

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

**Misc. Application No. 30 of 2013
And
Appeal No. 59 of 2013**

Date of decision: 23.07.2013

1. Zenith Infotech Limited
B-52, Electronic Sadan 1, MIDC,
TTC Area, Mahape,
Navi Mumbai – 400 710.
2. Rajkumar Saraf
5th Floor, Saraf House, SVP Road,
Chowpatty, Mumbai – 400 007.
3. Akash Rajkumar Saraf
5th Floor, Saraf House, SVP Road,
Chowpatty, Mumbai – 400 007.
4. Zenith Technologies Pvt. Ltd.
3rd Floor, A-Z Industrial Estate,
Ganpatrao Kadam Marg,
Lower Parel, Mumbai – 400 013.
5. VU Technologies Pvt. Ltd.
30 MIDC Central Road,
Andheri (East), Mumbai – 400 093.
6. Devita Rajkumar Saraf
5th Floor, Saraf House, SVP Road,
Chowpatty, Mumbai – 400 007.
7. Vijayrani Rajkumar Saraf
5th Floor, Saraf House, SVP Road,
Chowpatty, Mumbai – 400 007. ...Appellants

Versus

1. Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051.
2. QVT Fund LP
3. Quintessence Fund L.P. ...Respondents

Mr. Fredun Devitre, Senior Advocate with Mr. Zal Andhyarujina, Mr. Nirav Shah and Mr. Vivek Shetty, Advocates for Appellants.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody and Mr. Akhilesh Singh, Advocates for Respondent No. 1.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Navroz Seervai, Senior Advocate, Ms. Ankita Singhania, Mr. Ranjit Shetty, Ms. Sonali Sharma, Mr. Rupen Kanawala, Mr. Deepak Deshmukh and Ms. Tapasvini Shah, Advocates for Respondent Nos. 2 and 3.

CORAM : Jog Singh, Member
A. S. Lamba, Member

Per : Jog Singh

1. The present appeal has been preferred by the Appellants against the ad-interim ex-parte order dated March 25, 2013 passed by the learned Whole Time Member (Ld. WTM) restraining the six Appellants (i.e. Appellant Nos. 2 to 7) from accessing the securities market and also prohibiting them from buying, selling or dealing in the securities market in any manner whatsoever till further orders. The Appellants have also been called upon to furnish a bank guarantee for one year for an amount of USD 33.93 million within 30 days with other connected directions. The said order is stated to have been passed under Section 19 read with 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 (SEBI Act) and Section 12A of the Securities Contracts (Regulation) Act, 1956 (SCR Act).

2. The operative portion of the said order reads as under :-

“25. Therefore, in order to protect the interest of investors and the integrity of the securities market, I, in exercise of the powers conferred upon me by virtue of section 19 read with sections 11(1), 11(4) and 11B of SEBI Act, 1992 and section 12A of the Securities Contracts (Regulation) Act, 1956, pending investigation, hereby issue the following directions, by way of this *ad-interim ex-parte* order:

- i. The following promoters of ZIL are restrained from accessing the securities market and further prohibited from buying, selling or dealing in securities, directly or indirectly, in any manner whatsoever, till further directions:-

S. No.	Name	PAN No.
1.	Devita Rajkumar Saraf (Promoter)	AAFPS8848D
2.	Vijayrani Rajkumar Saraf (Promoter)	AMTPS0851J
3.	Zenith Technologies Pvt Ltd (Promoter)	AAACZ2074L
4.	Vu Technologies P Ltd (Promoter)	AACCV1663P
5.	Rajkumar Saraf (Promoter and Chairman cum Director)	AURPS4374C
6.	Akash Rajkumar Saraf (Promoter and Managing Director)	AAFPS8849C

- ii. The board of directors of ZIL is hereby directed to furnish, within 30 days from the date of this order, bank guarantee(s) of a minimum tenure of one year, for USD 33.93 million (i.e. the amount of sale proceeds of MSD Division that has been diverted as described in para 15 above), in the name of Securities and Exchange Board of India, without using the funds of ZIL or creating any charge on assets of ZIL. The bank guarantee may be invoked in case any adverse inference is drawn by SEBI in its final order with regard to the actions of Board of directors/promoters of ZIL in diverting the sale proceeds of MSD Division and SEBI deems it necessary to compensate ZIL.
26. This order is without prejudice to the right of SEBI to take any other action that may be initiated against ZIL and its directors/promoters in accordance with law. The above directions are without prejudice to the rights of FCCB holders to enforce their rights of redemption against ZIL before competent authority, forum or court.
27. The persons/entities against whom this order has been passed may file their reply to SEBI within 21 days from the date of receipt of this order, if they so desire. They may also indicate in their replies whether they wish to avail an opportunity of personal hearing in the matter.
28. This order shall come into force with immediate effect.”

3. When the appeal was listed on April 17, 2013 for admission and interim relief, the following interim order came to be passed:-

“ORDER:

Heard all the learned counsel for the parties. Certain jurisdictional issues have also been raised by Mr. Fredun Devitre, learned senior counsel for the appellants who appears with Mr. Zal Andhyarujia and Mr. Anand Desai. Mr. Shyam Mehta, learned senior counsel appears with Mr. Mihir Mody and Mr. Akhilesh Singh for the SEBI. Mr. Janak Dwarkadas, learned senior counsel with Mr. Navroz Seervai, learned senior counsel appearing for the interveners. After hearing the learned counsel for the parties the appeal is admitted. Two weeks’ time is granted to the respondent to file their reply-affidavit with an advance copy to the other side.

2. Similarly, turning to the Misc. Application preferred by the interveners today itself, parties have been heard. Prima-facie the Tribunal is of the opinion that the interveners should also be heard in this matter before any final order is passed. Misc. Application is, accordingly, allowed and interveners are also granted two weeks time to file their reply in the matter. Copy of appeal shall be given forthwith to the interveners so as to enable them to do the needful.

3. Also heard parties on the question of interim relief. Keeping in view the totality of facts and circumstances of the case and submissions made by the parties, the operation of the impugned ad interim ex parte order dated March 25, 2013 is hereby stayed in so far as para 25(ii) is concerned during the pendency of the present appeal. Para 25(i) of the impugned order shall, however, operate against the appellants (six persons/entities mentioned in the said para 25(i) of the ad interim ex parte impugned order).

4. It is further made clear that the appellants, in the meanwhile, shall neither alienate nor create third party interest in the properties owned and possessed by ZIL.

List this matter for final hearing on May 7, 2013.”

4. The brief facts are that there are seven Appellants in the present appeal and Appellant No. 1 i.e. Zenith Infotech Ltd. (“ZIL”) is a public limited company incorporated under the Companies Act, 1956 with its registered

office at Navi Mumbai. Its shares are listed on the Bombay Stock Exchange Ltd. (“BSE”) and the National Stock Exchange Ltd. (“NSE”). ZIL claims to be a leading international company specialising in delivering innovative IT solutions for virtual infrastructures, data storage and backup, and disaster recovery etc. It has about 900 employees in its offices spread across the globe. It had two sets of businesses: firstly; Cloud Computing Business (“CCB”) and secondly; Managed Services Division Business (“MSD Business”) prior to its (i.e. “MSD’s”) sale to Continuum Managed Services, LLC (“CMS”), on or about September 23, 2011.

5. Appellant Nos. 2 to 7 are the promoters of ZIL and Appellant No. 2 is also the Chairman-cum-Director of ZIL, whereas, Appellant No. 3 is also its Managing Director. Appellant No. 4 is, however, a company incorporated under the Companies Act, 1956 having its registered office at Lower Parel, Mumbai. Similarly, Appellant No. 5 is also a company incorporated under the Companies Act, 1956 with its registered office at Andheri (East), Mumbai. Appellant Nos. 2 to 7 together hold 64.89% of ZIL’s shareholding.

6. From the pleadings it appears that, in the course of its business operations, ZIL floated Foreign Currency Convertible Bonds (“FCCBs”) of USD 33 million (about Rs. 179 crore) in September 2006 and additional USD 50 million (about Rs. 271 crore) in August, 2007. The amount so collected through the FCCBs was due for redemption in August 2011 and August 2012 respectively; and the same is submitted to be governed by the offer document issuing said FCCBs, the Trust Deed executed between ZIL and the Trustees of said FCCBs, and also by the various provisions of the Foreign Exchange Management Act, 1999 (“FEMA Act”). Additionally, the Appellants submit

that issuance of FCCBs, their redemption and any dispute in case of default in redeeming the same by the Appellants, are all governed by the laws of the country where the FCCBs in question have been issued. It is emphatically submitted that FCCBs, therefore, do not fall under the provisions of the SEBI Act, 1992 or other securities laws in India. In this context, the Appellants submit that on their default to redeem the monies in question, the interveners and some other parties have already approached the Hon'ble High Court and Learned Small Causes Court, Mumbai in appropriate proceedings against the Appellants. It is, therefore, contended that SEBI is precluded from launching parallel proceedings against the Appellants on the same dispute involving exactly the same subject matter.

7. The case of the Appellants is that the FCCBs in question were issued and the monies collected by the Appellants at a time when the world economy was in boom almost everywhere. The rate of exchange of the American Dollar was between Rs. 41 to Rs. 45 during the relevant period. In the circumstances, it was the earnest belief of the Appellants that atleast a substantial part of the FCCBs would be converted into shares of the issuing Company by the FCCB holders. But, due to the global economic crash in the year 2008 recessionary trends across the whole world were witnessed and the same is a matter of record. Due to this phenomenon, most of the FCCB holders decided not to convert their FCCBs into shares and instead sought repayment / redemption of the FCCBs on maturity and due to economic crash in 2008, increase in cost of USD vis-à-vis Rupees and non-conversion of FCCBs into shares of ZIL, the ZIL did not have resources to repay FCCBs on maturity.

In the circumstances, the Board of Directors of ZIL resolved to raise funds by various means. Accordingly, an Extraordinary General Meeting

(“EGM”) was convened on January 29, 2011 to obtain the shareholders’ approval to borrow money upto Rs. 1500 crore and/or sell or lease the business, divisions, subsidiary of ZIL on such terms and conditions as the Board of Directors of ZIL might deem fit for an amount not exceeding Rs. 1000 crore. A special resolution to this effect was passed at the EGM under Section 293(1)(d) and other connected provisions of the Companies Act, 1956 and the FEMA Act. The Appellants submit that at the time of maturity of the FCCBs, there was a sharp decline in the share price because of adverse market conditions caused mainly due to the phenomenal increase in the rate of USD value vis-à-vis Indian Rupee (for one US Dollar was around Rs. 58 at that time and has continuously gone up since then, particularly in the recent past, leading to sharp depreciation in the value of the Indian Rupee). This led to an increase, between 25% to 40%, in the cost of redeeming the US Dollar denominated FCCBs.

8. Significantly, in September 2011 Summit Partners LP (“Summit”) formed Zenith RMM, LLC (“Zenith RMM”) under the laws of the State of Delaware, USA mainly for the purpose of acquiring the MSD Business of ZIL. Summit is stated to be a growth equity investor providing private equity and venture capital to rapidly growing companies. ZIL informed the BSE and NSE on September 26, 2011 that it had spun-off the MSD Business to Zenith Monitoring Services Pvt. Ltd. (“Zenith Monitoring”), which would be a subsidiary of Zenith RMM. The name of Zenith RMM was changed to CMS. Zenith Monitoring was formed with a paid up capital of Rs. 1,00,000/-, the initial shareholders of which were Appellant Nos. 1 to 3. As part of the transaction, all the shares of Zenith Monitoring were sold on or around September 23, 2011 at face value plus costs of incorporation to Zenith RMM.

The purpose of incorporating Zenith Monitoring was to make it a wholly owned subsidiary of Zenith RMM for the purpose of transferring about 550 employees in India along with movable assets of the MSD Business that were in India. The process of sale of the MSD Business was completed in the month of October, 2011. It is contended by the Appellants that the bondholders and trustees have always been aware of the fact that ZIL was in the process of mobilising funds for the purpose of, inter alia, redemption of FCCBs. In fact, the Appellants also seem to have made an attempt to negotiate amicably with the investors / bondholders for extension of time to redeem the FCCBs in question. In the process, the cutoff date i.e. September 21, 2011 meant for the maturity of the 2011 FCCBs lapsed and the trustees issued a notice of default on September 30, 2011 coupled with a notice of cross default for the 2012 FCCBs under Condition 11(D) of the Conditions relating to the said FCCBs. The trustees demanded payment of both the FCCBs i.e. 2011 and 2012. The Appellants submit that the maturity date of 2012 FCCBs could not be accelerated without the prior approval of the Reserve Bank of India (“RBI”). Moreover, the Appellants did not have adequate liquid funds to redeem all the FCCBs in one go. The negotiations for extension of time with the investors etc. for repayment failed in early October 2011 and as such Appellant No. 1 informed the BSE on October 13, 2011 of its default on FCCBs which were due on September 21, 2011.

9. The Appellants submit that on October 14, 2011 certain shareholders, claiming to be FCCB holders, filed Suit No. 2034 of 2011 before the Learned City Civil Court at Dindoshi to stop the sale of the MSD Business and understandably they also approached various regulators including SEBI. Next, the trustee of the said FCCBs also filed Suit No. 2865 of 2011 and Company

Petition No. 28 of 2012 in the Hon'ble Bombay High Court on October 21, 2011 seeking various reliefs in respect of the FCCBs against Appellant Nos. 1 to 3. The Appellants, therefore, submit that the holders of the FCCBs, through their trustee, have already elected to exercise their right as per law in respect of their interests and redemption of said FCCBs by approaching the Hon'ble High Court and, therefore, they are precluded from raising a parallel dispute before any other forum. It is specifically contended by the Appellants that the rights and interests of the FCCB holders have already been duly protected by the Hon'ble High Court particularly by its order dated October 9, 2012 passed in Suit No. 2865 of 2011 on the Notice of Motion moved by the Plaintiff (trustee, The Bank of New York Mellon, London Branch). The relevant portion of the said order of the Hon'ble High Court is reflected in paragraphs 16 to 20 and the same is reproduced herein below for the sake of convenience:-

“16. I have considered the submissions advanced by the learned Senior Advocates appearing for the Parties. It is not disputed that the FCCBs are matured and the Defendant No. 1 has not made payments due under the said Bonds. In fact, the Division Bench of this Court in paragraph 3 of its order dated 3rd May 2012 has inter alia recorded that, *“There is no dispute about the fact that when the maturity date of repayment / redemption of the 2011 bonds came in August/September 2011, defendant No. 1 did not make any payment. In view of the default, the plaintiff issued notice of demand as contemplated by the agreements and also addressed notices in October 2011 to defendant No. 1 being Notice of Acceleration and declaring the 2012 Bonds as due and payable”*. I am also prima facie satisfied that the Defendant Nos. 1, 5 and 6, despite representing their shareholders, Stock Exchange and the City Civil Court that the consideration received from the sale of the MSD business or at least part thereof would be applied towards buy-back/redemption of FCCBs, have after the sale of the MSD business, not paid any amount whatsoever towards buy back/redemption of FCCB series.

17. Order 38 Rules 5 to 13 of the CPC, 1908 pertains to attachment of properties of a party before judgment. Rule 5 provides that where, at any stage of a suit, the Court is satisfied by affidavit or otherwise, that the Defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, (a) is about to dispose of the whole or any part of his

property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the Defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. In the event of an order being passed under Order 38 Rule 5 requiring the Defendant to show cause why he should not furnish security, or to furnish the security as ordered and the defendant fails to do so within the time fixed by the Court, the Court is empowered under Rule 6 of Order 38 to order attachment of the property specified or such portion thereof as appears sufficient to satisfy and decree which may be passed in the suit. Sub-Rule (2) of Rule 6 of Order 38 provides that where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn or make such other order as it thinks fit. The said sub-Rule (2) of Rule 6 of Order 38 is by the Bombay amendment substituted as follows:

“(2) Where the defendant shows such cause or furnishes the required security or gives an undertaking to the Court to do or not to do a thing, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.”

18. In the present case, the Defendants have not disposed of any of its properties after filing of the suit. Though the provision as to attachment before judgment is not applicable where the property has already been disposed of, as held by the learned single Judge of the Calcutta High Court in *Premraj v. Md. Maneck Gazi* (supra) which decision is approved by the Hon'ble Supreme Court in *Raman Tech. & Process Engg.Co.* and another (supra), the conduct of the Defendants immediately before the filing of the suit can be taken into consideration by this Court to draw an inference as to whether the Defendant is about to dispose of the property and if so with what intention. Even if an order directing the Defendant Nos. 1, 5 and 6 is passed to furnish security and the Defendant Nos. 1, 5 and 6 fail to furnish the same, all that the Court can do is to pass an order of attachment against the assets of the Defendant No. 1. However, in the instant case, the Defendant Nos. 1,5 and 6 have themselves without prejudice to their rights and contentions expressed their willingness to undertake to the Court not to dispose of any of their assets disclosed on oath save and except the cash and bank balances and the amounts received by them from their sundry creditors from time to time to enable them to carry on their business which would include payment of

wages to 1000 workmen. Attaching the Bank balances of approximately Rs. 28 crores and the amount to be received from sundry creditors is bound to stop the day to day business of the Company affecting the lives of 1000 workmen and their family members. This will not be in the interest of anyone including the Plaintiff. Even otherwise, I am also not inclined to pass such a drastic order of stopping the entire business of the Defendant No. 1 at the ad-interim stage. In view thereof, until further orders, I pass the following order:

(i) The undertaking given by Defendant Nos. 1, 5, and 6 viz. that the Defendants shall until further orders not dispose of, sell, transfer alienate or create any third party right or interest in respect of their Cloud Computing Business valued by the Plaintiff's Valuers M/s. Grant Thornton between 198 Crores and Rs. 239.8 Crores and by M/s. Ernst & Young Pvt. Ltd. in their second report between 152 crores and Rs. 211 crores, is accepted.

(ii) The undertaking given by Defendant Nos. 1, 5 and 6 that they will maintain status quo in respect of their fixed assets valued at Rs. 163.4 crores more particularly described in Exhibit-B to the affidavit dated 10th May, 2012, is accepted.

(iii) The undertaking given by the Defendant Nos. 1, 5 and 6 that they shall maintain status quo in respect of their investments set out in Exhibit-B to the affidavit dated 10th May, 2012, aggregating to Rs. 66.01 crores, is accepted.

(iv) The undertaking of Defendant Nos. 1, 5 and 6 that they shall maintain status quo in respect of the money held in joint escrow account (Wells Fargo Bank, A/c. No. 83722000), is accepted.

(v) Defendant Nos. 2, 3 and 4 shall be at liberty to move this Court seeking appropriate orders if at any time they are of the view that they are entitled to claim the Equity Stake in Continuum Managed Services amounting to Rs. 39.86 crores and/or Rs. 32.27 crores held in joint escrow account.

(vi) The undertaking given on behalf of Defendant Nos. 1, 5 and 6 that in the event of its subsidiaries returning any loans aggregating to Rs. 50 crores, the same shall not be utilized by the Defendant Nos. 1, 5 and 6 and in any event they shall make their subsidiaries return an amount of Rs. 25 crores within a period of six months from the date of this order, which amount shall be invested in a fixed deposit of a Nationalised Bank and not utilize the same, is accepted.

19. The Application for further ad-interim reliefs is accordingly disposed of.

20. The hearing of the suit is expedited and the Chamber Summons taken out by Defendant Nos. 1, 5 and 6 seeking

revocation of leave granted to the Plaintiff under clause 12 of the Letters Patent Act is kept for hearing and final disposal on 30th October, 2012.”

In the above background, the Appellants contend that the impugned order of Ld. WTM, SEBI dated March 25, 2013, is without jurisdiction, void ab initio and illegal particularly because the same issue as dealt with in the impugned order is also the subject matter of the proceedings before the Hon’ble High Court and the rights and interests of the affected parties in the matter of redemption of the FCCBs in question are duly protected by the above said order dated October 9, 2012. The Appellants also submitted during the course of arguments that they have deposited Rs. 25 crore pursuant to the order of the Hon’ble High Court.

10. Per contra, the case of Respondent No. 1 is that not only, there was failure on the part of the Appellants to inform the BSE and NSE regarding the defaults with respect to the FCCBs in question, but the funds purportedly raised for redemption of said FCCBs were used for other purposes. This amounts to fraud within the meaning of provisions of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 and is also opposed to various provisions of the SEBI Act, 1992, the SCR Act, 1956 as well as the SEBI (Prohibition of Insider Trading) Regulations, 1992. The Respondent No. 1 has drawn our attention towards findings arrived at by the Ld. WTM in the impugned order dated March 25, 2013 particularly in paragraphs 15, 16, 18, 19 and 20 which can be summarised as below:-

- i) The amount received from the sale of the MSD division was not utilized for the purposes for which it was raised i.e. to redeem the FCCBs but was diverted for the other purposes.
- ii) The Appellants did not inform BSE/NSE, about the fact that Appellant No. 1 was going to default on its obligation to redeem the FCCBs nor did the Appellants inform the BSE/NSE about the default, having taken place.
- iii) The Appellants misled BSE/NSE vide its letters dated October 13, 2011 whereby they informed BSE/NSE that part of the amount would be utilized for partial repayment of FCCBs. They tried to hide the information about the default in connection with the repayment of FCCBs until intervention by the Stock Exchanges on October 13, 2011. They also did not make disclosure with regard to the Suit and the Winding-up of Petition filed against Appellant No 1. Similarly, the Stock Exchanges were not informed that USD 13 Million were transferred to two, promoters related entities in Dubai.
- iv) The Appellants did not disclose the price sensitive information as required under the Listing Agreement and the SEBI (Prevention of Insider Trading) Regulations, 1992. They rather employed a device or artifice to fraudulently divert the sale proceeds of its MSD division. As such, the shareholders had lost considerable amount of money as a result of the sharp fall in the price of the scrip

of Appellant No. 1 from Rs. 190/- to Rs. 45/- in 45 trading days thereby eroding shareholders' wealth.

11. Thus, the contention of Respondent No. 1 is that the Appellant No. 1 sold its MSD Business for an amount of USD 48 Million but the said amount was not utilized by Appellant No. 1 to redeem the FCCBs in question. Due to this default, a Suit and Winding-up Petition have been filed against Appellant No.1 by the FCCB holders. Moreover, the price of the scrip of Appellant No. 1 fell from Rs. 190/- on September 23, 2011 to Rs. 45/- on November 30, 2011. The Appellant No. 1, thus, misrepresented to the Exchanges by their letter dated October 13, 2011 that a part of the sale proceeds of the MSD would be used by Appellant No. 1 towards partial payment of the FCCBs.

12. The next contention of the Respondent No. 1 is that it has jurisdiction over FCCBs since Clause 21 of the Listing Agreement provides as under:

“The Company will fix and notify the Exchange at least twenty-one days in advance of the date on and from which the interest on debentures and bonds, and redemption amount of redeemable shares or of debentures and bonds will be payable and will issue simultaneously the interest warrants and cheques for redemption money of redeemable shares or of debentures and bonds, which shall be payable at par at such centres as may be agreed to between the Exchange and the Company and which shall be collected at par, with collection charges, if any, being borne by the Company, in any bank in the country at centres other than the centres agreed to between the Exchange and the Company, so as to reach the holders of shares, debentures or bonds on or before the date fixed for interest on debentures or bonds or redemption money, as the case may be.”

13. Learned senior counsel for the Respondent No. 1, Mr. Shyam Mehta, submitted that the expression “bonds” used in above said Clause 21 covers FCCBs as well, for the simple reason that it is not excluded in the definition.

Secondly, Mr. Mehta submits that a purposive and dynamic interpretation is required to be given to Clause 21 of the Listing Agreement so as to further enhance the definition and concept of “securities” as used in the SEBI Act, 1992 as well as SCR Act, 1956. Regarding the timely information required to be given to the stock exchange by the Appellants, the Respondent No. 1 has drawn our attention towards Clause 36 of the Listing Agreement which requires a company to inform the stock exchanges of all events which are likely to have a bearing on its performance / operations as well as price sensitive information. These include litigation / disputes which might have an impact on the present or future operations or profitability or financials of the company in question. Appellant No. 1 failed to inform the stock exchanges about the Suit and Winding-up of Petition filed against it by the FCCB holders for redemption of the FCCBs. With regard to disclosing the price sensitive information to stock exchanges, the Respondent submits that such an obligation is imposed on listed companies by Clause 2.1 read with Clause 7.0 (ii) of the Code of Corporate Disclosure Practices for Prevention of Insider Trading forming part of Schedule II of the SEBI (PIT) Regulations.

14. The finding in the impugned order regarding diversion of funds for the purposes other than the one for which the authority was taken by Appellant No. 1 from its shareholders is sought to be justified by the Respondents explaining the provisions of Section 12A of the SEBI Act, 1992 and Regulations 3 of the SEBI (PFUTP) Regulations, 2003 both of which are reproduced hereinbelow for the sake of convenience:-

Section 12A of SEBI Act, 1992

Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.

12A. No person shall directly or indirectly –

- (a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognised stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;
- (b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;
- (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;
- (d) engage in insider trading;
- (e) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the rules or the regulations made thereunder;
- (f) acquire control of any company or securities more than the percentage of equity share capital of a company whose securities are listed or proposed to be listed on a recognised stock exchange in contravention of the regulations made under this Act.”

Regulation 3 of SEBI (PFUTP) Regulations, 2003

“Prohibition of certain dealings in securities

No person shall directly or indirectly-

- (a) buy, sell or otherwise deal in securities in a fraudulent manner;
- (b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under;
- (c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are

listed or proposed to be listed on a recognized stock exchange;

- (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.”*

15. On the basis of the above said provisions, Respondent No. 1 contends that the companies cannot engage in any act, practice or course of business which would tantamount to fraud “in connection with” the issue or dealing in securities which are listed or proposed to be listed. The Respondents also rely upon the case of Hon’ble Supreme Court reported in **2004(5) SCC 632**, namely, **Tamil Nadu Kalyana Mandapmam Assn. v. Union of India (UOI) and Ors.**

16. As regards the jurisdiction of SEBI to entertain an issue which is pending before the Hon’ble High Court in a Suit / Company Petition filed by the FCCB holders, the learned senior counsel submits that the same does not, rather cannot, prevent SEBI from exercising its jurisdiction and powers vested in it under the SEBI Act, 1992 and Regulations made thereunder. In this connection, our attention is drawn towards Sections 15 Y, 20 A and 21 of the SEBI Act read with Section 22 E of the SCR Act. A judgment of the Hon’ble Bombay High Court in case of **Kesha Appliances P. Ltd. and Ors. v. Royal Holdings Services Ltd. and Ors., 2006(1) Bom CR 545** is pointed out. It is also suggested by the learned senior counsel for Respondent No. 1 that by the impugned order, the Ld. WTM has not sought to secure the redemption amount claimed by the FCCB holders but has merely directed the Appellants to

provide a bank guarantee for an amount of USD 33.93 Million received by them as sale proceeds after disposing of the MSD Business.

17. Lastly, on the question of non-compliance with the principles of natural justice in passing the impugned order on the ground of urgency, Respondent No. 1 has drawn our attention towards paragraph 23 and 24 of the impugned order which have been reproduced hereinbelow for ready reference:-

“23. In the facts and circumstances of the case, it is necessary to take urgent action for the above violations so as to prevent further loss of shareholders' value due to stripping of the asset and erosion of value in ZIL and also to preclude reoccurrence of such defaults/ violations. It is also noteworthy that the conduct of ZIL and its promoters/directors may raise concerns about the integrity of the securities market and may tarnish the image and reputation of the Indian securities market amongst foreign investors which is bad for development of the markets.

24. Given the vital function of protecting investors and safeguarding the integrity of the securities market vested in SEBI and the commensurate powers given to it under the securities laws, it is necessary for SEBI to exercise these powers firmly and effectively to insulate the market and its investors from the fraudulent actions of the participants in the securities market. One of the basic premise that underlies the integrity of securities market is that the participants conform to standards of transparency, good governance and ethical behavior prescribed in securities laws and do not resort to fraudulent activities. In this case, the conduct of the promoters / directors, as brought out above has been violative of this basic premise. Therefore, in view of the aforesaid *prima facie* findings, it is felt necessary to intervene in this matter to safeguard the interest of the retail shareholders of ZIL and protect the integrity of the securities market. I am convinced that this is also a case where, pending investigation, effective and expeditious action is required to be taken to prevent any further harm to investors and to thwart any further design, which are *prima facie* fraudulent, manipulative and unfair, of ZIL and its promoters/ directors. This is also a fit case where SEBI needs to send a stern message to prevent companies and their promoters/ directors from indulging in such acts of omissions and commissions as observed in this case. In my view, therefore, in the facts and circumstances of this case an urgent preventive and remedial action needs to be taken by way of *ad interim ex -parte* order.”

18. It is also pointed out by Respondent No. 1 that in paragraph 27 of the impugned order the Ld. WTM has granted time to the Appellants to file reply / replies within three weeks and that there is sufficient compliance with the principles of natural justice and, therefore, the Appellants should have approached SEBI instead of preferring the present appeal before this Tribunal.

19. The case of the Respondent Nos. 2 and 3 (Interveners) namely QVT Fund LP and Quintessence Fund L.P. is that the bond holders submitted that they have invested 75.6% in the 2011 FCCBs and 57% in the 2012 FCCBs. In addition, two affiliations of the bond holders namely, QVT Mauritius West Fund and Quintessence Mauritius West Fund collectively hold 0.2438% of the issued share capital of Appellant No. 1 since August 2010. Appellant No. 1 vide notice dated December 27, 2010 notified shareholders regarding convening of the EGM on January 29, 2011. In the said EGM shareholders passed a resolution for the sale of the business and/or divisions including the subsidiaries of Appellant No. 1, mainly to redeem the FCCBs. After the sale of the MSD Business, Appellant no. 1 did not make the repayment of the FCCBs in question. The shareholders, therefore, filed a suit before the City Civil Court, Dindoshi, Mumbai against Appellant No. 1, Zenith RMM and Summit (Suit No. 2034 of 2011) stating that Appellant No. 1 acted in contradiction to the shareholders' resolution in relation to the sale of the MSD business. It is submitted by Respondent Nos. 2 & 3 that Mr. Rajkumar Saraf, Appellant No. 2 stated in an affidavit that the sale proceeds received by Appellant No. 1 (ZIL) will be applied towards buy-back redemption of FCCBs etc. which was not done.

20. The trustee for the FCCBs pursuant to the instructions of Respondent Nos. 2 & 3 also filed Suit No. 2865 of 2011 before the Hon'ble Bombay High Court along with a Winding-up Petition against the Appellant No. 1 being Company Petition No. 28 of 2012. The trustees also filed Notices of Motion No. 3520 of 2011 and No. 3527 of 2011 for attachment before judgment and for other ad-interim reliefs. The Notices of Motion were heard and disposed of by the Hon'ble High Court by its order dated October 9, 2012 which recorded the undertakings of Appellant Nos. 1 to 3 as under:-

1. *Shall not dispose of, sell, transfer, alienate or create any third party right or interest in respect of Cloud Computing Business of the Company.*
2. *Shall maintain status quo in respect of the Company's fixed assets valued at INR 163.34 crores as of 10th May 2012;*
3. *Shall maintain status quo in respect of the Company's investments aggregating to INR 66.01 crores;*
4. *Shall maintain status quo in respect of the money held in joint escrow account amounting to approximately INR 32.27 crores;*
5. *In the event any of its subsidiaries return any of its loans aggregating to INR 50 crores, the same shall not be utilized by the Company, Rajkumar Saraf and Akash Saraf; and*
6. *Shall within a period of 6 months from the date of the said order (i.e. by April 9, 2013) make its subsidiaries return an amount of INR 25 crores and such amount shall be invested in a fixed deposit of a nationalized bank and shall not be utilized by the Company, Rajkumar Saraf and Akash Saraf."*

21. The Respondent Nos. 2 & 3 further submitted that the objective of selling the MSD Business in the Board Resolution dated December 27, 2010 and the explanatory statement dated December 27, 2010 was to pay the amounts due under the FCCBs. It led to a default of the 2011 Bonds and a cross-default with respect to the 2012 Bonds as well. Due to this non-compliance the share price of Appellant No. 1 fell drastically from Rs. 190/- to Rs. 45/- in a span of

45 trading days in the year 2011 itself. Reference has been made to **Kaye vs. Croydon Tramways Company, (1898) 1 Ch. 358** where it has been held that a notice which does not fairly disclose the purpose of the meeting is a tricky notice and is invalid. It is submitted that the Ld. WTM has rightly noted in the impugned order that actions of the Appellants have been detrimental to interests of the securities market, and that the Appellants' conduct has led to the erosion of the value of the shareholding of Appellant No. 1. The proceedings initiated by SEBI against the Appellants are not for enforcement of the rights under the FCCBs, but against the conduct of the promoters and/directors of Appellant No. 1 (which is a listed company) which has caused loss to the shareholders and is dealt with in paragraph 8 of the impugned order. Further, paragraph 20 of the impugned order records that the acts of omission and commission of the Appellants amount to non-observance of the principles of corporate governance and are in breach of the SEBI (PIT) Regulations, 1992 and the Listing Agreement with BSE/NSE. Similarly, paragraph 24 of the impugned order further records that vital function of SEBI is protecting investors and safeguarding integrity of securities market vested in SEBI and commensurate powers given to it under securities laws. Next, Hon'ble Supreme Court in **N. Narayanan vs. Adjudicating Officer, SEBI**, has enunciated principles in relation to conduct of entities operating in the securities market and the role of SEBI as the market regulator. In paragraph 30 it is stated that any manipulative or deceptive practices in contravention of the SEBI Act or its Regulations whether employed directly or indirectly in connection with the issue, purchase or sale of any securities listed in the Stock Exchange must be dealt with in accordance with the provisions of the Act, which is absolutely necessary for investors protection and to avoid market abuse. In paragraph 35, the Hon'ble Supreme Court lays down the parameters regarding the concept of

market abuse and directs that the SEBI to act as an auditor and an overseer to ensure that no market abuse takes place. The Hon'ble Supreme court states that SEBI has a duty to send out a message to foreign investors that market security is the motto of the securities market in India. In fact, the principles enunciated in the Sahara Case have further been approved by the Supreme Court in the Narayanan's case. It is stated that the submissions of the Appellants that the findings of Sahara Case and Narayanan's Case are after the final order of SEBI are wholly irrelevant in as much as the law laid down by the Hon'ble Supreme Court in both the judgments would be applicable to SEBI at any and every stage at which it exercises its regulatory powers and discharges its duties, whether in passing an ex-parte order or otherwise.

22. Regarding the plea of the Appellants that the matter being sub judice in the Hon'ble High Court, SEBI cannot hold parallel proceedings on the same subject matter, the Respondent Nos. 2 and 3 submit that a matter can be said to be sub-judice in a particular forum only when the forum in which proceedings are pending has the jurisdiction to grant the relief as prayed for in the subsequent proceeding. Whereas in the Suit filed in the Hon'ble Bombay High Court the trustees' are seeking a monetary decree for recovery of amounts due to the bondholders, the action initiated by SEBI is in discharge of its statutory duties. A Civil Court is not only not capable of granting such a relief but, as pointed out by the learned senior counsel appearing for SEBI the Respondents, there is an actual bar on the Civil Courts to grant such reliefs to promoters and directors of the Company. In any event the order of SEBI for furnishing a bank guarantee of USD 33.93 Million is an order for which SEBI has got jurisdiction. It can also pass orders against the promoters and directors of the company who have dealt with the funds of the company contrary to the mandate given by

shareholders. This is meant to restore the faith of investors in the company whose share value has dropped from Rs. 190/- per share in the year 2011 to Rs. 12/- in the year 2013. In the facts and circumstances of the present case where default in payment of FCCB bondholders is admitted and there appears to be diversion of funds to companies controlled by promoters which are located outside India, i.e., Dubai and Singapore, particularly without there being any urgency for the same and contrary to the mandate given by the promoters and directors, SEBI would be failing in its duty if it were to not pass the impugned order is the contention of the Respondents.

23. Further, the fact is that there may be an order in the Civil Suit filed by the trustee for recovery of monies recording the undertaking of Appellant No. 1 not to dispose of its movable and immovable assets, this firstly establishes that the Company has defaulted in obligations regarding the FCCBs requiring the Civil Court to pass such an order; and secondly does not in any manner divest SEBI of its power to protect the interests of the shareholders of Appellant No. 1 who are not the plaintiffs in the Civil Suit. The impugned order is infact an order which is in the interests of the minority public shareholders who due to small holdings would not have the wherewithal to approach the Civil Court.

24. The relevant provisions of law under which the ad-interim ex-parte order is stated to have been passed are reproduced hereinbelow :-

SEBI Act, 1992

Delegation.

“Section 19 The Board may, by general or special order in writing delegate to any member, officer of the Board or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the powers under section 29) as it may deem necessary.”

Functions of Board.

“Section 11(1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.”

“Section 11(4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:-

- (a) suspend the trading of any security in a recognised stock exchange;*
- (b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;*
- (c) suspend any office-bearer of any stock exchange or self-regulatory organisation from holding such position;*
- (d) impound and retain the proceeds or securities in respect of any transaction which is under investigation;*
- (e) attach, after passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:*

Provided *that only the bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached;*

- (f) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation :*

Provided that the Board may, without prejudice to the provisions contained in sub-section (2) or sub-section (2A), take any of the measures specified in clause (d) or clause (e) or clause (f), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market :

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.”

“Section 11B. Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary, -

- (i) in the interest of investors, or orderly development of securities market; or
- (ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or
- (iii) to secure the proper management of any such intermediary or person,

it may issue such directions, -

- (a) to any person or class of persons referred to in section 12, or associated with the securities market; or
- (b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market.”

SCR Act, 1956:

Power to Issue directions.

“Section 12A. If, after making or causing to be made an inquiry, the Securities and Exchange Board of India is satisfied that it is necessary –

- (a) in the interest of investors, or orderly development of securities market; or

- (b) *to prevent the affairs of any recognised stock exchange or clearing corporation, or such other agency or person, providing trading or clearing or settlement facility in respect of securities, being conducted in a manner detrimental to the interests of investors or securities market; or*
- (c) *to secure the proper management of any such stock exchange or clearing corporation or agency or person, referred to in clause (b),*

it may issue such directions, -

- (i) *to any stock exchange or clearing corporation or agency or person referred to in clause (b) or any person or class of persons associated with the securities market; or*
- (ii) *to any company whose securities are listed or proposed to be listed in a recognised stock exchange,*
as may be appropriate in the interests of investors in securities and the securities market.”

25. We have heard learned senior counsel for all parties appearing before us at length and have perused pleadings and documents annexed therewith, including the written submissions and judgments etc. brought to our notice by them. The Appellants have appealed against ad-interim ex-parte order dated March 25, 2013 of Ld. WTM, SEBI mainly on two grounds: firstly, the Appellants submit that Respondent No. 1, SEBI, has no jurisdiction over FCCBs as the same are not listed on any of the Stock Exchanges in India and are not covered by the definition of “securities” as defined in the SEBI Act, 1992 read with relevant provisions of the SCR Act, 1956. The first limb of the argument on jurisdiction as advanced by the Appellants is that the entire matter is sub judice before the Hon’ble High Court in two Suits and more than 40 hearings have already taken place in the two matters. A detailed interim order has also been passed by the Hon’ble Bombay High Court on October 9, 2012

in Suit No. 2865 of 2011 duly protecting the interests of the bond holders in question.

26. The second limb of the argument advanced by the Appellants is that the impugned ad-interim ex-parte order of Ld. WTM, SEBI is almost final in nature in as much as it seeks to restrain the Appellants from accessing the securities market, in any manner whatsoever till further orders, and further directs them to deposit USD 33.93 Million as Bank Guarantee for a period of one year. The Appellants submit that there are other drastic findings against the Appellants in the whole order which have been gravely prejudicial to the interests and defence of the Appellants and the same have been passed without affording any opportunity of hearing to the Appellants. The post decisional opportunity of hearing sought to be granted to the Appellants by filing a reply within three weeks is nothing but an empty formality.

27. We have given our thoughtful consideration to the matter and the submissions made by Mr. Fredun Devitre, learned senior counsel for the Appellants, Mr. Shyam Mehta, learned senior counsel for Respondent No. 1 and Mr. Janak Dwarakdas, learned senior counsel for Respondent Nos. 2 and 3. We are of the considered opinion that the impugned ad-interim ex-parte order dated March 25, 2013 is not sustainable in the eyes of law as it has been passed in gross violation of the principles of natural justice. No complaint as mentioned in the impugned order has ever been supplied to the Appellants by giving them an opportunity of hearing in the matter before the order could be passed. We hasten to add that Respondent No. 1 is empowered to pass ex-parte ad-interim orders in urgent cases but this power is to be exercised sparingly in most deserving cases of extreme urgency. In the case in hand, on its own

showing, we note that Respondent No. 1 had knowledge of the matter from the very beginning. Paragraph 8 of the impugned order itself makes it abundantly clear that the share price of ZIL fell from Rs. 190/- on September 23, 2011 to Rs. 45/- on November 30, 2011 just in 45 days. In our considered opinion September – October 2011 would have been the right time for SEBI to act, to protect interests of investors, provided it had jurisdiction to do the same in respect of the FCCBs in question. This, however, was not done for almost 15 months for reasons not made known to this Tribunal and any sort of urgency having already disappeared, Respondent No. 1 should have given an opportunity to the Appellants by supplying a copy of the complaint and calling upon them to present their defence. This has admittedly not been done and no cogent and convincing reason has been put forth for depriving the Appellants of such a valuable right of being heard before passing the impugned order in question.

28. Lastly, we turn to the contention of the learned senior counsel for Respondent No. 1, Mr. Shyam Mehta, that an opportunity of hearing was given to the Appellants by granting them three weeks' time to reply in the impugned order itself. It is difficult for us to agree with Mr. Mehta on this issue. It is settled that if the essentials of justice in the sense of granting opportunity of hearing are ignored in passing an order to the prejudice of a person, the order is a nullity for want of natural justice and no amount of post-decisional hearing can cure the same. We, therefore, hold that such a post decisional hearing in the fact and circumstances of the present case is no more than an eyewash.

29. In the circumstances, we have no hesitation in setting aside the impugned order and remanding the matter to Respondent No. 1 for fresh

consideration in accordance with law by supplying a copy of the complaint to the Appellants in advance and also by deciding the jurisdictional issues raised by the Appellants in the present Appeal before hand. Ordered accordingly.

30. The matter is, thus, remanded to Respondent No. 1 for fresh consideration expeditiously and preferably within a period of six weeks, from receiving a copy of this order. We hope that the Appellants as well as other affected parties whom the Respondent No. 1 may feel appropriate to summon, shall cooperate with Respondent No. 1 in expediting the matter. All other contentions raised by the parties are kept open. Misc. Application No. 30 of 2013 also stands disposed of. No costs.

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

23.07.2013

Prepared and compared by:

msb