Anwar's house to the account named Mian Nisar Elahi held in Mr. Tanveer Malik brokerage

house. The share transfer is shown in annexure I2 and I3. The Appellant has referred to this transaction as a return of loan by Shafi Chemicals to the Appellant (NE). However, apart from the share transfers being shown as per record there is no documentary evidence to corroborate the existence of such a loan transaction. Even otherwise the transaction show group entity of accounts.

(i) Para 33(xv) and (xvi) of the impugned order show the share transfer of the August 4, 1999 when 125000 shares of ICP (SCMS) were transferred from the account named DIL held in Naeem Anwar's brokerage house to the account named Mian Nisar Elahi held in Appellant (TM)'s brokerage house (Ref: annexure I4 and I5). On August 15, 1999 75000 shares of ICP (SCMS) were transferred from the account named Diamond Industries Limited held in Naeem Anwar's brokerage house to the account named Mian Nisar Elahi held in the Tanveer Malik's brokerage house. The counsel has referred to these transactions as those by the Appellant (NE) to DIL and its return. The share transfer between such accounts show group entity and no documentary evidence has been shown.

(j) As for the objection of the counsel for the Appellants Appellant TM and NE relating to the finding in the impugned order of inter se trading without change in beneficial ownership by the Appellant (NE) the counsel has emphasized that to constitute the manipulation the transactions must be trades. It has rightly been pointed out by the Respondent that what is referred to in para 46(e)(xi & xii) of the impugned orders an instance of manipulation by the counsel for the Appellants (NE) and (TM) were in fact aimed at showing the existence of the group entity and not manipulation itself.

(k) We are of the considered view that a closer analysis of shares transfers confirms that considerable quantity of shares were transferred by IS group to the house of the Appellant Appellant (TM) in favour of the accounts kept in the name of the Appellant and DIL. In particular shares transfers noted in paragraph 33 sub paras i, v, vi, viii, x, xi, xii, xiv, xv and xiv. The IS group as rightly pointed out by the Respondents orchestrated the concentration and accumulation of its share holding with the Appellant (TM).

28. Similarly the explanation given by the Appellant (IS) relating to para 33(I) to 33(XVI) are precisely an acknowledgement of transactions but with a variation of the view that these were mainly transfers as a result of loan or return of loan. In our considered view the said transactions reveal that there is a link or relation between the accounts used as the admitted transfer is not a result of trading or settlement obligation between the relevant accounts, it also shows lack of consideration for such transfer or absence of closure/opening of respective accounts which may have resulted in such transfer and not having any documentary support for the purported loan transaction providing for terms and condition of loans as per normal practice

29. In order to support the finding that there was in fact a Group Entity Respondent No.2 in paragraphs 31 and 34 of the impugned order found *inter alia* that certain specified liabilities were accrued in the account named DIL in TM's brokerage house the corresponding benefit of which was credited into different accounts held by the group. The Appellant IS has attached an annexure at page 216 of his appeal a letter purportedly written and sent by DIL to Appellant (TM) where in Appellant (TM) is directed to reverse certain debit entries erroneously recorded.

However, Respondent No.1 drew our attention to the fact that ledger statements or any other record generated from the brokerage house of Appellant (TM) have at no time after the purported delivery of the said letter of DIL shown any reversal of debit entries in the DIL account. In fact during the investigation process carried out by both the LSE and SEC, Appellant (TM) provided records much after June 26, 2000 on DIL account which showed no reversal of debit entries and when providing the records never highlighted such direction having been given to him by DIL. Clearly had DIL given such instructions Appellant (TM) would have been under a statutory obligation when providing the record to the SEC to inform it of the incorrect debits as the same otherwise would have been tantamount to false and misleading information. Therefore, the production of such a document by IS at this point in time over two years after its purported delivery undermines its genuineness. Furthermore, as pointed out herein the record does not support DIL's direction having ever been given in the first place.

30. It is relevant to point out that LSE has raised allegations against Respondent Nos. 4 & 5 to be treated as part of the Group Entity. However, since neither the impugned order nor the impugned show cause notice relates to these parties, we do not consider it appropriate to adjudicate on this issue.

31. With reference to paragraph 46(e)(iv)(a) of the impugned order against the Appellant NE which pertains to a transaction for the week ending April 28, 2000 in the brokerage house of Appellant TM whereby 1.050 million shares of AICL were sold through the account named DIL and the same were purchased through the account named NE. The Appellant's counsel has referred to this transaction as an inhouse Badla transaction between NE and DIL. The CDC statement shows that the said shares were transferred to the account of NE, however, as alleged by the counsel for the said Appellant that the transaction was COT the said shares should have returned to the account of DIL which is clearly not shown as per the CDC's statement. The argument put forward by the counsel in this respect was that the shares were not transferred to the account of DIL due to the apprehended default of IS. This supports and strengthens the arguments of the Respondent relating to group entity and to some extent the aspect of manipulation that the concerned did not act at arms length basis and that basically what is lying in the Appellant (NE)'s account belongs to IS group rather than to the Appellant (NE) alone.

32. In view of the foregoing we are left in no doubt that the Appellants acted as one group entity despite even though the term "IS Group" is not particularly defined the transactions discussed clearly establishes nexus and bond between the major market players in particular the three Appellants. On reading the inquiry report and after looking at these transactions what is brought to light is that there is an IS Group which includes the other two Appellants who are operating through many accounts. In our view the term "IS Group" which has its root in the Enquiry Report for the purposes of this case refers to a group entity which consists of the Appellants Mr. Iftikhar Shafi, Mian Nisar Elahi and Mr. Tanveer Malik operating either through their own brokerage houses (in case of Appellants TM and IS) or brokers of KSE and LSE namely Mr. Muhammad Iqbal Khawaja, Mr. Naeem Anwar, Mr. Shahid Nauman Rana, First Capital ABN Amro, Prudential Securities, Hanif Moosa, Mr. Muhammad Hanif Dharwarwalla, Republic Securities, Mr. Aqeel Karim Dadi through the accounts in the name of Mian Nisar Elahi, Nisar Elahi, Nisar Iftikhar (NI), Iftikhar Shafi, Waqar Shafi, Usman, Diamond Industries Limited, Shafi Chemicals Limited,

Gohar Ejaz, Waqar Khan, Aftab Waqar, SS, Mustafa and Ejaz Spinning Mills Limited. The term “Group Entity” therefore has to be interpreted and understood in this sense in its application to the Appellants.

33. For this purpose we shall now proceed to determine as to whether the common object or purpose of the activities of the group was manipulation of price as contemplated as under Section 17 of the Ordinance. Before we get into the act of manipulation itself we need to look at the objections raised by the Appellants in respect of act of manipulation. The counsel for Appellants NE and TM has argued that manipulation has to be committed on a “person”. In the absence of such person being identified in the manipulation cannot be said to have been committed. In our view in the dynamic situation it is not necessary that one can identify a specific person, as it may be the case that the investors at large or the stock exchanges themselves are the person who are affected. This view finds strength from the view taken in the inquiry report at page-65 “*in the dynamic situation of the stock market the exact determination of book losses is difficult to determine as many related parties may be holding on to positions in the hope of a market turn around”.* Further it has also been said that the losses of such manipulation have not be identified. In this regard attention is drawn to page-66 of the inquiry report which reads as follow: *“The contingent losses of various stock brokers and investors due to sudden crash of the market are not quantifiable but appear to be substantial, considering the erosion of market capitalization discussed earlier in this Chapter. The most negative impact has been the loss of investor confidence in the stock market, at both local and foreign”.* It was also argued that for the violation of Section 17)(e) an order is required to be placed whereas Respondents have referred to transactions instead of orders. To us this does not seem to be a relevant objection as Section 17(e)(iv) is just one of the instances of manipulation and act of manipulation as discussed earlier cannot be restricted to such interpretation. In any case reliance in the impugned order primarily seems to have been placed on Section 17(e)(ii) and (iii) of the Ordinance. Also an objection has been raised that every transaction results in manipulation, therefore, to show and establish the illegality of manipulation intent becomes relevant, which according to the counsel Respondents have failed to establish.

34. As for the argument whether the manipulation constitutes an act of fraud, we have considered the arguments put forward by both sides, and from the plain and ordinary reading of the relevant provision it is explicitly clear that Section 17 of the Ordinance envisages fraud, deceit or manipulation which distinct offences as rightly pointed out by the counsel of LSE, however, in our view they may or may not overlap. In any event the committing of these offences entails a penalty, which may or may not be coupled with imprisonment, therefore, the issue that needs to be examined is whether for the purpose of manipulation intent is a must to be established, independent of the act of manipulation itself as argued by the Appellants. We find merit in the arguments submitted by the Respondent No.1 that a finding of a manipulative purpose is to be based on inferences drawn from circumstantial evidence. As rightly quoted by the Respondent No.1 “Since it is impossible to probe into the depths of a man’s mind”, it is necessary in the usual case that the finding of manipulative purpose be based on inferences drawn from the circumstantial evidence. Therefore, it is our considered view that in the absence of an admission, proof of manipulative intent must depend on inferences drawn from a mass of factual detail. Any findings can only be gleaned from patterns of behaviour, apparent irregularities and from trading data amongst other circumstances. When all

of these are considered together they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces. So far as if such factors are established, we are left in no doubt or else cannot envisage as to how the purpose of such manipulation can be proved. It has also been argued by the counsel for the Appellant (IS) that no gain was made by the Appellant, therefore, manipulation could not be alleged against him. In our view the motives for committing or attempting to commit can vary: it can be done, to increase the value of a position in the market for finance or account purpose, or to enable issuance of new shares at a high price; or to cause such a price rise that other investors are attracted to the stock, creating demand that the manipulator can sell into. Thus this objection does not have merit.

35. On the request of the Appellant (IS) Paragraph 43 of his appeal and the arguments therein are to be adopted and are thus addressed as follows: when the documentary evidence including the trading data (Annexure A) and the Enquiry Report which forms basis of the impugned order has been provided to the Appellants during the instant proceeding the plea of the Appellant of not being in possession of the same is no more tenable.

43 (i) of IS Appeal relates to Para 46 (e) (i) of the impugned order:

46(e)(i) During the period beginning 4th January 2000 to 18th February 2000 the Accused purchased over 7 million shares of BOP. The heaviest trading occurred through the brokerage houses of First Capital ABN AMRO, Tanveer Malik, Iqbal Khawaja and Naeem Anwar. In the same period, the BOP share price increased from Rs. 21.45 to Rs. 29.90, which is an increase of 39%. (Annexures A-23 to A-31, A-1 to A-11, A-16 to A-22, A-32 to A-40 (A-1 to A-71)).

36. The Appellant has failed to furnish any evidence in support of his claim of not purchasing or selling more than 200,000 shares of BOP. The accumulation of shares of BOP by the Group Entity can be seen from the trading data (Annexure A) and page 63 of the Enquiry Report, which states that the group holding increased from 7.822 million shares of BOP on January 4, 2000 to 17.268 million shares of BOP by February 25, 2000 which constituted 20.3% of the total issued shares.

43(ii) of IS Appeal relates to para 46 (e) (ii) of the Impugned Order:

46(e)(ii) On 7th April 2000 Mohammad Hanif Moosa, Tanvir Malik (both of whom acting on behalf of the Accused), Diamond Industries and Iftikhar Shaffi held 6.230, 6.437, 4.050 and 3.902 million shares of BOP respectively. The price of BOP shares peaked on 13th April 2000 at Rs. 48.50 [(Holding of BOP in CDC by Mr. Iftikhar Shaffi and selected members as Annexure XXVI of the Enquiry Report and 2nd para on page 63 of the Enquiry Report)].

37. The Enquiry Report on page 63 observes that on 7th April 2000 Mohammad Hanif Moosa, Tanvir Malik (both of whom acting on behalf of the group), DIL and Appellant (IS) held 6.230, 6.437, 4.050 and 3.902 million shares of BOP respectively. The price of BOP shares peaked on 13th April 2000 at Rs. 48.50. Appellant has accepted the holdings to be correct to some extent, but has not provided any evidence to the contrary. The accumulation and holdings of the group in our view do indicate intentional interference with the market forces to corner the

stock and thereby artificially controlling its prices.

43 (iii) of IS Appeal relates to 46 (e) (iii) of the Impugned Order:

46 (e)(iii) COT of the Accused in BOP during the period January to end May 2000 reflects excessive use of badla financing. An instance of this is seen for the week ended 13th April 2000 where 5.584 million shares of BOP were placed into COT through Tanveer Malik alone. The total COT volume in the market for BOP shares at the Lahore Stock Exchange was 6.3 million shares. The excessive use of badla financing by the Accused is indicative of the fact that the Accused, through the use of COT, was able to trade heavily in the shares of BOP on margin finance and, consequentially, manipulate the share price of BOP. [(Trading data of COT as Annexure A-1 to A-11 / consolidated COT position of BOP in LSE on page 53 of the Enquiry Report/ Breakup of COT on page 55 of the Enquiry Report)].

38. It has been observed that the impugned order does not hold COT to be an illegal activity nor for that matter does it place any restriction on the number of shares that can placed on badla as purported by the Appellant (IS). However, the Group Entity's use of COT market in such a manner also shows some deliberate and artificial activity generated to control and affect prices.

43 (iv) of IS Appeal relates to para 46 e (iv) of the Impugned Order:

46(e)(iv) The Accused sold over 17 million shares of BOP at the LSE for the weeks ended, 7th April, 13th April, 12th May, 19th May, and 26th May 2000 through Iftikhar Shaffi, Tanveer Malik and Naeem Anwar. This sale of BOP shares represented over 20% of the total issued shares of BOP. It is important to note that the price of BOP share plummeted from Rs. 47 on 7th April 2000 to Rs. 33 on 26th May 2000 [(trading record as Annexure A)].

39. The Appellant (IS) has alleged that he purchased approximately 15,48,000 shares of BOP during the period April and May 2000 in order to support the market, but has not substantiated his claim with any evidence of the same. Further, the Appellant has made allegations against certain brokers for selling his shares but has failed to furnish any specific fact in this respect. The decrease in holding of the group has been shown on page 63 of the Enquiry Report wherein, it is noted that *"the holding of the group started to decline from April 13, 2000. Interestingly, however, the COT volume in the shares started to increase from April 21, 2000. The fall in holding of the IS group from 23.5 million shares as on April 13, 2000 to 9.5 million on May 19, 2000 i.e. 14.0 million is roughly equal to the increase in COT volume during the same period (13.4 million")*.

43 (v) of the IS Appeal relates to para 46 (e) (v) of the Impugned Order:

> *46(e)(v) The Enquiry Committee Report in its findings observe that the Accused' accumulation of AICL touched 8.084 million shares by March 03, 2000* [(Page 61, line no. 13 of the Enquiry Report)] *and goes on to increase to 10.903million shares and 14.565million as on April 21,2000 and April 28, 2000 respectively* [(Page 62, para no. 3 of the Enquiry Report)]. *The shares of AICL held by the Accused as on April 28, 2000 represented 34% of the total issued shares of AICL (total shares issued: 42.9 million ordinary shares).*

The Enquiry Committee Report also observes that the Accused and their stockbrokers held 17.268 million shares of BOP shares by February 25, 2000, which constituted 20.3% of the total issued shares. Their holding increases to 24.3 million shares on April 07,2000. The shares of BOP held by the Accused as on April 07, 2000 represented 28.5% of the total issued shares of BOP [(Page 63, para no. 1 of the Enquiry Report)].

40. The Appellant has asserted that quantities mentioned in para 46 (e) (v) of the impugned order do not represent the correct assessment of the accounts operated by the Appellant, however, he has stopped short of providing evidence of the same. The findings of accumulation of shares of AICL and BOP by the group are noted in the Enquiry Report at pages 61, 62 and 63.

43 (vi) & (vii) of IS Appeal relates to 46 (e) (vi) and (vii) of the impugned order:

46(e)(vi) The price trend of AICL depicted a rising trend from Rs 52.50 on January 3, 2000 to peak of Rs. 182 on 20th April, 2000, which is a percentage rise of 247%. Weekly turnover in AICL increased from 13.6 million in the first week of January 2000 to 52 million upto April 13 2000 at the KSE [(Page 45, para 2 of the Enquiry Report)]. The consolidated KSE and LSE COT volume, which was 4.7 million for the week ended 4th January, 2000 touched its peak of 23.3 million shares on April 7, 2000 [(Table of combined position of carry over trades at KSE and LSE on page 42 of the Enquiry Report)]. Due to the relatively low capitalization and manageable market float of AICL, the Accused created a bull market in the scrip and the resultantly price soared [(Page 47, Para no. 2 of the Enquiry Report)]. The price of AICL started dropping at the end of April 2000 and closed at Rs.72 on 31 May 2000. Similar price fluctuation was witnessed at the LSE.

46 (e) (vii) The price of BOP at the KSE which was Rs.21.45 on 04-January, 2000 ranged between Rs.45-56 during the first three weeks of April 2000 showing rise of 161%. The maximum turnover at KSE was 14.9 million during the week ended 14 January, 2000. However, the turnover at LSE was generally higher and peaked at 33 million for the week ended 12th May, 2000 [(Page 50, para no. 2 of the Enquiry Report)]. The consolidated KSE and LSE COT volume which was 7.2 million for the week ended 04-January, 2000 [(Table on page 56 of the Enquiry Report)] touched its peak of 22.8 million shares on 19th May, 2000 [(Page 50, last paragraph)]. The price of BOP started decreasing at the end of April 2000 and closed at Rs.20 on 31 May 2000 at the KSE. Similar price fluctuation was witnessed at the LSE.

41. The Appellant (IS) has stated that the figures quoted in para 46 (e) (vi) and (vii) appear to be more or less correct. The figures quoted are the fluctuations in price of share of AICL and BOP and the corresponding turnover, which are provided for in the Enquiry Report.

43 (viii) of the IS Appeal relates to para 46 (e) (viii) of the Impugned Order:

46 (e) (viii) The analysis of stock trading of the Accused and the price movement, turnover and COT in the scrips of AICL and BOP made in the above paragraphs, are evident of the fact that the Accused practiced and engaged in acts that operated as a manipulation of stock prices of the said shares. This was primarily achieved through

acquisition of major portion of shareholding in the said scrips resulting in cornering of the said stocks through the excessive use of Carry Over Financing to build up huge weak holding positions by effecting transactions within the Accused accounts maintained with one or more brokers.

42. The Appellant has alleged misinterpretation of facts. The Appellant has been provided adequate opportunity to show such misinterpretation, if any, as alleged by him however, he has not come forward with any evidence that negates or undermines the findings of the Enquiry Report or the documentary evidence that has been provided to him by the Respondents.

43 (ix) of the IS Appeal relates to para 46 (e) (ix) (a) of the impugned order:

46 (e) (ix) Furthermore, the Accused manipulated the stock prices of AICL and BOP and created a false and misleading appearance of active trading and such trading on many occasions did not result in any change in beneficial ownership of the said scrips and was affected through one or more brokers. Instances of which, inter alia are referred to below:

(a) For the week ending 28th April 2000, in the brokerage house of Tanveer Malik, 1.050 million shares of AICL were sold through the account named Diamond Industries Limited and 1.050 million shares of AICL were purchased through the account named Mian Nisar Elahi.

The transaction in para 46 (e) (ix) (a) of the impugned order has been alleged by the Appellant as an in-house COT. The factual position is that for the week ending 28th April 2000, in the brokerage house of Mr. Tanveer Malik, 1.050 million shares of AICL were sold through the account named Diamond Industries and 1.050 million shares of AICL were purchased through the account named Mian Nisar Elahi (reference annexure A). Both the accounts of Diamond Industries and Mian Nisar Elahi form part of the group entity and have been used in this particular instance to enter an order for the purchase of such security with the knowledge that an order of substantially the same size, at substantially the same time and at substantially the same price, for the sale of any such security has been or will be entered by or for the same parties. It is clearly a “Wash Sale” wherein, purchase and sale orders are entered within the same broker though one or more accounts, which in this case, are the accounts of Mian Nisar Elahi and DIL. Legal Counsel for Mian Nisar Elahi has stated that it is merely a transaction between the badla provider and the buyer of securities. This, he has stated, in itself is not illegal manipulation. Since there are no illegal act the perquisites of criminal offence, the actus reus has not been established. In any case he submitted, ‘badla is not relevant because it is not a trade which is what S. 17 of the SEO, 1969 is aimed at. Here it would be pertinent to define COT. COT as defined in the COT Regulations of the exchanges means the combination of two or more transactions taking place simultaneously. COT transactions are completed when a financier matches with the purchaser who wants to do a COT at an agreed rate. The financier takes the deliveries on behalf of the purchaser and sells them back at a marked up price after a week to the purchaser. However, in this particular transaction shares have been transferred to account of Mian Nisar Elahi but have not been transferred back to the account of DIL. Therefore, it is our view that in any case market can be manipulated through COT. The learned counsel has failed to prove that the application of Section 17 is restricted to trades

despite the way it has been worded.

43. 43 (x) of the IS appeal. The transactions referred to by the Appellant relate to Para 46 (e) (x) of the impugned order (an excerpt provided below):

46(e)(x). The Accused shifted their trading positions within their accounts between two or more brokers:

> *a. On March 20, 2000 the Accused through the Iftikhar Shaffi brokerage house purchased 1.476 million shares of AICL out of which 0.4984 million shares were purchased from Tanveer Malik and 0.9781 million shares were purchased from Naeem Anwar. This transaction constituted 88% of the total trading volume of AICL at the Lahore Stock Exchange. [(Annexure G-5, G-45, G-46)]*
>
> *b. On March 20, 2000 the Accused through the Iftikhar Shaffi brokerage house purchased 2.725 million shares of BOP from Naeem Anwar. This transaction constituted 89% of the total trading volume of AICL at the Lahore Stock Exchange. [(Annexure G-5, G-49, G-50)]*
>
> *c. On March 30, 2000 Accused through the Iftikhar Shaffi brokerage house purchased 591,000 shares of AICL from Tanveer Malik. This transaction constituted 72% of the total trading volume of AICL at the Lahore Stock Exchange. [(Annexure G-6, G-52)]*

44. The transactions referred in para 46 e (x) (a) (b) and (c) of the impugned order is apparently shifting of positions of IS group between brokers. It is an instance of “Matched Orders” which constitutes a false appearance of active trading when a customer enters a purchase order and sale order at the same time, at the same price through different brokers. Such transactions have also been referred in the Enquiry Report on page 59, which state that the record obtained indicate that Mr. Iftikhar Shaffi used to shift positions among his brokers. The quantum of the transactions, constituting significant portion of the total turnover clearly show false appearance of trading which is a violation of Section 17 (e) (ii) of the Securities and Exchange Ordinance 1969.

43 (xi) & (xii) of the IS Appeal relates to para 46 e (xi) a & b:

> *46 (e) (xi) The Accused bought and sold shares of BOP through two or more brokers listed above within the same clearings. Instances of these are found as follows:*

a. For the week ending 19th May, 2000, 300,000 shares of BOP were sold in the account name “USMAN” through Naeem Anwar and 522,000 shares of BOP were purchased in the account named Mian Nisar Elahi through Tanveer Malik (Annexure A-8 & A-38);

b. For the week ending 31st March, 2000, 37,500 shares of BOP were sold in the account name Shaffi Chemicals Limited through First Capital ABN Amro and 273,000 shares of BOP were purchased in the account named Iftikhar Shaffi through

Hanif Dharwarwala (Annexure A-30 & A-71);

> *46 (e) (xii) The Accused bought and sold shares of AICL through one or more brokers within the same clearings. Instances of these are found as follows:*

a. For the week ending 5th May, 2000 116,500 shares of AICL were sold in the account name Iftikhar Shaffi through Hanif Dharwarwala and 167,000 shares of AICL were purchased in the account name Diamond Industries through First Capital ABN AMRO (Annexure A-68 & A-26);

b. For the week ending 14th January 2000 89,800 shares of AICL shares were sold in the account named Mian Nisar Elahi through Tanveer Malik and 190,000 shares of AICL were purchased in the account named Shaffi Chemicals Industries Ltd through Naeem Anwar (Annexure A-10 & A-39).

c. For the week ending 28th January 2000 332,200 shares of AICL were purchased for the account named Diamond Industries Limited and 356,900 shares were sold for the account named Shaffi Chemicals Limited (both accounts being held in Naeem Anwar's brokerage house)(Annexure A-39).

45. We are of the view that the transactions in para 46 e (xi) a & b of the impugned order are supported by documentary evidence as Annexure A-8, A-38, A-30 and A-71 and therefore the allegations made by the Appellant are incorrect. The transactions in para 46 e (xii) a, b and c of the impugned order are supported by documentary evidence as Annexure A-68, A-26, A-10, A-39 respectively. The Appellant (IS) has misconstrued the transactions as representing manipulation, where in fact the transactions show operation and trading network of accounts of the IS group. Legal Counsel for the Appellant (NE) and Appellant (TM) has also referred to the said transactions in his arguments in a similar manner. However, the instant transactions do not purport to show manipulation as alleged by both the Appellants but rather portray only trading through certain accounts of the Group Entity via various brokers and thus reflecting the trading network created by the group for purpose of showing Group Entity.

43 (xiii) of IS Appeal relates to para 46 (e) (xiii) of the Impugned Order:

46 (e) (xiii) Mr. Iftikhar Shaffi, as quoted in particular by the Enquiry Committee Report and in general by the broker community, used to disclose his trading positions and trading strategy to the brokers as well as the investors and thereby induced and influenced other "persons" to purchase and sell in the scrip [(Page 59, 3rd line from the top of the Enquiry Report)]. In a letter dated 6 July 2000 addressed to the Chief Executive of Islamic Republic of Pakistan; General Pervez Musharraf, Mr. Iftikhar Shaffi admitted the fact that he was "instrumental" in lifting of the Karachi Stock Exchange from index points 1300 to 2000 within the short span of 6 months. Mr. Nisar Elahi in his undated letter to Finance Minister made similar claims.

46. Legal Counsel for Mian Nisar Elahi argued that buying of large quantities of shares is not illegal per se and referred to paragraph 46 of Mian Nisar Elahi's Appeal. He then drew the Bench's attention to paragraph 109 of the Reply of Respondents 1 and 2 in which they effectively conceded that buying of large quantities of shares without intent/ motive to manipulate share prices is not in itself

price manipulative. The Respondents had failed to produce evidence of the intent of his client. In any case, if the maximum shareholding of the so-called Group was 34% of AICL shares and 28.5% of BOP shares, then how could his client be accused of cornering the market when they had less than two-thirds of the total issued shares in each company. The Appellant has ignored the fact that buying large quantities in such magnitudes constitutes an act to deliberately and intentionally control and affect price as the findings of the Enquiry Report show that price fluctuation and turnover in shares of AICL and BOP were abnormal and had grossly outperformed the market without any fundamental news or otherwise relating to them or the industry and further are determined to have influenced the sudden crash of the market. The Enquiry Report on page 46 states that Mr. Iftikhar Shaffi in his interview had admitted that at one time he was holding 26.5 million shares of AICL, which constitute about 62% of the issued shares.

47. From the above it is apparent that such transfers in addition to the purpose of pooling of resources for the accounts managed under a group with the intention to profit unlawfully through manipulation, unfair and unethical means were also directed towards meeting settlement obligation of the recipient account under different title to a thirds party or meeting margin or exposure requirement of a recipient account under a different title or else accumulating securities under a different title or pooling of resources for the accounts such as that of are being used for the Group Entity's personal interest.

48. It is also relevant to point out that the Appellant has admitted that he was instrumental in lifting of the KSE index from 1300 to 2000 in the span of about six months, which has been categorized on page 6 of the Enquiry Report as a sudden boom without any significant changes in the fundamental factors of the market. Furthermore, the Appellant (TM) before LSE has also made a statement which was signed by him which has been referred to in the fact finding report of the sub committee of the Board of LSE which has now be retracted by the Appellant. The counsel on behalf of the said Appellant has raised the objections that it was obtained under coercion and duress and that his client is illiterate who cannot understand English and more so that this statement at best in extra judicial confession which is a weak evidence and cannot be made a basis for conviction. As for the illiteracy part the stand seems without merit and as for coercion nothing has been brought forward to establish the same. Giving this statement the status of extra judicial confession even if assumed to be true is also not tenable because in a recent case by the Supreme Court in SCMR 2001 at page 1914 it has been held that even a retracted confession can be used against the person/maker thereof if corroborated by other evidence and in view of what has been discussed above, we find no merit is left in the counsel's argument.

Change in Exposure Regulation

49. It has been repeatedly argued by the Appellant IS that the real cause of the securities' market crisis in 2000 was due to the change in exposure regulations by the KSE. In this respect, IS contended that not only was such a change made with the intention of crippling IS exclusively, but also is tantamount to manipulation of the market by the management of the KSE. In this regard we find merit objection taken by the Respondents that the said issue whether such exposures regulations had a bona fide basis and issues ancillary thereto are pending before an inquiry committee, therefore, it is not appropriate for us to delve into this

issue at this stage. Furthermore, the inquiry committee has observed at page-23 that *"no major market player particularly Mr. Nisar Elahi, Mr. Iftikhar Shafi or their brokers namely First Capital ABN Securities, Mr. Hanif Moosa and Mr. Hanif Dharwarwalla were affected as they had no or little from April 10 to 28, 2000"*. The inquiry committee at page-34 was also of the *"opinion that the management and board of LSE operated the exchange with less prudent exposure regulations and held a favourable bias towards the group of investors known as Mr. Iftikhar Shafi and Mian Nisar Elahi and their stock brokers".* In view of the above findings the Appellant IS has not adduced any evidence to rebut the aforesaid position and has failed to prove that he has suffered any loss or that such loss was due to such change in regulation. It may also be relevant to add as argued by LSE there was no change in the Exposure Regulations of LSE and also that manipulation by the parties in any case also related to the time prior to change in KSE's Exposure Regulations. We would also like to point out that as IS was not a member of KSE the changed exposure demands were only effective as against the group's brokers. In such a situation the group's broker would either have to obtain the required shares to satisfy their respective exposure demands from the group or alternatively from their own resources the omission to do which would have constituted acts of default by the brokers and not the Group Entity as per the Exposure Regulations of KSE.

Squaring up of Appellant IS's position

50. The Appellant IS has vehemently argued that had his position been squared up by LSE on his request contained in his letter dated May 30, 2000 the losses at that time would have been crystallized and kept to a manageable level such that IS would have been in a position to meet his liabilities. However, in derogation of his request IS contended that LSE did not square up his position until June 5, 2000 thereby unjustly increasing the amount of losses. In reply the LSE argued that IS's letter of May 30, 2000 was rendered meaningless by his conduct on May 31, 2000 when he did in fact make a payment of Rs. 32,500,000 to the clearing house on his personal account. This and more is being acceded to in Mian Mumtaz Abdullah's letter April 6, 2001 wherein he informs that the Chairman SEC at paragraph 3 of his letter that his client made a payment of Rs.100,000,000 on May 31, 2000. The LSE further argued that it is not possible during a trading cycle to square up positions. However, where a member's trading rights temporarily suspended for his failure to meet exposure obligations to the clearing house such member may request the management to allow him to trade temporarily to reduce his exposure. Although this was not the case with IS as his brokerage house was not the subject of a suspension on May 29, 2000. Therefore, IS was capable of squaring up his positions by himself. Furthermore, it was argued by the LSE that the act of squaring up positions during the trading cycle was not a possibility as the obligation of delivery accrued only on settlement date which in this case was June 7, 2001. In the alternative even had the LSE been able to square up IS's position during the trading cycle the same was made particularly difficult due to the dearth of buyers in the market. Having heard the Appellant at length on this issue we find some merit in LSE's arguments and are of the view that at best this issue may only effect the quantum of liability.

Jurisdiction

51. With reference to jurisdiction objection has been raised by the Appellants that the present case could not have been heard by a single

Commissioner in view of Section 38 of Act and should have been heard by two Commissioners who were competent to hear proceedings relating to criminal offences. On plain reading of Section 38 all that is required under the said provision is that the consent in writing of the Commission is to be obtained which should be signed by any two Commissioners. This stage would arise only once the proceedings are initiated before the Court of Session, therefore, the argument cannot be sustained. Furthermore, the Appellant NE has challenged the jurisdiction of the SEC to pass orders concerning the disposal of shares lying in the NE account. Submissions in support of this plea are that, in the absence of statutory provisions like the SEBI Regulations, SEC does not have any basis to take such an action. It was argued that even if it is assumed that such powers exist under the statute, the same would have been unconstitutional as violating the principle of separation of powers. In the alternative it was argued that even if it is conceded that the SEC has civil jurisdiction, under Section 10 of the Civil Procedure Code, the Commission must decline jurisdiction in this matter since the same issue is pending before the civil courts prior to the initiation of the impugned proceedings. LSE's argument in this regard are quite enlightening and progressive. In the LSE's view, Sections 7 and 17 of the Ordinance read with Section 20 of the Act empower the SEC to issue any direction to any person. They have referred to clause 12 of the SEBI Regulations where under SEBI can direct the concerned persons to dispose of any securities acquired in contravention of the SEBI Regulations in such manner as SEBI may deem fit for restoring the status quo ante. LSE further argued that, in the instant case, the securities acquired and accumulated by the IS Group in CDC's sub-account no. 577 is a result of their manipulation and unfair trade practices and, therefore, can be ordered/directed by SEC to be disposed of to make good the losses resulting due to the default of other members of the IS Group. This shall restore the position as it would have been had no manipulation or unfair trade practices by the IS Group taken place and the resultant default of its members: "Securities and Exchange Board of India v. Alka Synthetics Ltd., AIR 1999 Gujrat 211, according to which it has been held, inter alia, that as:

SEBI has to regulate a speculative market where varies 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. … 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 object sought to be achieved by Act is fully served, rather than being defeated on the basis of any technicality.

Accordingly, it was argued by LSE that SEC has held in the concluding paragraph 15 of the said order (Re: Aslam Motiwala Case) that "the Commission has the authority under law to take necessary actions under the provisions of the Act independent of the Ordinance".

52. Here, it may be useful to add and refer to the following portion in the supra judgement:

"Thus there is an authority under law to take the measures and mainly because measures have not be laid down in advance and publish it cannot be said that SEBI had no authority under law to issue the directions,… the authority has been given

under law to take appropriate measure as it thinks fit and that by itself is sufficient to clothe the SEBI with the authority of law……"

53. The reason we have referred to the above is because the court has observed the above in the context of Section 11 under the SEBI Act 1992 which is similar to 20(6)(g) of the SECP Act. In the said case the authority to direct impounding money received by exchange as concluded transactions for squaring up of the outstanding transactions was the issue for adjudication which was recognized while issuing an interim measures. As to the argument whether such powers can be exercised against an investor we would adopt the view given in a recent judgement by the Bench of SEC re: Diamond Industries Ltd. Vs SEC in an order dated July 29, 2002 for the reasons stated therein which among others, precisely includes that Section 20 of the Ordinance is wide enough to include an investor in the term "any person"

54. We strongly feel that the Hon'ble court of India has viewed the regulator's power in its true perspective and such an approach/support is required for the effective regulation of the Securities Market and to enable the regulator to perform its functions in achieving the objectives laid down under the relevant laws. Therefore, we are of the considered view that even in the absence of such power SEC can exercise powers similar to SEBI that of directing any person to dispose of any such securities acquired in contravention of law in such manner as SEC may deem fit. However, the underlying premise seems to be that since the NE account forms part of the assets of the Group Entity and the said group has defaulted to its various brokers and LSE directly, LSE should be allowed to obtain the shares in the NE account in satisfaction of the groups' default. What must be borne in mind is that the act of manipulation can be established independent of the default and these two are distinct.

55. Notwithstanding the foregoing, we are convinced that manipulation by the Group Entity, did consequently lead to the market decline and Appellant (IS)'s default among others. As the very unrealistic levels to which the Group Entity raised the prices of AICL and BOP could not be maintained especially in light of the fact that the majority of shares acquired by the Group Entity was by way of COT financing and, as such, the act of taking delivery of shares (which would be the normal course taken by genuine investors) was not within the financial capability of the Group Entity . The subsequent realization in the market that the prices of AICL and BOP were unusually high coupled with the fact that the Group Entity was a weak holder a panic situation was generated in which owners of stock began unloading. The Group Entity's inability to finance their purchases as aforesaid ultimately led to badla providers not offering anymore finances to the Group Entity and, therefore, at the end of May, 2000 the Group Entity defaulted to the majority of its brokers and the LSE directly. Indeed the inquiry committee has observed in its report that AICL and BOP had relatively high daily turnover for their respective capitalizations. These shares out performed the market without any fundamental news adverse or otherwise relating to them or the industry and thus it was determined that trading in the shares of the said companies had influenced the sudden crash in the market leading to the subsequent default and crisis. This proposition finds a great deal of strength in evidence wherein it has been proven that the Group Entity's preliminary cornering followed by frequent trading in the shares of AICL and BOP constituted the vast majority of trading volumes in those shares. This artificial market activity was created through the buying and selling of shares between the various members of

the Group Entity to each other via the account managed by the said group. This phenomenon was achieved not solely through the regular market but also the COT market which enabled the group to cause artificial activity and also to share resources by providing finances to each other. The public was attracted to AICL and BOP shares due to the large volumes generated that was exacerbated through the boastful claims of the Appellant (IS) who has admitted during the course of hearing that he used to trade openly and which, in turn, precipitated a herd mentality. The tools used by the group were a typical of manipulative activity, which include matched orders, wash sales and artificial control of prices through deliberate and intentional interference with normal market operations, which has been discussed at length herein above.

56. It would, therefore, be just and equitable for losses incurred as a result of price manipulation and the resultant default to be appropriated from the Group Entity's available assets that include the benefits of such price manipulation. Such a view finds support from the principle enunciated in section 23 sub clauses (3) and (5) of the Ordinance since the Appellant (IS) has defaulted and has been declared as defaulter. However, before exercising such power it is relevant to point out that though we have discussed the cause of crisis the role of the frontline regulator, in the present case LSE, needs to be scruitinised. In light of the pending enquiry, we have not deliberated on this issue vis-à-vis management of the crisis in enforcing the default regulations, which requires to be addressed by the Commission. Notwithstanding this, we recognize that the procedure for recovering money on account of such default is provided under the Default Regulations and General Rules and Regulations and the frontline regulator has due authority in this regard. Further, the quantum of such default obligation is pending adjudication before the court. Therefore, before allowing that disposal of securities lying in Appellant (NE)'s sub-account No.577 of the Appellant (TM) held with CDC, determination of the quantum of liability is essential. Thus the Bench considers it expedient that in order to safeguard the interest of investors and losses sustained owing to such manipulation or default the sub account of Appellant (NE) held with Appellant (TM) (Appellant (NE)'s sub-account No.577 of the Appellant (TM) held with CDC) should remain subject to restraint to the effect that the shares lying in the account should not be transferred from this account and proceeds from the sale of shares from the said sub-account No.577 pledged with the clearing house that are kept in an escrow account of the Lahore Stock Exchange should not be utilized until such determination of the quantum of default obligations.

57. In view of the foregoing, the Appellants are found to have committed price manipulation under Section 17 of the Ordinance during the period from January to June, 2000. We hereby maintain the decision taken in the impugned order to initiate criminal proceedings against the Appellants under Section 24 of the Ordinance. In view of the said violations the removal of the Appellants (IS) and (TM) from the membership of Lahore Stock Exchange as directed in the impugned order is also maintained. The shares lying in the Appellant (NE)'s sub-account No.577 of the Appellant (TM) held with CDC shall not be transferred therefrom and proceed from the sale of shares from the said account pledged with clearing house that are kept in escrow account of LSE shall not be utilized until final determination of the quantum of the Appellant (IS)'s default obligations. Appeals Nos. 19, 27 and 28 are, accordingly, disposed off.

Announced : Islamabad
30 July, 2002

(M. ZAFAR-UL-HAQ HIJAZI)
Commissioner
(Company Law)

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