

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of hearing : 21:07:2017

Date of decision : 11:08:2017

Appeal No. 52 of 2017

Paramjit Singh Gill
C-3, Regency Bliss, 10,
Cornwell Road, Langford Garden
Bangalore – 25.

..... Appellant

Versus

Securities & Exchange Board of India
SEBI Bhavan, C-4A, G-Block,
Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051.

..... Respondent

Mr. Somasekhar Sundaresan, Advocate with Mr. Joby Mathew,
Ms. Harshada Nagare, Advocates i/b Joby Mathew & Associates for the
Appellant.

Mr. Rafique Dada, Senior Advocate with Dr. Poornima Advani,
Mr. Pulkit Sukharamani, Mr. Siddha Pamecha, Advocates i/b The Law
Point for the Respondent.

With
Misc. Application No. 61 of 2017
And
Appeal No. 68 of 2017

Dr. Vijay Mallya
Ladywalk, Queen Hoo Lane,
Tewin, Hertfordshire,
AL6 0LT, U.K.

..... Appellant

Versus

Securities & Exchange Board of India
SEBI Bhavan, C-4A, G-Block,
Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051.

..... Respondent

Mr. Darius Khambatta, Senior Advocate with Mr. Sandeep Parekh, Mr. Anil Choudhary, Mr. Shashank Patil, Advocates i/b Finsec Law Advisors for the Appellant.

Mr. Rafique Dada, Senior Advocate with Dr. Poornima Advani, Mr. Pulkit Sukharamani, Mr. Siddha Pamecha, Advocates i/b The Law Point for the Respondent.

**With
Appeal No. 71 of 2017**

1. Mr. Sowmiyanarayanan
Flat No. 304, Tulip Block, Rakesh
Fantasy Garden, 2nd Main Road,
Kasturi Nagar, Bangalore – 560043.
2. Mr. S. N. Prasad
A 801, Vaishnavi Splendour, 6th Cross,
80 Feet Road, RMV II Stage,
Bangalore – 560094.
3. Mr. Ainapur S. R.
Flat No. 1108, Renaissance Woods1, JB
Kaval, Forest Road, Near Gangamma
Circle, Bangalore – 560015. Appellants

Versus

Securities & Exchange Board of India
SEBI Bhavan, C-4A, G-Block,
Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051. Respondent

Mr. Sandeep Parekh, Advocate i/b Finsec Law Advisors for the Appellants.

Mr. Rafique Dada, Senior Advocate with Dr. Poornima Advani, Mr. Pulkit Sukharamani, Mr. Siddha Pamecha, Advocates i/b The Law Point for the Respondent.

CORAM : Jog Singh, Member
Dr. C. K. G. Nair, Member

Per : Jog Singh, Member (Oral)

1. In these three appeals common issues have been raised and, as such, the appeals have been heard together and are being disposed of by this common order with the consent of all the counsel for the parties. For the sake of convenience facts of Appeal No. 68 of 2017 (Dr. Vijay Mallya) is taken as a lead case. By way of this appeal, the Appellant, Dr. Vijay Mallya, has challenged the Show Cause Notice-cum-ad interim ex-parte impugned order dated January 25, 2017 passed by the Securities Exchange Board of India against the Appellant, (a non-independent non executive director) and certain other Key Managerial Persons (“**KMPs**”) of United Spirits Limited (“**USL**”), namely, Mr. Ashok Capoor (non-independent Managing Director), Mr. Sowmiyanarayanan (Assistant Vice President – Accounts), Mr. S. N. Prasad (Senior Vice President – Finance and Accounts), Mr. P. A. Murali (Executive Director and Chief Financial Officer), Mr. Paramjit Singh Gill (President – All India Operations) and Mr. Ainapur S. R. (Divisional Vice President – Accounts). The Appellant herein has been *prima facie* found to have violated Section 12A(c) of the SEBI Act 1992 (“**SEBI Act**”), Regulation 3(d), Regulation 4(1) along with Regulation 4(2)(e), (f) and (k) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 (“**PFUTP Regulations**”). By the said impugned order the Appellant has been –

- (i) restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in securities in any manner whatsoever, either directly or indirectly
- (ii) restrained from holding position as Director or Key Managerial person of any listed company

(iii) directed to file reply to SEBI within 21 days from the date of receipt of the impugned order and also directed to indicate in the reply whether the Appellant wishes to avail the opportunity of personal hearing in the matter.

2. SEBI's *prima facie* view is that the appellant was instrumental in diverting funds from United Spirits Limited (hereinafter referred to as "USL") to certain United Breweries Group Companies [hereinafter referred to as "UB Group Companies"] at the behest of Dr. Mallya, thereby, engaging in an act which *prima facie* operated as a fraud or deceit on the public shareholders of USL.

3. These legal provisions are reproduced herein below for the sake of convenience :

SEBI ACT, 1992

Under Chapter VA - Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.

Regulation 12A

No person shall directly or indirectly—

a).....

b).....

c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;

SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003

Under Chapter II - Prohibition Of Fraudulent And Unfair Trade Practices Relating To The Securities Market

Regulation 3

- a).....
- b).....
- c).....
- d) *engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made there under.*

Regulation 4

(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely:—

- a).....
- b).....
- c).....
- d).....
- e) *any act or omission amounting to manipulation of the price of a security;*
- f) *publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;*
- g).....
- h).....
- i).....
- j).....
- k) *an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;*

4. Briefly stated the facts of the case is that USL is a company incorporated under the Companies Act, 1956 on March 31, 1999 as “McDowell Spirits Limited” and was later named USL on October 17, 2006. The matter took shape after BSR & Co. LLP, statutory auditor of

USL at the time, qualified certain transactions in its audit report for the financial year 2013-14. A financial statement or a transaction is said to be qualified when the auditor is unable to conclude that a company's financial statements depict a true and fair view in accordance with the financial reporting framework used for the preparation and presentation of financial statements and accordingly, issues a declaration to that effect in the Audit Report. For auditors, an issue must be material or financially worth considering to make a qualified report. The purpose of issuing a qualified financial statement or transaction is to put the readers of the report on guard and protect the auditor himself, to the extent he has qualified the report, from allegations of professional misconduct or negligence. The qualified transaction in the present matter was the provision created by USL for ₹ 649.55 crore in its accounts, which it was supposed to have received from its debtors. It appears that during previous years, USL had advanced sums of money to certain parties ("debtors") under the supervision and management of Dr. Vijay Mallya and Mr. Ashok Kapoor, which were disclosed as amounts provided for working capital requirement, enhancement of capacities, lease deposits etc., in the books of accounts of USL. The beneficiaries of these sums of money, further, lent the money advanced to them by USL, to certain group companies of the UB Group. On July 03, 2013, the loans due from these debtors, approx. 1337.40 crore in value, were consolidated into and recorded as an unsecured loan vide an agreement between USL and United Breweries Holdings Limited ("UBHL").

5. In addition to this, on explicit instructions of the management of USL, amounts due from certain debtors of USL were allowed to be

withheld till such time the UBHL group companies repaid the loans extended to them by these debtors. As a result, balance confirmations from such debtors, which previously went undisputed till the financial year 2013, became conditional for the financial year ending March 31, 2014. The debtors provided the requisite balance confirmations along with the condition that dues to USL shall be paid only once the loans extended by these debtors to UBHL group companies are repaid. Hence, the qualifying statement from the statutory auditors BSR & Co. LLP was issued.

6. In January 2015, UBHL defaulted in payment of interest to USL on the ground that UBHL was involved in various winding up proceedings and could not part with any money without the consent of the Court. An investigation was conducted by PWC-UK, at the behest of the USL Board, to assess the transactions qualified by the statutory auditors of USL. The report dated March 24, 2015, revealed that funds from USL had been diverted and the ultimate beneficiaries of these advances were certain group companies of UBHL, including Kingfisher Airlines Ltd (“KFA”). To illustrate, in one instance, USL transferred ₹ 25 crore to a Tie-up Manufacturing Unit (“TMU”) named “UTKAL” on November 24, 2011 and on the same day UTKAL transferred an equivalent amount to KFA.

7. On April 25, 2015, the Board of USL made certain decisions regarding pressing matters such as recovery of funds that were diverted from USL; Dr. Mallya’s resignation from the Board, which he unabashedly refused. The Board also decided that an internal committee

be constituted by the MD and CEO Mr. Anand Kripalu, to initiate internal proceedings against employees who were involved in the transactions covered by the PWC-UK Report.

8. Almost a year later, Dr. Vijay Mallya entered into a settlement agreement with Diageo, on February 25, 2016, for USD 75 million in exchange for his resignation from his position as Chairman and non-executive director of USL. On the same date, Dr. Mallya and USL agreed to a mutual release in relation to matters arising out of the PWC – UK report. The following day, on February 26, 2016, USL made a public announcement to BSE with respect to Dr. Mallya's resignation.

9. Pursuant to this announcement, SEBI decided to investigate the matter of USL and vide letters dated March 09 and May 11, 2016, sought information regarding improper transactions highlighted by USL from the PWC-UK report, action taken by USL pursuant to the report to mitigate the issues, the inaccuracy of financial statements as pointed out by the Statutory Auditors of USL, details of the diversion of funds from USL and transactions that resulted in showing a lower exposure of USL to UBHL than what actually existed between 2010 and 2013.

10. USL relied heavily on the PWC-UK report while submitting its response to SEBI. It was here that USL revealed, certain measures were taken to portray a lower exposure of USL to UBHL, than what actually existed. Round tripping of funds appeared to have been undertaken to keep the exposure of USL to UBHL under the Board approved limits and/or to manage the expectations of external stakeholders and rating agencies. Transactions such as shifting the UBHL loan of 305 crore in the

books of accounts of USL to Shaw Wallace Breweries Ltd (“**SWBL**”) and reduction in value of intercompany loans provided by USL to UBHL and SWBL to the extent of ₹ 150 crore, by rotating funds through multiple entities, resulted in advancing of funds to Project Related Entities on the pretext of capital projects.

11. On July 09, 2016, USL disclosed to the BSE and NSE that the Board of USL had instructed its MD and CEO to conduct an investigation into the additional matters pointed out in the PWC-UK report, lest they too be fraught with improprieties (“**Additional Inquiry**”). This Additional Inquiry was conducted by Ernst and Young (“**E&Y**”) and the report was submitted by USL to SEBI on July 11, 2016, which further revealed a fund diversion amounting to ₹ 913.5 crore and other potential improper transactions involving USL and its Indian and Overseas subsidiaries amounting to ₹ 311.8 crore. The improper transactions so identified, in most cases, were with overseas or Indian entities that appeared to be affiliated to Dr. Vijay Mallya, such as Force India Formula One, Watson Ltd, Continental Administrative Services, etc. Dr. Mallya seemed to have a material, direct or indirect interest in these entities. The USL Board also announced that the mutual release agreed with Dr. Mallya on February 26, 2016, would not extend to matters arising out of the Additional Inquiry Report. The review period for the Additional Inquiry was between October 2010 and July 2014.

12. In view of the findings and clarifications provided by USL, whilst relying on the investigations conducted by PWC-UK and Ernst and Young, the WTM, as an interim measure, passed the Impugned Order

restricting the Appellants and the KMPs from accessing the securities market and prohibited from buying selling or otherwise dealing in securities in any manner whatsoever, either directly or indirectly, till further instructions from SEBI.

13. The impugned order has provided the Appellant and the 6 other KMPS mentioned above, an opportunity to file their replies before the SEBI within a period of 21 days from the date of receipt of the order and in the event the Appellant and the said KMPs want an opportunity of personal hearing, the same would be provided to them. However, the appellant has not preferred to submit his reply despite the passage of 21 days from the date he came to know of the order and instead has filed the present appeal prematurely.

14. We have heard the Learned Counsel for both the parties at length and have perused the pleadings and other connected material, including the file on which the case of the applicant is processed by the SEBI before passing the impugned order in question. We have also gone through various rulings cited by the parties before us.

15. The Appellant has impugned order dated 25th January, 2017, passed by the Securities and Exchange Board of India under Sections 11(1), 11(4)(b), 11(B) read with Section 19 of the SEBI Act. The Appellant is alleged to have violated the provisions of Sections 12 A(c) of the SEBI Act read with regulations 3(d), 4(i), 4(2)(e), (f) and (k) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) relating to the Securities Market Regulations, 2003. On being found that the Appellant has *prima facie* violated various provisions of the Securities

Laws, SEBI has invoked its discretion under Sections 11(1), 11(4)(b) and 11(B) and has prohibited the appellant from accessing the securities market in any manner and has also restrained the Appellant from holding position as a Director or Key Managerial Person [hereinafter referred to as 'KMP'] of any listed company till further directions. Instead of submitting reply to the impugned interim order, as required by SEBI within 21 days, the Appellant has preferred the present appeal challenging the said interlocutory order. This order had already come into force on 25th January, 2017 and is continuing till date, as the Tribunal has not stayed the same.

16. It is true that the Appellant has been a Non-Executive Chairman of the USL from 27th April, 2000, a company registered in March 1999 with its Headquarters at Bangalore. Its shares are listed on Bombay Stock Exchange (BSE) and National Stock Exchange (NSE). The Appellant and few others have been found to have indulged in improper transaction and diversion of huge amount of funds from the USL. These prima facie findings of the SEBI are primarily based on the *[Reports prepared by Ernst & Young and PwC-UK] and the material collected by SEBI from the two Stock Exchanges, i.e., BSE and NSE. There are few other KMPs in the two connected Appeals who have also been found by the Statutory Auditors as having the knowledge of the fund diversion by Dr. Vijay Mallya. The extracts of the two *[Experts'] reports have been produced before us by SEBI along with other material on the basis of which *prima facie* view has been formed by SEBI to pass the impugned order in question against the Appellant and other KMPs. We shall be dealing with the same a little later.

17. The case of the Appellant as submitted by Shri Khambata, learned senior counsel, is that the impugned order suffers from certain legal infirmities. It is argued on behalf of the Appellant that there was no urgency in the matter and as such no occasion for SEBI to invoke discretion conferred upon it by Sections 11(1), 11(4)(b) and 11(B) to pass an ex parte ad interim order against the Appellant without affording any opportunity of hearing. The order is, therefore, violative of the principles of natural justice. It is argued by Shri Khambata that the jurisdictional prerequisite of pendency of an investigation or an enquiry, as contemplated by Sections 11(B) and 11(4) of the SEBI Act has not been met with. There was no investigation or enquiry pending with the SEBI as on the date of the present ex parte impugned order against the Appellant.

18. In fact, these are some of the fundamental jurisdictional issues argued by Shri Khambata at length by relying upon at least 4 to 5 judgments of this Tribunal itself. Both the arguments pertaining to jurisdictional prerequisite and the violation of principles of natural justice pertain to the interpretation of Section 11(1), 11(4) and 11(B) of the SEBI Act read with the object of the SEBI Act and its broad scheme to protect the investors' interest and regulate the capital market. In support of his submissions, Shri Khambata has cited following rulings :

1. Nandkumar
2. Dilip S. Pendse Vs. SEBI [2009 (90 SCL 302 (SAT)]. (Page 8 of Appeal)

3. Zenith Infotech Limited & Others Vs. SEBI , QYT Fund LP & Quintessence Fund L.P. [Manu/SB/0034/2013] (M.A. No. 30/2013 & Appeal No. 59/2013 decided on 23.07.2013).
4. Pan Card Clubs Ltd. Vs. SEBI [Appeal Nos. 254/2014 and 255/2014 and Misc. Application No. 104 & 105 of 2014].
5. H. L. Trehan & Others Vs. Union of India & Others [AIR 1989 SC 568]

19. An important limb of Shri Darius Khambata's argument is that the impugned order was passed in gross violation of the principles of natural justice without affording any opportunity of being heard to the appellant. There was no urgency for passing an ex-parte ad interim order in the matter by invoking powers/discretion under Sections 11(1), 11(b) and 11(4) of the SEBI Act. It is submitted that the principle of natural justice form the bedrock for any administrative adjudicatory or quasi judicial proceedings. While SEBI is not required to mandatorily follow strict procedures like those mandated in the judiciary, they are required to adhere to well established principles of natural justice. The Learned Counsel for the appellant relied upon the order in **Pancard Clubs Limited Vs. SEBI [Appeal No. 254 and 255 of 2014 decided on 17.09.2014]** wherein this Tribunal held that "*Exercise of discretion in an unruly manner is not envisaged in the scheme of SEBI Act, particularly, sections 11(1), 11(4) and 11B thereof. Invocation of discretion under these provisions, therefore, has to be rational and be guided by sound principles of natural justice and fair play in action.*" The Learned Counsel for the appellant also placed reliance on the ruling of this Tribunal in the case of **D. A. Gadgil Vs. SEBI [2003 48 SCL 480 (SAT)]**

wherein this Tribunal observed that “*natural justice demands that a person who is to be directly affected by an administrative action be given prior notice of what is proposed so as to enable him to make proper representation of defend his cause. The aim of the rules of natural justice is to secure justice. Soul of the rule is fair play in action. The message of the doctrine is that no one should be condemned without being heard.*”

Learned Counsel for the applicant submits that this Tribunal in **Zenith Infotech Limited Vs. SEBI [Appeal No. 59/2013 decided on 23.07.2013]** held that SEBI was duly empowered to pass an ex-parte order in urgent cases but this power was to be exercised sparingly in most deserving cases of extreme urgency.

20. The Learned Counsel for the Appellant submits that SEBI has passed the impugned order having adverse consequence on the Appellant behind his back, without giving an opportunity of hearing or inquiring and informing the Appellant that such legal action is imminent. It is further submitted that the appellant was no longer related to USL after his resignation on February 25, 2016 and he was not even made aware of the actions undertaken by USL in regard to the matter and various communications between USL and SEBI. As such, it is submitted that this is clear violation of the principles of natural justice.

21. It is submitted that while Sections 11 and 11 B of the SEBI Act empower SEBI to undertake measures and issue directions to protect the interest of investor and promote the development of the securities market, the directions contained in the impugned order is not in furtherance of

protecting the interests of investors and promoting the development of the securities market.

22. In this connection, it is emphatically argued by Shri Khambata that SEBI cannot pass ad interim ex-parte order without initiating any enquiry or investigation, as envisaged under SEBI Act, 1992. SEBI failed to initiate and undertake the requisite investigation or inquiry prior to the impugned order. Section 11(4) of the SEBI Act empowers SEBI to undertake measures thereunder “*either pending investigation or inquiry or on completion of such investigation or inquiry*”. Further Section 11B of the SEBI Act empowers SEBI to issue directions thereunder only “after making or causing to be made an enquiry”. It is argued by the Learned Counsel for Appellant that SEBI failed to fulfill the conditions of causing an enquiry or investigation required under Section 11(4) and 11(B) of SEBI Act, as such, the impugned order is not only in violation of natural justice but also beyond the scope of its power accorded under Section 11(4) and 11(B) of SEBI Act. SEBI took cognizance of the matter only after the public announcement regarding resignation of the Appellant was made by USL on February 26, 2016. Thereafter, SEBI sought information from USL and based on the information supplied by USL, SEBI passed the impugned order. SEBI has neither appointed an Inquiry Officer nor has it issued a written order instructing its officers to conduct a formal investigation against the Appellant. SEBI had not sought any information from the Appellant regarding the matter and any of the alleged violations prior to passing of the impugned order. All communications of SEBI leading up to the impugned order were made only with USL without any knowledge of the appellant. Therefore, in the absence of a formal

investigation or representation sought from the person aggrieved, it is submitted that the impugned order is passed in violation of powers granted to SEBI under the SEBI Act.

23. On the basis of the above submissions, the appellant concludes that the charges are based on total surmises, probabilities and conjectures. SEBI cannot merely make the allegations without producing adequate evidence in support of the charge. The party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof.

24. The appellant has drawn attention to the position occupied by him in the USL ostensibly without going into the merit of the findings in detail. It is submitted that Shri Mallya was a non-executive chairman of USL at the time the alleged violation took place. He was not involved in the day to day management of the USL and was never connected with the preparation of final results of the company. The various violations of the FUTP regulations, particularly, enshrined in Regulation 3(d); 4(i); 4(2)(e); 4(2)(f) and 4(2)(k), etc. have been erroneously placed on the appellant instead of on the other persons who were actually responsible for the day to day management of USL, including those responsible for preparation of the books of accounts.

25. Elaborating further, it is submitted by the Appellant that alleged violations are not in the nature of fraud under Section 12(A)(c) of the SEBI Act, 1992 and the various FUTP Regulations pressed into service by SEBI against Shri Mallya. The appellant submits that there has, in fact, been no dealing or issue of securities and, therefore, there cannot possibly be a fraud in connection with such dealings or issue of securities. The

appellant submits that Section 12 A(c) of the SEBI Act and Regulation 3(d) of the PFUTP Regulations deal with fraud or deceit in connection with the issue, dealing in securities and any violation would be established when such violation is in connection with the issue or dealing in securities. The charges of fraud cannot be based on wild allegations without convincing evidence. In support of his submission, the Appellant has relied on the decision of this Tribunal in **KSL & Industries Vs. Chairman, SEBI [Appeal No. 9/2003 decided on 30.09.2003]** wherein it is held that *“a wild allegation of market manipulation, in particular, the charge of fraudulent action unsupported with convincing evidence is not to be sustained.....that allegation of fraud cannot survive on mere conjectures and surmises”*. It is submitted by the Appellant that the impugned order is based purely on hearsay information and not on any prima facie findings of fraud by SEBI. The impugned order is issued by SEBI based on surmises and conjectures, without carrying out any independent investigation of its own or making any prima facie finding of how the actions of the appellant amount to violation of each or any of the specified provisions in connection with the issue, dealing in securities.

26. The Appellant submits that Regulation 4(1) of the PFUTP provides an overriding prohibition of indulging in fraudulent or unfair trade practices in securities while Regulation 4(2) discusses what kind of dealings in securities shall be deemed as fraudulent or an unfair trade practice. It is submitted that dealing in securities is essential for any charge of a fraudulent or an unfair trade practice. SEBI has at no point even alleged that the Appellant undertook dealing in securities or was involved in dealing in securities which operated as fraud or deceit. SEBI

has not produced any evidence to show that there has been manipulation of the price of a security. Further, in the absence of any allegation that any of the financial reports published by USL were untrue or inaccurate at any stage, SEBI has erred in alleging a prima face violation of Regulation 4(2) of the PFUTP Regulations.

27. It is also one of the contentions raised by the Appellant that SEBI grossly erred in placing reliance on biased third party report of PWC-UK dated 24.03.2015 and observations contained in E&Y Report dated 29.06.2016. Shri Khambata submits that SEBI had no power to rely upon private reports to pass an ex-parte ad interim order against the Appellant in the manner in which it has been sought to be done by the respondent. More precisely, Shri Khambata submits that the private reports can corroborate SEBI's investigation and enquiry but said private reports cannot be the sole basis for passing such an ex-parte order of drastic nature. The contention is that the two reports of the Auditors are not authentic and are motivated and have been given under the influence of Diageo, the Appellant's competitor.

28. Lastly, Shri Khambata submits that the expression 'in connection with securities' has been unnecessarily pressed into service for passing the restraint order against the Appellant in question. Shri Khambata has also explained the concept of KMPs to contend that the Appellant cannot be restrained to be a Director or a KMP in the facts and circumstances of the case.

29. Shri Rafique Dada, Learned Senior Counsel appearing for SEBI submits that there was some substantial material before the SEBI on the

basis of which ex-parte ad interim order was passed against the Appellant. Shri Dada submits that SEBI has also taken the help of information and material available with the two Stock Exchanges, namely – BSE and NSE, regarding the Appellant as well as various connected entities. SEBI has minutely gone through the statutory auditor's report, report by PWC-UK and also report by the E&Y. The material before SEBI, which was gathered in a span of 4 to 5 months clearly revealed huge diversion of funds by Shri Vijay Mallya from USL to other entities, including overseas subsidiaries. The money still remains untracked and that various agencies of the Government of India like SFIO and CBI are working on it. Such acts/violations by Shri Mallya were within the knowledge of the above said 6 KMPs and, as such, action has been taken against them also because of their prima facie involvement in the matter. Shri Dada submitted that a letter dated 09.03.2016 addressed by the SEBI to USL seeking information, after taking cognizance of the public announcement made by Diageo/USL regarding resignation of the Appellant in relation to the examination conducted in the matter. *Inter-alia*, the following information was sought :

1. Agreement entered by USL with Dr. Vijay Mallya.
2. Compliance in relation to Regulation 23 of SEBI (Listing Obligation and Disclosure Requirement)
3. Comments of the Audit Committee on the above.

USL, by letter dated 28.03.2016, replied to the SEBI's letter and gave the requisite information, which is at paragraph 1.14 page 66 of the appeal. After consideration of the reply submitted by the USL, SEBI sought further clarifications from USL by letter dated 11.05.2016. On the basis

of the notes and comments mentioned in the Audit Report dated 13.05.2015, inter alia, USL was asked to provide details of modus-operandi by which the funds were diverted, action taken by the company to recover said amount, etc. which is at paragraph 1.15, page 72 of the Appeal. USL, by relying upon the PWC-UK Report gave SEBI a point wise reply vide their letter dated 16.06.2016 (paragraph 1.16 at page 73 of the Appeal). A copy of the PWC-UK Report and Additional Inquiry Report dated 24.03.2015 and 29.06.2016 were submitted to SEBI by USL respectively by their letters dated 20.06.2016 and 11.07.2016 (Paragraph 1.17 and 1.19 at pages 78 and 79 of the Appeal respectively). USL gave further information on clarifications sought by SEBI by their letter dated 05.08.2016, which is at paragraph 1.20, page 79 of the paper book).

30. We have given a thoughtful consideration to the above submissions of both the Learned Senior Counsel for the parties. First of all we would like to deal with the contention of Shri Khambata that it was not a case fit enough in which powers conferred under 11, 11(b), 11(4) of the SEBI Act should have been invoked for passing the ad interim order and that it has led to violation of the natural justice inasmuch as no opportunity of hearing was afforded to the Appellant before passing the impugned order. We have looked into the various judgments cited by Shri Khambata in this regard. It is true that Section 11, 11(b) and 11(4) do confer wide discretion on SEBI to pass ad interim orders in order to protect the investors' interest and for a healthy and orderly growth of the capital market. It is also equally true that by way of various judicial pronouncements this Tribunal has consistently held that the power conferred under 11, 11B and 11(4), particularly after introduction of

Section 11(4), SEBI do empower it to issue ad interim ex-parte orders to achieve the twin objective enshrined in the SEBI Act, i.e, the protection of investors' interest and orderly growth of capital market. If market abuses likely to occur, SEBI shall invoke such powers subject to the satisfaction of the Board/Members of SEBI. This discretion is a vital discretion conferred upon SEBI to be used sparingly and not in a routine manner. In normal, routine cases where investigation reveals some mischief or fraud being conceived or perpetrated in the market, SEBI should resort to adjudicating proceeding by appointing an Adjudicating Officer as per Chapter IV-A of the SEBI Act. But keeping in view the gravity of the matter, SEBI was not unjustified in invoking such extra-ordinary power. Similarly, SEBI has justified the delay of few months in passing the impugned order against the Appellant. Similarly, there is no unnatural or unreasonable delay on the part of the SEBI in passing the impugned order.

31. In this context, a perusal of the original file on which the case of Dr. Vijay Mallya was processed reveals that decision to initiate action against the Appellant was taken at the highest level in SEBI to look into the matter and take action as per law. So it cannot be argued that no investigation or inquiry was pending against the Appellant when the SEBI invoked powers under Sections 11(1), 11(4)(b) and 11B of the SEBI Act.

32. Next, the contention of the Appellant that SEBI did not have material of its own to sustain the impugned order also cannot be accepted in the present case. It is a matter of record that SEBI has relied on the following documents while passing the ex-parte ad interim order:

- (a) Letter dated 05.01.2012 issued by the Appellant authorizing Wave to withhold ₹ 190 crore due to USL.
- (b) Email dated 25.03.2012 whereby the Appellant informed Mr. Ashok Capoor (Managing Director of USL) and P.A. Murali (Executive Director and CFO of USL) that KFA had significant dues towards the Income Tax Appellate Tribunal and instructed that USL “would have to come up with ₹ 44 Crore, if needed.”

- (c) Email dated 19.04.2012 to P. A. Murali, whereby the Appellant stated that –

“1. You are aware of my compulsion to keep KFA flying. Any slippage will be a disaster for the Group.

2. To set the record straight, I confirm that you have been acting under my direct authorization, for which I take responsibility.

3. You are aware that I have been following up three fund raising proposals –

A) HDFC

B) Bank of Maharashtra

C) Pelican Funding.

The Pelican Funding is to ensure that UBHL meets its obligations as well as to fund KFA.

4. As the Pelican Funding is complex and time consuming despite best efforts, I am asking for interim funding support from USL. Once this is in place, UBHL can return funds to USL with the appropriate accounting entries.

- (d) Vide email dated 13.07.2012, Mr. Ashok Capoor informed the Appellant that it was not possible for USL to support UB Group Companies to meet any of their needs and, in fact, USL needed support from UB Group Companies in those circumstances. In response, the Appellant, vide an email dated 08.07.2012 stated that –“I know the USL position exactly. It is my final call. If you cannot accept

my instructions, you are free to decide further steps.... but let me repeat, my call is final and an instruction.”

SEBI contends that the above material is sufficient to form a prima facie conclusion that the Appellant acted in fraudulent manner towards the public shareholders/investors in USL. It is submitted by SEBI that a final view in the matter can only be taken once the explanation is received.

33. Lastly, we may mention that the ex-parte impugned order has been passed on *prima-facie* view and the appellant, instead of rushing to the Tribunal, should have defended himself before SEBI by availing of the opportunity granted to him. It is pertinent to note that the impugned order was to effectively operate for 21 days only from the date of its issuance, i.e. 25.01.2017. If the appellant had preferred a reply to SEBI in his defence or had appeared in person to defend his case and if he had pointed out any perversity, irregularity, illegality or irrationality in passing the impugned order by SEBI or any hardship which might have been faced by Shri Mallya due to the passing of the ex-parte ad interim order against him and if some substance was found in Shri Mallya's defence, SEBI would have passed appropriate orders either modifying or recalling the impugned order against the appellant as per law.

34. During arguments, however, Shri Khambata, learned senior counsel for the appellant also suggested that the Appellant be at least allowed to continue as a Chairman of UBL. We find that this prayer of the Appellant should be considered by the SEBI as per law on receipt of such a representation, which may be preferred by the Appellant, if so advised, and in case SEBI finds merit in the submission of the Appellant,

it would be free to grant partial relief to the Appellant in accordance with law.

35. In view of the above facts and circumstances and analysis of law and with above observations we are inclined to dismiss the appeal with a direction to the appellant to appear before SEBI, in person or through a legally authorized representative, and make his submissions before SEBI within 21 days from today. Thereafter, SEBI shall consider the same and proceed further in the matter and pass final orders expeditiously and preferably within a period of four months in accordance with law to give finality to the issue. We make it clear that after receiving Mr. Vijay Mallya's reply, if SEBI considers it appropriate to relax any of the conditionalities prescribed in the impugned ad-interim ex-parte order it shall be free to do so as early as possible and according to law. Ordered accordingly.

36. Appellant, Mr. Paramjit Singh Gill in Appeal No. 52 of 2017 is stated to have filed reply before SEBI. Appellants in Appeal No. 71 of 2017 shall also file reply within 21 days and SEBI shall consider the same and pass appropriate order in accordance with law in these replies/representations within a further period of *[four] months and bring finality to the issue in question. Before we part with this matter, we may pertinently note that the Appellants in Appeal Nos. 52/2017 and 71/2017 have brought to our notice certain facts to distinguish their cases from that of Dr. Vijay Mallya. Since we are not considering the merits of the matter, all the contentions of the parties are kept open and SEBI shall consider such distinguishing facts, if any, which may be pointed out by

these appellants in their replies, and pass appropriate orders on such replies while considering and disposing of the same within four months.

37. All three appeals stand dismissed with the abovesaid directions. No order as to costs.

Sd/-
Jog Singh
Member

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

11.08.2017
Prepared & Compared by
PTM

* Amended pursuant to order dated 01.09.2017.