

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

**Date of Decision: 12/10/2017
Order reserved on: 15/09/2017**

Appeal No.4 of 2014

Cals Refineries Limited
21, Basant Lok Complex,
Vasant Vihar,
New Delhi – 110 057.

... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051.

... Respondent

Mr. Pradeep Sancheti, Senior Advocate a/w Ms. Faiza Dhanani, Advocate i/b
Dhruve Liladhar & Co. for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate a/w Mr. Mihir Mody and
Mr. Nishant Upadhyay, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH
Appeal No.141 of 2015**

Sarvesh Kumar Goorha
A-26, Press Enclave,
Saket,
New Delhi – 110 017.

... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051.

... Respondent

Mr. R.R. Bhonsale, Advocate i/b Ms. Smita Gaidhani, Advocate for the
Appellant.

Mr. Aditya Mehta a/w Mr. Mihir Mody and Mr. Nishant Upadhyay,
Advocates i/b K. Ashar & Co. for the Respondent.

WITH
Appeal No.155 of 2015

D. Sundararajan
601, 6th Floor, Griselda,
Plot No.35, 5th Road,
Off Bhau Daji Road,
Matunga (East),
Mumbai – 400 019.

... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051.

... Respondent

Mr. Vinay Chauhan a/w Mr. K.C. Jacob, Advocates i/b Corporate Law Chambers India for the Appellant and Mr. D. Sundararajan, the Appellant in person.

Mr. Aditya Mehta a/w Mr. Mihir Mody and Mr. Nishant Upadhyay, Advocates i/b K. Ashar & Co. for the Respondent.

WITH
Appeal No.220 of 2015

Deep Kumar Rastogi
1/25, Shanti Niketan,
New Delhi – 110 021.

... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051.

... Respondent

Mr. Pradeep Sancheti, Senior Advocate a/w Ms. Faiza Dhanani, Advocate i/b Dhruve Liladhar & Co. for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate a/w Mr. Mihir Mody and Mr. Nishant Upadhyay, Advocates i/b K. Ashar & Co. for the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
Dr. C.K.G. Nair, Member

Per : Justice J.P. Devadhar

1. Appellants in all these appeals are aggrieved by the orders passed by the Whole Time Member (for short, 'WTM') of Securities and Exchange Board of India (for short, 'SEBI') on 23rd October, 2013 and on 31st December, 2014 ('Impugned Orders') respectively.
2. By order dated 23rd October, 2013, the WTM of SEBI has directed Cals Refineries Limited ('Cals' for short) not to issue equity shares or any other instruments convertible into equity shares or any other security for a period of 10 years. By order dated 31st December, 2014, the WTM of SEBI has prohibited other appellants who at the relevant time were the Directors of Cals, from accessing the capital market, directly or indirectly, and dealing in securities or instruments with Indian securities as underlying, in any manner whatsoever, for a period of 10 years. Since the violations held to have been committed by the appellants relate to facts which are common, all these appeals are heard together and disposed of by this common decision.
3. Impugned Orders are passed against Cals and its directors basically for the reason that Cals aided by its directors who are appellants herein had employed fraudulent arrangement with regard to the subscription of the Global Depository Receipt ('GDR' for short) issue of Cals and that they had misled the investors by making false announcements regarding successful subscription of GDRs and also failed to disclose 'related party transaction', which were in violation of Section 77(2) of the Companies Act, 1956 and in violation of the SEBI Act and the regulations made thereunder.

4. Appellants in all these appeals do not dispute that above violations are committed in relation to the GDR issue of Cals. However, each appellant claims to be a victim of that fraud and not a vehicle of fraud.

5. Facts relevant for disposal of all these appeals are as follows:-

- (a) Cals Limited was originally incorporated on 25/7/1984 as Computer Aided Learning System Pvt. Ltd. and was converted into a public limited company on 22/9/1992. The name of the company was changed to Cals Limited on 25/2/1994. In September, 1994, Cals Ltd. came out with a public issue and was initially listed on the Bombay Stock Exchange (BSE) and other exchanges. Cals Ltd. did not have any business since 1997 and it had incurred heavy losses and debt in its operation. By the year 2007, Cals Ltd. had become virtually a defunct company with huge losses. Mr. Sarvesh Goorha, original promoter of Cals Ltd. claims that he himself had discharged the debts and other liabilities of Cals Ltd. to a great extent.
- (b) Sometime in May/June, 2007, Sanjay Malhotra one of the promoters of the Spice Energy Group approached Goorha, promoter-director of Cals and submitted that SRM Exploration Pvt. Ltd. ('SRM' for short), which was a Spice Energy group company had undertaken a refinery project for which SRM had already entered into arrangement/contracts with various foreign companies for buying Refinery Equipments and that the Spice Energy group wanted to take over a defunct listed Indian Company so as to implement the refinery project through that

listed company by raising funds from the investors in India and abroad.

- (c) The proposal put up by Sanjay Malhotra to Cals was as follows:-
- i) Spice Energy group would first come in as a strategic investor and appoint its nominees as majority directors on the Board of Cals and take over complete control of Cals. Thereafter, the refinery project of SRM would be assigned to Cals and implemented by Cals by raising funds from the investors.
 - ii) Sarvesh Goorha shall continue as a figure head/non-Executive Director on the Board of Cals during the transitional period as he was aware of the pending legal cases and Goorha would complete the due diligence process with the legal advisors and agencies appointed by SRM.
 - iii) Interest free unsecured loan of Rs.10.19 lac advanced by Goorha would be converted into equity shares with a lock-in period of 3 years as per SEBI guidelines.
 - iv) Change of management resolution would be passed via ballot or at the AGM wherein Goorha/other old promoters of Cals would exit Cals and the Spice Energy group would officially take over as new promoters of Cals.
- (d) Above proposal was considered by the Board of Directors (BoD) of Cals on 23/7/2007 and the minutes of the said meeting as per the Minute Book of Cals, inter alia, records the following:-

- (i) Name of Cals Limited be changed as Cals Refineries Limited.
- (ii) Mr. Sarvesh Goorha ('Goorha'), Chairman of the meeting informed the members of the Board that Cals which is in a defunct position since last several years is venturing into a refinery business with the help of SRM belonging to the Spice Energy Group as a strategic investor.
- (iii) Resolved to appoint Mr. Bhupendra Kansagra ('Kansagra), Mr. Ravi Chilikuri ('Chilikuri), Mr. Manabendra Guha Roy ('Roy') and Mr. D. Sundararajan ('Sundararajan'), nominees of Spice Energy Group as Additional Directors of Cals.
- (iv) SRM (strategic investor) had extended interest-free unsecured loan of Rs.87 lac to Cals to meet the general and corporate expenses, hence Cals proposes to issue on preferential basis 8,70,000 equity shares of Rs.10 each at par against the money brought in by SRM.
- (v) Mr. Sarvesh Goorha, promoter of Cals had extended interest-free unsecured loan of Rs.10.19 lac to Cals to meet the general and corporate expenses, hence Cals proposes to issue on preferential basis 1,01,900 equity shares of Rs.10 each at par against the money brought in by Mr. Goorha.
- (vi) In order to implement the refinery projects, Cals would raise USD 500 million by issuance of GDR/FCCB.

- (vii) The Audit Committee and remuneration committee of Cals shall be reconstituted by including Roy and Sundararajan along with the existing member Mr. Mohan Lal Garg.
- (e) In the AGM of Cals held on 12/9/2007, appointment of Kansagra, Chilikuri, Roy and Sundararajan (nominees of Spice Energy group) as Directors of Cals was approved. Further it was resolved that the authorized share capital of Cals be increased from Rs.60 crore to Rs.2000 crore divided into 200 crore equity shares of Rs.10 each. Preferential allotment of 1,01,900 share and 8,70,000 shares to Goorha and SRM respectively were also approved in the AGM dated 12th September, 2007. In the said AGM, Mr. M.S. Ramachandran, former Chairman of Indian Oil Corporation was co-opted as an Additional Director of Cals. In the said AGM, the Board was inter alia, authorized to issue GDRs/FCCB for an aggregate sum of USD 500 million.
- (f) As a result of inducting aforesaid four directors, Spice Energy group had majority directors on the BoD of Cals. However, in the AGM of Cals held on 12/9/2007, resolution relating to 'Change of Management' was deferred at the instance of newly appointed directors to avoid making a 'public offer' as required under the regulations framed by SEBI. According to Goorha, he had insisted that the resolution relating to the change of management be included in the said AGM, however, Sundararajan, director, nominated by the Spice Energy group

and in-charge of the GDR issue, prevailed upon Goorha. This fact was recorded by Goorha in his email dated 2/8/2007 addressed to Sundararajan with a copy to Mr. Deep Kumar Rastogi of the Spice Energy group.

- (g) In the BoD meeting of Cals held on 17/10/2007, Mr. Ramachandran was appointed as an additional director of Cals and was later on made Chairman of Cals. Issuance of 8,70,000 shares (14.5% of equity) to SRM (Spice Energy group) and conversion of interest-free loan given by Goorha into 1,01,900 equity shares of Cals was also confirmed in the said meeting.
- (h) In the BoD meeting of Cals held on 30/10/2007 Roy (director) informed the members of the Board that all the agreements entered by SRM in connection with the refineries would be assigned to Cals by executing Assignment Agreements. Sundararajan (director) informed the members of the Board that the total cost of the refinery project is USD 950 million and cost of the said project would be partly met by raising issue of GDR amounting to USD 200 million.
- (i) It is interesting to note that the minute book maintained by Cals does not record passing of any resolution on 30/10/2007 to open a bank account with Banco Efisa S.A. Lisbon ('Banco' for convenience) or any other bank for the purpose of receiving the GDR subscription amount. However, extract of the minutes of the meeting dated 30/10/2007 duly certified by Mr. Sundararajan and sent by Cals to Banco records the following:-

“RESOLVED THAT a bank account be opened with Banco Efisa S.A. Lisbon (“the Bank”) or any of branch of Banco Efisa S.A. including Offshore Branch outside India for the purpose of receiving subscription money in respect of Global Depository Receipt issue of the Company.

RESOLVED FURTHER THAT Mr. Sarvesh Goorha, Director and Mr. D. Sundararajan, Director be and are hereby severally authorized to sign, execute any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and any other paper(s) from time to time as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required.

RESOLVED FURTHER THAT Mr. Sarvesh Goorha, Director and Mr. D. Sundararajan, Director be and are hereby severally authorized to draw cheques and other documents and to give instruction from time to time as may be necessary to the said Banco Efisa S.A. or any other branch of Banco Efisa S.A. Lisbon including Offshore Branch, for the purpose of operation of and dealing with the said account and carry out other relevant and necessary transactions and generally to take all such steps and to do such things as may be required from time to time on behalf of the Company.

RESOLVED FURTHER THAT the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans, if any, as well as to enter into any Escrow Agreement or similar arrangements if and when so required.”

- (j) Goorha in para 5.16 of his Memo of Appeal admits that in the Board meeting of Cals held on 30/10/2007 Goorha and Sundararajan were authorized by the Board to open an account with Banco. Sundararajan also admits that on 30/10/2007 the Board had passed resolutions for opening bank account with Banco Efisa, Portugal to park the proceeds of the GDR issue. Sundararajan has explained the discrepancy in the minutes recorded in the minute book of Cals and the minutes certified by him by stating that since the account opening form from

Banco was not received at the time when the Board meeting was held on 30/10/2007, above resolution was not recorded. As the account opening form from Banco was received immediately after the meeting, Sundararajan had asked the Company Secretary and Goorha to include the above resolution relating to opening a bank account with Banco, in the minutes of the Board meeting dated 30/10/2007 itself by briefing other directors, however, the Company Secretary forgot to include the same in the minutes dated 30/10/2007.

- (k) On 10/12/2007 Cals informed BSE that the GDR issue of USD 200 million would open for subscription on 12/12/2007.
- (l) On 11/12/2007 Honor Finance Ltd. ('Honor' for short) incorporated and registered in the British Virgin Islands on 5/10/2007, which is wholly owned by Sanjay Malhotra (promoter of Spice Energy group) entered into a Credit Agreement with Banco for availing loan of USD 200 million to subscribe to the GDR issue of Cals which was to be listed on Luxembourg Stock Exchange.
- (m) On the same day i.e., on 11/12/2007 itself an Account Charge Agreement was executed by and between Cals and Banco as a result of which the GDR subscription amount of USD 200 million to be deposited in the designated account of Cals with Banco stood secured by Cals in favour of Banco for all the obligations of Honor under the Credit Agreement dated 11/12/2007. The said Account Charge Agreement signed by Goorha on behalf of Cals, inter alia, contains a clause that upon

payment of all or part of the amounts due to Banco by Honor under the Credit Agreement, Cals may withdraw from its account the equivalent amount. In other words, as per the Account Charge Agreement, Cals could withdraw the GDR subscription amount of USD 200 million, only to the extent loan of USD 200 million taken by Honor from Banco for subscribing to the GDRs of Cals was repaid.

- (n) In the BoD meeting of Cals held on 12/12/2007, it was inter alia resolved to open a current account with Axis Bank Ltd. at its branches at New Delhi and Mumbai. In the said meeting, inter alia, Sundararajan, Roy and Deep Kumar Rastogi ('Deep Rastogi') were authorized to draw cheques, bill of exchange and promissory notes drawn, accepted or made on behalf of Cals. It is relevant to note that on 12/12/2007 Deep Rastogi was not even a director of Cals.
- (o) On 12/12/2007 BBS Capital Partners, Switzerland, the Lead Manager to the GDR issue, informed Cals that the GDR issue was subscribed by 10 foreign investors. On 12/12/2007 Cals informed BSE that GDR issue of USD 200 million has been fully subscribed by foreign investors.
- (p) On 14/12/2007, the GDR of Cals worth USD 200 million were listed on the Luxembourg Stock Exchange.
- (q) In the BoD meeting of Cals held on 19/1/2008, minutes of the meeting held on 30/10/2007 and 12/12/2007 were approved by the BoD. In the said meeting, Deep Rastogi was appointed as a non-executive director of Cals and Sanjay Malhotra was

appointed as an advisor to Cals on a lump sum payment of Rs.15 lac per month. In the said meeting it was also resolved to open an account with Punjab National Bank (International) Ltd., London, and also to open a current account with Axis Bank Ltd., Golpark Branch, Kolkata.

- (r) On 27/6/2008, a special resolution was passed by Cals wherein it was resolved that Cals has accorded its consent for change in control of Cals in favour of Spice Energy group represented by SRM and that the Spice Energy group represented by SRM and its affiliates be recognized and known as the new promoter having control over Cals.
- (s) It is interesting to note that during the period from 27/12/2007 to 27/3/2009 Cals withdrew the GDR subscription amount in several installments and withdrawals made by Cals were proportionate to the loan repaid by Honor to Banco under the Credit Agreement from time to time, which clearly shows that the GDR subscription amounts were withdrawn by Cals in terms of the Account Charge Agreement.
- (t) On 13/1/2009, Extension Agreement to the Account Charge Agreement dated 11/12/2007 was executed between Cals and Banco. As a result of the said Extension Agreement, the GDR subscription amount which was given as security by Cals for the loan taken by Honor from Banco for subscribing to the GDRs of Cals stood extended up to the period specified therein. The Extension Agreement was signed by Chilikuri on behalf of Cals.

- (u) Pursuant to the Board resolution dated 23/1/2009, Cals on 5/2/2009 entered into an agreement with Asia Texx Enterprises Ltd. ('Asia Texx' for convenience) for purchase of plant and machinery required for the refinery project at a cost of USD 290 million. Asia Texx was controlled by Gagan Rastogi, son of Deep Rastogi (director in Cals). As per the said agreement, USD 90 million was to be paid by Cals to Asia Texx as advance immediately on signing the agreement. Sundararajan had signed the said agreement dated 5/2/2009 as director of Cals.
- (v) On 26/3/2009 Asia Texx purchased 2,50,00,000 GDRs from Honor and paid USD 92 million to Honor.
- (w) On 27/3/2009 Honor repaid the outstanding loan amount of USD 9,18,00,000 under the Credit Agreement to Banco.
- (x) On 27/3/2009 Cals paid USD 92 million to Asia Texx (USD 90 million as advance under agreement dated 5/2/2009 + USD 2 million towards dismantling charges).
- (y) On 9/7/2009 Asia Texx transferred 2,50,00,000 GDRs to Gagan Rastogi free of cost.
- (z) On 28/7/2009 Sundararajan resigned from the Board of Cals and thereafter rejoined the Board of Cals as Managing Director on 5/2/2011.
- (aa) On 15/3/2011 a Deed of Novation & Amendment relating to the Asia Texx – Cals Agreement dated 5/2/2009 was entered into by and between Cals, Asia Texx and Amber Enerji Makina Logistics Ltd. incorporated in Seychelles ('Amber' for convenience). The said agreement records that Cals wishes to be

released and discharged from the obligations under the agreement dated 5/2/2009 and Asia Texx wishes to release and discharge Cals from the obligations under the agreement dated 5/2/2009 and further records that the parties have agreed that the rights, obligations and liabilities of Cals under the agreement dated 5/2/2009 shall be novated to Amber. By the said Novation Agreement, the purchase price of plant and machinery set out in the agreement dated 5/2/2009 was reduced from USD 290 million to USD 90 million.

- (bb) On 21/9/2011 WTM of SEBI passed an ex-parte order inter alia directing Cals not to issue equity shares or any other instrument convertible into equity shares or alter its capital structure in any manner till further direction.
- (cc) On 30/12/2011 an order was passed by the WTM of SEBI, confirming the ex-parte order dated 21/9/2011.
- (dd) By show-cause notice dated 19/9/2013 and supplementary show-cause notice dated 11/10/2013 Cals and various entities including the directors of Cals who are appellants herein were inter alia called upon to show-cause as to why action should not be taken against them for the alleged violations set out therein.
- (ee) After hearing the entities, the WTM of SEBI has passed the impugned orders on 23/10/2013 and 31/12/2014 against various entities including the appellants herein.
- (ff) Appellants have filed these appeals to challenge the impugned orders dated 23/10/2013 and 31/12/2014.

6. Since each appellant claims to be a victim of fraud and not a vehicle of fraud, it would be just and proper to consider argument of each appellant independently.

CALS (APPEAL NO. 4 OF 2014)

7. Argument of Cals that it is a victim of fraud and not a vehicle of fraud is unsustainable as can be seen from the following:-

- (a) Basic argument advanced on behalf of Cals is that fraud relating to the GDR issue of Cals has been committed by few conspirators, namely, Sanjay Malhotra, Chilikuri, Goorha and Sundararajan against whom there is direct evidence. It is contended that Cals at the relevant time had no knowledge and therefore, the acts and knowledge of the persons who had committed fraud on Cals cannot be attributed to Cals and made basis for holding that Cals is guilty of committing offences under the Companies Act, 1956 and also guilty of violating the SEBI Act, 1992 and the regulations framed thereunder.
- (b) It is further contended on behalf of Cals that the 'Doctrine of Attribution' generally permits the acts and knowledge of the directors or employees of a company to be attributed to the company itself, however, fraud is an exception to that principle, under which the company is not held and/or made liable for acts and/or knowledge of the directors and employees who (i) were committing fraud on the company (ii) were acting throughout for their own benefit and (iii) were acting contrary to instructions or outside the scope of employment. In support

of above submission, Counsel for Cals has relied on various decisions rendered by Courts in England and Canada.

- (c) We see no merit in the above arguments advanced on behalf of Cals. As rightly contended by Counsel for SEBI, Apex Court's decision in case of *Iridium India Telecom Ltd. vs. Motorola Inc. & Ors.* reported in (2011) 1 SCC 74, which is binding on this Tribunal, clearly postulates that criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such a case, what is to be ascertained is, whether the degree and control of the person or body of persons was so intense that a corporation could be said to think and act through the person or the body of persons controlling its affairs.
- (d) At the outset, it is relevant to note that in the present case, the liability imposed on Cals is a civil liability and not a criminal liability. Sometime in May/June, 2007, Sanjay Malhotra, one of the promoters of Spice Energy group approached Goorha (promoter & director of Cals) with a proposal to take over Cals for implementing the refinery project of SRM which was a Spice Energy group company. As Cals had virtually become a defunct company, the BoD of Cals in its meeting held on 23/7/2007 approved the proposal and accordingly 4 nominees of the Spice Energy group viz. Kansagra, Chilikuri, Roy and Sundararajan were appointed as additional directors of Cals. It was inter alia resolved in the said meeting that for

implementing the refinery project, Cals would raise funds through issuance of GDR/FCCB. Accordingly, Cals had issued GDRs amounting to USD 200 million.

- (e) According to SEBI, by opening an account with Banco and executing the Account Charge Agreement, Cals has financed subscription of its own GDRs which is prohibited under the Securities laws. Since Cals denies the above charges, the question to be considered is, whether Cals had passed any resolution to open a bank account with Banco for depositing the GDR subscription amount and whether Cals had authorized any person to execute the Account Charge Agreement on 11/12/2007 so that the GDR subscription amount of USD 200 million deposited in its account with Banco is kept as security towards the loan of USD 200 million taken by Honor from Banco for subscribing to the GDRs of Cals.
- (f) Fact that the minutes as per the minute book of Cals does not contain any resolution to open a bank account with Banco cannot be a ground to infer that Cals had not intended to open an account with Banco because, firstly, on the basis of the Board resolution dated 30/10/2007 certified by Sundararajan, director of Cals, an account was in fact opened in the name of Cals with Banco for depositing the GDR subscription amount. Secondly, on issuance of GDRs, the GDR subscription amount was in fact deposited in the said account of Cals with Banco. Thirdly, apart from the Board resolution dated 30/10/2007 certified by Sundararajan, there is no other resolution passed by Cals to

open an account for depositing the GDR subscription amount. Fourthly, the GDR subscription amount deposited in the said bank account with Banco has been withdrawn by Cals in installments from time to time which is in consonance with the Account Charge Agreement executed by Cals. Without opening a bank account, Cals could not have opened the GDR issue. Very fact that Cals operated the account opened with Banco on the basis of resolution dated 30/10/2007 certified by Sundararajan clearly falsifies the case put up by Cals that it had not authorized any one to open an account with Banco for depositing the GDR subscription amount.

- (g) Similarly, argument that Cals had never authorized any person to sign any Account Charge Agreement is also without any merit, because, the Account Charge Agreement was signed by Goorha promoter-director of Cals. The Account Charge Agreement provides that all communications in relation thereto should be addressed either to Goorha or Sundararajan as they were the two authorized signatories to operate the Bank account of Cals with Banco. It is relevant to note that Goorha was the founder, promoter, director of Cals, whereas, Sundararajan was the director of Cals nominated by the Spice Energy group which had taken over Cals with a view to implement its refinery project through Cals by raising funds through issuance of GDRs. Admittedly, Sundararajan was in-charge of the entire GDR process. Thus, the bank account with Banco for depositing the GDR subscription amount was opened by Sundararajan,

director representing the Spice Energy group and the Account Charge Agreement was signed by Goorha, director representing the promoter group of Cals. In these circumstances, the conclusion drawn by SEBI that opening a bank account with Banco and executing the Account Charge Agreement were the acts done by Cals through its directors to finance Honor for subscribing the GDRs issued by Cals in gross violation of Section 77(2) of the Companies Act, 1956 and the provisions contained in the SEBI Act and the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for convenience), cannot be faulted.

- (h) The Spice Energy group (through its promoter, Malhotra) took over control of Cals with a view to implement its refinery project through Cals by raising funds from investors by issuing GDR/FCCB. Before issuance of GDRs, Malhotra, promoter of Spice Energy group got incorporated and registered a company called Honor Finance Ltd. ('Honor' for convenience) in the British Virgin Islands on 5/10/2007. Malhotra was the only registered shareholder and ultimate beneficial owner of Honor. On 11/12/2007, Malhotra as an authorized signatory of Honor entered into a Credit Agreement with Banco to avail loan of USD 200 million for subscribing to the GDRs of Cals subject to Honor furnishing security for that amount. On the same day i.e. on 11/12/2007 itself, Goorha, authorized signatory of Cals controlled by Spice Energy group executed the Account Charge

Agreement in favour of Banco according to which the GDR subscription amount of USD 200 million was to remain as security till the loan of USD 200 million given by Banco to Honor for subscribing to the GDRs of Cals was repaid by Honor to Banco. Thus, the Spice Energy group, through 'Honor' controlled by one of its promoters (Malhotra) sought to subscribe to the GDRs by availing loan of USD 200 million from Banco and made Cals controlled by the Spice Energy group to execute the Account Charge Agreement so that USD 200 million deposited by Honor as GDR subscription amount in the account of Cals was kept as security till the loan of USD 200 million taken by Honor for subscribing to the GDRs of Cals was repaid. It is not in dispute that the GDR subscription amount withdrawn by Cals (except the last withdrawal) was always to the extent of loan repaid by Honor to Banco. Thus, in the facts of present case, involvement of Cals controlled by the Spiece Energy group is so intense that it can be easily seen that the fraudulent acts and deeds were executed by Cals through its directors. In these circumstances, argument that Cals was not aware of the actions of its directors cannot be accepted. Consequently, the finding recorded in the impugned order that Cals and its directors had financed for the subscription of its own GDRs in gross violation of Section 77(2) of the Companies Act, 1956 and the provisions contained in the SEBI Act and the PFUTP Regulations cannot be faulted.

- (i) Similarly, finding recorded in the impugned order that Cals had furnished false information to the Stock Exchange regarding the initial subscribers to its GDR issue cannot be faulted. Argument that Cals furnished the information based on the information received from the Merchant Banker to the GDR issue, is without any merit, because, the finding of fact recorded in the impugned order is that GDR subscription amount was received by Cals from Honor and not from the alleged 10 initial subscribers. If the initial subscribers to the GDRs were persons other than Honor, then Cals would have received GDR subscription amount from those 10 foreign investors and not from Honor. Very fact that Cals received USD 200 million from the loan account of Honor with Banco and Cals secured the loan of USD 200 million taken by Honor from Banco, clearly shows that Cals made false statement to the Stock Exchange that the GDRs have been fully subscribed by foreign investors and thereby made the investors in India to believe that foreign investors have shown great interest in the GDRs of Cals and the GDRs have been subscribed by foreign investors on the first day itself. Neither in the Memo of Appeal nor during the course of arguments, Cals has disputed the finding of fact recorded in the impugned order that USD 200 million was received by Cals from Honor and not from the alleged 10 foreign investors. In these circumstances, decision of SEBI that by furnishing false information to the Stock Exchange that the GDRs have been fully subscribed by 10

foreign investors, Cals has misled the investors in India cannot be faulted.

- (j) Similarly, finding recorded in the impugned order that the transaction between Cals and Asia Texx Enterprises Ltd., Hong Kong (Asia Texx) was a 'related party transaction' and failure to disclose the said related party transaction to the exchanges was in violation of Clause 32 of the Listing Agreement cannot be faulted. Asia Texx was beneficially owned by Gagan Rastogi, who was also one of the promoters of Spice Energy group. Deep Rastogi, father of Gagan Rastogi became director of Cals with effect from 19/1/2008. On 5/2/2009 Cals entered into an agreement with Asia Texx for acquiring plant and machinery required for the refinery project. According to SEBI, Deep Rastogi had significant influence over Cals and therefore as per AS-18, Cals was liable to disclose to the exchanges about the related party transaction between Cals and Asia Texx.
- (k) Argument of Cals that the transaction between Cals and Asia Texx was not a related party transaction and under the provisions contained in AS-18, Deep Rastogi could not be said to have significant influence over Cals is without any merit. Although Deep Rastogi did not hold any shares of Cals, admittedly, Deep Rastogi was a director of Cals controlled by the Spice Energy group on the date on which Cals entered into agreement with Asia Texx. It is not in dispute that Asia Texx was wholly owned by Gagan Rastogi (son of Deep Rastogi) who was also one of the promoters of the Spice Energy group. In

these circumstances, inference drawn in the impugned order that Deep Rastogi had significant influence over Cals as contemplated under AS-18 cannot be faulted. Consequently, findings recorded in the impugned order that the transaction between Cals and Asia Texx was a related party transaction and failure to disclose the same to the Stock Exchanges was in violation of Clause 32 of the Listing Agreement cannot be faulted.

- (1) No doubt that some of the directors of Cals have been let off by SEBI by merely giving a warning which in our opinion was totally wrong. Having recorded a finding in para 30(2) of the order dated 31/12/2014 that other directors of Cals cannot be said to be unaware of the activities of Cals, the WTM of SEBI could not have let off some of the directors of Cals merely because they had not signed any document and there is no direct evidence to show their involvement in the fraud. Very fact that they were part of the BoD of Cals which indulged in committing various violations in relation to the GDR issue, was sufficient to hold them liable for the violations. However, fact that some of the directors of Cals have been erroneously let off by the WTM of SEBI cannot be a ground for Cals to escape liability for the fraud committed on the investors in India especially when the fraud was committed by Cals controlled by the Spice Energy group and even today, admittedly, Cals is controlled by the Spice Energy group.

(m) Argument advanced on behalf of Cals that Guha Roy and Ramachandran (directors of Cals) had contended that on 30/10/2007, the Board of Cals did not discuss or approve execution of the Account Charge Agreement and since they are let off with a warning, Cals should also be let off is without any merit. In fact, argument of Ramcachandran recorded in para 10(xvi) of the order dated 31/12/2014 is that in the meeting held on 30/10/2007 Sundararajan had informed the Board that the GDR issue of Cals was for USD 200 million and that there was commitment from the investors for subscribing the GDRs. Aforesaid submission of Ramachandran read with the Board resolution dated 30/10/2007 certified by Sundararajan clearly shows that as on 30/10/2007 the BoD of Cals knew as to who would be subscribing to the GDRs and that the GDR subscription amount so received would have to be secured in connection with the loan to be taken. Alternate argument of Cals that by resolution dated 30/10/2007 certified by Sundararajan, Cals intended to give GDR subscription amount as security to the loan that may be taken by Cals cannot be accepted, because, firstly, as on that date there was no proposal by Cals to take any loan and secondly, the entire USD 200 million raised for the refinery project could not be used for any other purpose. Thus, the submission made by Ramachandran, in fact, supports the conclusion drawn in the impugned order that even before issuance of GDRs, Cals knew as to who would be the initial subscribers to the GDRs. In these circumstances,

the decision of SEBI that Cals financed Honor for subscribing to its own GDRs cannot be faulted.

- (n) It is interesting to note that Cals (controlled by the Spice Energy group) not only financed Honor (owned by Malhotra, promoter of the Spice energy group) for subscribing to the GDRs of Cals, but also resolved in its BoD meeting held on 19/1/2008 to appoint Malhotra as an advisor to Cals for setting up the refinery in Haldia on a monthly consultancy charge of Rs.15 lac. Thus, it is evident that Malhotra was not a stranger to Cals and all acts done by Cals in relation to the GDRs were at the instance of Malhotra, promoter of the Spice Energy group. As the promoter directors of Cals have also participated in the fraud committed in relation to the GDRs, Cals cannot escape liability for the misdeeds committed by its entire BoD.
- (o) For all the aforesaid reasons, the findings recorded and the directions issued against Cals in the impugned order dated 23/10/2013 cannot be faulted.

SARVESH KUMAR GOORHA (APPEAL NO. 141 OF 2015)

8. Arguments advanced on behalf of Goorha, promoter-director of Cals is that by 23rd July, 2007 the Spice Energy group had taken over the management of Cals and thereafter all decisions relating to the refinery project and the GDR issue were taken by the majority directors of Cals nominated by the Spice Energy group. It is contended that Goorha was only a figurehead and was not involved in the day-to-day management of Cals, nor did he have any role to play, nor was he party to any dispute in respect of

the refinery project or the GDR issue. Relying on various decisions of the Apex Court, it is contended on behalf of Goorha that in the absence of facts relating to fraud unequivocally stated, SEBI is not justified in holding that Goorha was party to the fraud committed by Malhotra and majority directors of Cals nominated by the Spice Energy group. It is further submitted that mere fact that Goorha had signed the Account Charge Agreement could not be a ground to hold that Goorha was aware of the fraud being committed. Goorha had submitted that the Account Charge Agreement was signed by him reluctantly and without any knowledge of its contents, only because, Sundararajan had requested Goorha to execute the Account Charge Agreement. It is submitted that the impugned decision is based on conjectures and surmises and not on any factual basis which is sufficient to sustain the charge levelled against Goorha.

9. In our opinion, fact that Goorha had signed the Account Charge Agreement on behalf of Cals is sufficient to hold that he was privy to the fact that Cals controlled by the Spice Energy group was financing subscription of its GDRs in gross violation of the Securities laws. Goorha does not dispute the resolution dated 30/10/2007 certified by Sundararajan, according to which Cals had authorized the Board to open an account with Banco for depositing the GDR subscription amount of USD 200 million and that amount could be kept as security for any loan that may be taken. Since the Account Charge Agreement of Cals is executed by Goorha, it is apparent that Goorha signed the Account Charge Agreement on the basis of the resolution dated 30/10/2007 duly certified by Sundararajan.

10. Argument of Goorha that he signed the Account Charge Agreement without knowing the contents of that agreement is ex facie untenable because,

the very name of the document 'Account Charge Agreement' itself suggests that the amounts in the account of Cals would stand charged as per the terms set out in the Account Charge Agreement. At the relevant time, there was only one account of Cals with Banco for depositing the GDR subscription amount and there was no proposal on part of Cals to take any loan from Banco. Thus, the title of the document 'Account Charge Agreement' itself indicates the object with which it is being executed and to ascertain the object it was not necessary to read the entire document. Therefore, argument of Goorha that he signed the Account Charge Agreement without knowing its contents is wholly unsustainable. In these circumstances, the findings recorded against Goorha and the directions issued against Goorha in the impugned order cannot be faulted. Accordingly, we find no merit in the appeal filed by Goorha.

D. SUNDARARAJAN (APPEAL NO.155 OF 2015)

11. Findings recorded in the impugned order against Sundararajan is that he was involved in the fraud perpetrated in relation to the GDR issue of Cals and was aware of the execution of Account Charge Agreement and Credit Agreement. It is further held that Sundararajan was responsible for submitting false information to SEBI regarding the initial subscribers to the GDRs issued by Cals. It is also held that Sundararajan was aware of the fact that the transaction between Cals and Asia Texx which was a related party transaction, however failed to take steps to disclose the same. For the aforesaid violations, Sundararajan is prohibited from accessing the capital market directly or indirectly and dealing in securities or instruments with Indian securities as underlying in any manner whatsoever for a period of 10 years.

12. Basic argument advanced on behalf of Sundararajan is that he was not aware of the execution or contents of the alleged Account Charge Agreement entered into between Cals and Banco. It is submitted that the BoD resolution dated 30/10/2007 certified by Sundararajan neither refers to execution of the Account Charge Agreement nor authorizes that the GDR proceeds be kept as security to the loan availed by a third party i.e. Honor. It is submitted that the resolution passed on 30/10/2007 was intended to cover as security for any loan that Cals may avail from Banco from time to time. Therefore, the finding recorded in the impugned order that the BoD of Cals on 30/10/2007 had authorized Sundararajan and Goorha to sign the Account Charge Agreement so as to secure the GDR subscription amount as security in connection with loans taken by Honor is factually incorrect. It is submitted that merely because the Account Charge Agreement contains a clause that any notice or communication in relation to the Account Charge Agreement be issued in the name of Sundararajan, it could not be inferred that Sundararajan had knowledge about the Account Charge Agreement. Similarly, it is submitted that the GDR subscription amount was withdrawn as and when required for the business purposes of Cals and therefore, the inference drawn that the withdrawals were made in consonance with the terms of the Account Charge Agreement is wholly unjustified.

13. With reference to the finding that Sundararajan had furnished false information relating to the initial subscribers to the GDRs, it is submitted that Sundararajan was neither aware of the credit agreement nor aware of the Account Charge Agreement and he had submitted information on the basis of the information relating to initial subscribers received from the Merchant

Banker/Lead Manager to the GDRs. In these circumstances, it is submitted that Sundararajan could not be held guilty of submitting false information.

14. As regards the non-disclosure of related party transaction, it is submitted that Sundararajan had no knowledge about the significant influence of Gagan Rastogi in Asia Texx and that the transaction between Cals and Asia Texx was a related party transaction. It is submitted that when the said contract was executed, Sundararajan was only a non-Executive Director of Cals and thus he was never involved in the due diligence or negotiation of the proposal and finalization of the contract with Asia Texx. It is submitted that just because Sundararajan was a director of Cals, it could not be presumed that he was aware of the related party transaction between Cals and Asia Texx. It is submitted that the GDR process got over in the year 2007 and the agreement with Asia Texx was executed by Cals in the year 2009. Merely because Sundararajan had signed the agreement on behalf of Cals, knowledge of beneficial ownership of Asia Texx by Gagan Rastogi cannot be attributed to Sundararajan. In these circumstances, it is submitted that Sundararajan cannot be said to have concealed information relating to the related party transaction.

15. As regards the findings recorded in para 27 of the impugned order that Sundararajan had failed to provide correct information in response to the summons issued under Section 11C(3) of the SEBI Act, it is submitted that Sundararajan was not aware that the transaction between Cals and Asia Texx was a related party transaction and therefore it could not be said that Sundararajan had concealed any information in response to the summons issued under Section 11C(3).

16. We see no merit in the above contentions. Admittedly, Sundararajan was in-charge of the GDR issue and as per the BoD resolution of Cals, dated 30/10/2007 certified by Sundararajan, the GDR proceeds were liable to be kept as security to the loans, if any. Argument of Sundararajan that the above resolution was intended to cover as security for any loan that Cals may avail from Banco from time to time is totally dishonest to say the least, because, firstly, amount of USD 200 million were raised through GDRs for the refinery project and the said amounts could be utilized only for the refinery project and could not be kept as security for any loan that may be taken. Secondly, as on 30/10/2007 there was no proposal whatsoever on part of Cals to take any loan outside India for any purpose. Therefore, in the facts of present case, it is abundantly clear that as on 30/10/2007 Sundararajan, nominee of Spice Energy group knew that the GDR subscription amount was liable to be kept as security for the loan taken by Honor owned by Malhotra, promoter of the Spice Energy group. Thirdly, fact that Banco under the Credit Agreement dated 11/12/2007 agreed to give loan of USD 200 million to Honor (owned by a promoter of Spice Energy group) for subscribing to the GDRs of Cals and on the same day i.e. on 11/12/2007 itself Cals (controlled by Spice Energy group) executed an Account Charge Agreement thereby agreeing to keep the GDR subscription amount of USD 200 million as security for the loan of USD 200 million taken by Honor from Banco, leave no manner of doubt that the resolution passed on 30/10/2007 was intended to secure the loan taken by Honor for subscribing to the GDRs of Cals.

17. Explanation given by Sundararajan relating to the discrepancy in the resolution dated 30/10/2007 recorded in the minute book of Cals and the resolution dated 30/10/2007 certified by him is not worthy of acceptance

because, assuming that there was lapse on part of the Company Secretary of Cals to record the said resolution in the minute book of Cals on 30/10/2007, then, Sundararajan would have got the error corrected in the subsequent Board meeting. However, in the meeting of BoD of Cals held on 19/1/2008, the minutes of BoD meeting dated 30/10/2007 as recorded in the minute book of Cals was approved. Very fact, that Sundararajan who was present in the BoD meeting dated 19/1/2008 did not take any steps to get the alleged error in the minutes of meeting dated 30/10/2007 rectified, clearly shows the mala fide intention on part of Sundararajan.

18. Prior to joining Cals, Sundararajan was Group CFO of the Spice Energy group. Pursuant to the resolution passed by the BoD of Cals on 23/7/2007, 4 nominees of Spice Energy group including Sundararajan were appointed as directors of Cals. As a result of inducting 4 nominees of the Spice Energy group, control of Cals stood vested in the Spice Energy group from 23/7/2007. This fact, according to Goorha, was not recorded in the minutes of Cals dated 23/7/2007 at the instance of Sundararajan and the same was recorded in the e-mail sent by Goorha to Sundararajan on 2/8/2007 with a copy to Deep Rastogi. During the course of arguments, Sundararajan has admitted before us that he had received the aforesaid e-mail of Goorha dated 2/8/2007. These facts on record clearly show that Sundararajan was instrumental in keeping investors in dark about the Spice Energy group taking over the control of Cals from 23/7/2007.

19. During the course of arguments, Sundararajan has also admitted that he had sent an e-mail to Goorha on 13/11/2007 expressing his inability to go to London for executing the documents on behalf of Cals and requested Goorha

to sign necessary documents on behalf of Cals. Accordingly, Goorha had signed the Account Charge Agreement on 12/11/2007 (as per the date in London). Apart from signing the Account Charge Agreement, no other agreement was signed on behalf of Cals on 12/11/2007. These facts clearly demonstrate that Sundararajan was clearly aware that the document to be executed on behalf of Cals at London on 12/12/2007 was the Account Charge Agreement. Therefore, argument of Sundararajan that he did not know anything about the Account Charge Agreement is a blatant lie.

20. Once it is held that Sundararajan was instrumental in opening a bank account of Cals with Banco for depositing the GDR subscription amount of USD 200 million and that he was instrumental in executing the Account Charge Agreement by Cals for securing the loan of USD 200 million taken by Honor from Banco for subscribing to GDRs of Cals and in fact USD 200 million was deposited by Banco in the account of Cals from the bank account of Honor with Banco, it becomes crystal clear that the sole subscriber to the GDRs of Cals was Honor and no one else. In these circumstances, argument of Sundararajan that he had given information to the Stock Exchange regarding the initial subscribers to the GDRs of Cals, on the basis of information received from the Merchant Banker/Lead Manager clearly shows that it was stage managed to mislead the investors in India. Having opened an account on behalf of Cals with Banco for depositing the GDR subscription amount of USD 200 million and having made Goorha to sign the Account Charge Agreement so as to secure the loan taken by Honor for subscribing to the GDRs of Cals, it does not lie in the mouth of Sundararajan to contend that he honestly believed that foreign investors other than Honor had subscribed the GDRs of Cals. In these circumstances, the finding recorded in the

impugned order that Sundararajan concealed the information in relation to initial subscribers to the GDRs of Cals in response to the summons issued under Section 11C(3) of SEBI Act cannot be faulted.

21. Argument of Sundararajan that he was not aware that the transaction between Cals and Asia Texx was a related party transaction is without any merit because the agreement between Cals and Asia Texx was signed by Sundararajan as authorized representative of Cals on 5/2/2009. Deep Rastogi was involved in the affairs of Cals even before he became a director of Cals is evident from the e-mail of Goorha (promoter-director of Cals) dated 2/8/2007 and the minutes of BoD of Cals dated 12/12/2007. Moreover, Asia Texx was beneficially owned by Gagan Rastogi (son of Deep Rastogi) who was also one of the promoters of the Spice Energy group. In these circumstances, inference drawn in the impugned order that Sundararajan was aware of the fact that Deep Rastogi had significant influence over Cals as contemplated under AS-18 and failure to disclose the related party transaction between Cals and Asia Texx was in violation of the Securities laws, cannot be faulted.

22. For all the aforesaid reasons, we see no merit in the appeal filed by Sundararajan.

DEEP KUMAR RASTOGI (APPEAL NO.220 OF 2015)

23. Basic argument advanced on behalf of Deep Rastogi is that he became director of Cals on 19/1/2008 that is, after the GDRs were issued by Cals on 12/12/2007 and, therefore, Deep Rastogi cannot be said to be a party to the fraud committed by Cals in relation to the GDR issue. It is submitted that Deep Rastogi had no knowledge of the Credit Agreement or the Account

Charge Agreement and that the transaction of Cals with Asia Texx was not a related party transaction, because, Cals had no significant influence over Asia Texx.

24. Involvement of Deep Rastogi in the affairs of Cals even before his becoming director of Cals on 19/1/2008 is evident from the e-mail sent by Goorha on 2/8/2007 addressed to Sundararajan with a copy to Deep Rastogi. In the said e-mail, Goorha has specifically stated that on induction of four Spice Energy group nominees as directors of Cals, there was change of management which ought to have been recorded in the minutes of the AGM held on 23/7/2007, however, at the instance of Sundararajan nominated by Spice Energy group and in-charge of the GDR issue, the said resolution has not been recorded. Very fact that Goorha, promoter-director of Cals had sent a copy of an e-mail dated 2/8/2007 to Deep Rastogi, when he was not even a director of Cals, clearly shows that Deep Rastogi had significant influence over Cals even before becoming a director of Cals.

25. Apart from the above, BoD of Cals on 12/12/2007 resolved to permit Deep Rastogi to operate the bank account of Cals to be opened with the Axis Bank Ltd. Thus, Deep Rastogi was permitted to operate the bank account of Cals when he was not a director of Cals which clearly falsifies the claim made by Deep Rastogi that he was not concerned with the affairs of Cals prior to becoming director of Cals on 19/1/2008.

26. It is relevant to note that in para 6.9(c) of the Memo of Appeal, Deep Kumar Rastogi has admitted that Sundararajan and Chilikuri deliberately misled him by stating that the transaction of Cals with Asia Texx was an arms-length transaction requiring no disclosure. This admission made by

Deep Rastogi clearly shows that at all times Deep Rastogi knew that transaction between Cals and Asia Texx was a related party transaction requiring disclosure, however, other directors prevailed on him and hence no disclosure was made. In these circumstances, the findings recorded in the impugned order that Deep Rastogi had significant influence over Cals and that he had failed to disclose related party transaction between Cals and Asia Texx cannot be faulted. Accordingly, we see no merit in the appeal filed by Deep Rastogi.

27. In the result, all four appeals are dismissed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

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

12/10/2017
prepared & compared by-dg