BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on : 27.09.2023

Date of Decision : 30.10.2023

Appeal No. 714 of 2023

Punit Goenka
6 & 7th Floor, Vasant Sagar
Properties Pvt. Ltd.
A Road, Opp. Jai Hind College,
Churchgate,
Mumbai – 400 020. …Appellant

Versus

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

Dr. Abhishek Manu Singhvi, Senior Advocate with Mr. Navroz Seervai, Senior Advocate, Mr. Somasekhar Sundaresan, Mr. Amit Bhandari, Mr. Nitesh Jain, Ms. Shruti Rajan, Mr. Mudit Jain, Mr. Vivek Shah, Mr. Anubhav Ghosh, Mr. Hari, Mr. Jitendra Motwani, Mr. Abhiraj Arora, Mr. Deepanshu Agarwal and Ms. Samreen Fatima, Advocates i/b ELP for the Appellant.

Mr. Darius Khambatta, Senior Advocate with Mr. Aditya Mehta, Ms. Vidhi Shah, Mr. Mihir Mody and Mr. Arnav Misra, Advocates i/b. K. Ashar & Co. for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per : Justice Tarun Agarwala, Presiding Officer

1. The appellant has challenged the confirmatory order dated August 14, 2023 passed by the Chairman of Securities and Exchange Board of India ('SEBI' for short) confirming the *ex parte ad interim* order dated June 12, 2023 passed by the Whole Time Member ('WTM' for short) with certain modifications.

2. The facts leading to the filing of the present appeal is, that the appellant Punit Goenka is the Managing Director and Chief Executive Officer of Zee Entertainment Enterprises Ltd. ("ZEEL" for short) since January 1, 2010.

3. In November 2019 three Independent Directors of ZEEL resigned (wrongly mentioned as two in the *ad interim* order) after raising concerns over several issues and one such issue was appropriation of a fixed deposit of Rs. 200 crore of ZEEL by Yes Bank Limited for squaring off the loans of related parties of Essel Group.

4. The respondent conducted an examination regarding the events leading to the resignation of the independent directors. The examination revealed that Subhash Chandra issued a 'Letter of Comfort' dated September 4, 2018 to Yes Bank Ltd. regarding credit facilities availed by Essel Green Mobility Ltd. (EGML). Through this 'Letter of Comfort' it was stated that ZEEL would ensure that a fixed deposit of at least Rs. 200 crore would be made available to the Bank at all times while the loan remained outstanding and, in the event of a default, the bank could appropriate the fixed deposit towards repayment. The investigation further revealed that this 'Letter of Comfort' was only known to a few persons in the management and that the Board of Directors were unaware of the said letter. The examination also revealed that the seven related entities of ZEEL were:-

Sl. No.	Name of the Associate Entities
1.	Pan India Infraprojects Pvt. Ltd.
2.	Essel Green Mobility Ltd.
3.	Essel Corporate Resources Pvt. Ltd.
4.	Essel Utilities Distribution Company Ltd.
5.	Essel Business Excellence Services Pvt. Ltd.
6.	Pan India Network Infravest Ltd.
7.	Living Entertainment Enterprises Pvt. Ltd.

5. The investigation revealed that Axis Bank instead of squaring off the credit facility of EGML had adjusted the fixed

deposit against the credit facility given to seven related entities of ZEEL as stated in the previous paragraphs. The investigation further revealed that the aforesaid seven related entities paid back Rs. 200 crore to ZEEL during September / October 2019 along with interest. The investigation revealed that the issuance of the 'Letter of Comfort' without informing the Board of Directors and without taking its approval was violative of Regulation 4 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('LODR Regulations' for short) and accordingly a show cause notice dated July 6, 2022 was issued. In these proceedings, a settlement application was filed by the appellants which was rejected on April 18, 2023. The adjudication proceedings are still pending.

6. According to SEBI it decided to examine the matter further with regard to ZEEL's claim of receipt of funds from the related entities. In this regard, details regarding the amount paid by the related entities was sought by SEBI on April 27, 2023. The details were provided by ZEEL on May 8, 2023. Thereafter, SEBI sought some clarifications vide their letter dated June 7, 2023 to which a reply was given on June 11, 2023 and thereafter the impugned *ex parte ad interim* order was passed. The interim directions that was issued:-

a) *The Noticees shall cease to hold the position of a director or a Key Managerial Personnel in any listed company or its subsidiaries until further orders.*

b) *ZEEL shall place this order before its Board of Directors, within 7 days from the date of receipt of the Order.*

7. While passing the *ex parte ad interim* order directing the appellant and Shri Subhash Chandra that they would cease to hold any position of a director or a Key Managerial Personnel in any listed company or its subsidiaries till further orders, it also directed the appellant to file their reply / objections, if any, within 21 days. Instead of filing a reply the appellant and Shri Subhash Chandra chose to file an appeal before this Tribunal.

8. Against the *ex parte ad interim* order, two appeals were filed, one by the appellant Shri Punit Goenka and the other by Shri Subhash Chandra. Both the appeals were disposed by an order dated July 10, 2023 directing the said appellants to file an appropriate reply for vacation / modification of the *ex parte ad interim* order and that if such a reply along with such vacating application was filed, the WTM would decide the matter after giving an opportunity of hearing within a specified period. Based on the aforesaid direction, replies were filed and the

matter was heard by the Chairperson of SEBI who after considering the matter passed the impugned order dated August 14, 2023 confirming the *ex parte ad interim* order with the following modification, namely-

> "(i) *The investigation in the matter by SEBI shall be completed in a time-bound manner and in any event, within a period of 8 months from the date of this Order;*
>
> *(ii) Entity No. 1 and Entity No. 2 shall not hold position of a Director or a KMP in the following companies till further directions:*
>
> *(a) Zee Entertainment Enterprises Ltd.;*
>
> *(b) Zee Media Corporation Ltd.;*
>
> *(c) Zee Studios Ltd. (wholly owned subsidiary of Zee Entertainment Enterprises Ltd.);*
>
> *(d) Zee Akaash News Pvt. Ltd. (wholly owned subsidiary of Zee Media Corporation Ltd.;*
>
> *(e) any resultant company that is formed pursuant to a merger or amalgamation of the above named companies with any other company, wholly or in part;*
>
> *(f) any company, which is formed pursuant to demerger of any of the above named companies."*

9. The WTM while passing the *ex parte ad interim* order found that 7 associate entities of ZEEL had paid the following amounts to ZEEL pursuant to the appropriation of ZEEL's fixed

deposit of Rs. 200 crore by Yes Bank Limited. Thus, amounts were paid between September 26, 2019 and October 10, 2019 as under:-

(Amount Rs. in Crore)

Name of the Related Party	Amount repaid	Date of repayment
Pan India Infraprojects Pvt. Ltd.	14.80	26-Sep-19
Essel Green Mobility Ltd.	17.10	27-Sep-19
Essel Corporate Resources Pvt. Ltd.	22.30	30-Sep-19
Essel Utilities Distribution Company Ltd.	19.20	30-Sep-19
Pan India Infraprojects Pvt. Ltd.	36.90	30-Sep-19
Essel Business Excellence Services Pvt. Ltd.	23	10-Oct-19
Pan India Network Infravest Ltd.	49.30	01-Oct-19
Living Entertainment Enterprises Pvt. Ltd.	17.4	01-Oct-19
Total	**200**	

10. The WTM further came to the conclusion that the funds paid by 7 associate entities had in fact originated from ZEEL or other listed companies of Essel Group which moved through multiple layer promoter family owned / controlled entities and was ultimately transferred to ZEEL in order to show the fulfillment of payment obligation of the associate entities towards ZEEL. The WTM came to the conclusion that movement of the funds as depicted in paragraphs 14, 17, 20, 23 and 26 of the *ex parte ad interim* order would show that there was no actual net receipt of funds by ZEEL and these were merely book entries to show receipt of funds. The WTM came to the conclusion that ZEEL's owned funds and funds from other listed companies of Essel Group were used to give an

impression that the associate entities had indeed returned the money they owed to ZEEL as result of revocation of LoC given by Mr. Subhash Chandra.

11. The WTM also came to the conclusion that *prima facie* the *modus operandi* adopted showed that Rs. 143.90 crore out of Rs. 200 crore had been transferred from ZEEL / other listed companies of Essel Group to falsely portray repayment of due amounts to ZEEL from associate entities.

12. The WTM accordingly came to a *prima facie* conclusion that funds had been siphoned of from ZEEL and other listed companies of Essel Group which ultimately benefited the promoter family.

13. The WTM also came to the conclusion that the subsequent disclosure by ZEEL in its annual report showing receipt of funds from associate entities was false and that ZEEL misrepresented the financial statements in its annual report.

14. The WTM also came to the conclusion that the appellant, being the Managing Director and Chief Executive Officer of ZEEL at the time when the funds were moved out of ZEEL for being routed again to ZEEL through layered and circuitous

transaction, had a direct role in the diversion of the funds of ZEEL and other listed companies of Essel Group and that the appellant falsely portrayed in its annual report that ZEEL had received the dues from the associate entities.

15. The WTM *prima facie* came to the conclusion that the alleged diversion of funds and misrepresentation in the annual report that it had received the funds from associate entities amounted to fraudulent and unfair trade practices and that the appellant had violated the provisions of Regulation 4 of the LODR Regulations.

16. The WTM came to the conclusion that the siphoning of the funds was pursuant to a well planned scheme through layers of transaction and since the appellant has abused his position as a Director / key managerial personnel (KMP) of a listed company for siphoning off funds for his own benefit, the WTM thought it fit to pass an *ex parte ad interim* order directing that the appellant would cease to hold the position of a Director or Key Managerial Personnel till further orders in any listed company or its subsidiaries during the pendency of the investigation.

17. Before the Chairperson the appellant contended that the matter of alleged siphoning of funds was of the year 2019 and since the matter was four years old there was no imminent urgency in passing the *ex parte ad interim* order. It was also contended that the WTM relied upon certain information under the settlement proceedings which was not permissible and that reliance on entries in a bank statement cannot lead to a conclusion of the same being sham entries or that it was a circuitous transaction. It was urged that the funds transaction with associate companies were not bogus book entries but were genuine transactions and the monies flowed through valid banking channels. It was also urged that there was no dealing in securities or inducement and consequently the SEBI Act or its Regulations were not violated nor was there any material to show that the appellant was dealing in securities or inducement to deal in securities. It was contended that the bank transfer by ZEEL to its subsidiary entities was for valuable consideration and the subsequent transfers made by the associate entities was of no consequences as no loss was caused to ZEEL and, in any event, the appellant cannot be asked to explain the transactions beyond the first leg of bank transfer of monies by ZEEL to its subsidiary or associate entities since the appellant was not connected with the associate entities. It was also contended that

the transactions made by ZEEL to its subsidiary or associate entities were backed by appropriate documentation, namely, memorandum of understanding, agreements and invoices which were duly approved by relevant authorities and that these transactions were also approved by the audit committee. It was, thus, urged that so long as ZEEL had made payments for valuable consideration, the subsequent utilization of funds by other parties to repay ZEEL does not constitute diversion of funds nor does it cause any loss to ZEEL. It was also urged that the appellant was not in control of the day to day transaction of the associate entities and had no access or right to operate its bank accounts and was not involved in the operations, financing or control of the borrower entities nor has the appellant benefited from the alleged impugned transactions. It was also urged that the transaction were genuine and legitimate and consequently there was no misrepresentation in the annual reports nor any false submissions were made to SEBI and consequently the appellant had not violated either the SEBI Act or its Regulations.

18. The Chairperson after considering the objections and after giving an opportunity of hearing and after perusing the record confirmed the *ex parte ad interim* order with certain

modifications which has already been extracted above. The Chairperson held that:-

(i) The Letter of Comfort (LoC) was for the outstanding loan of Essel Green Mobility Ltd. and that Yes Bank Limited had appropriated the entire FD of Rs. 200 crore towards outstanding loan not only of Essel Green Mobility Ltd. but also of six other associate entities.

(ii) Whether the appropriation by Yes Bank Limited of ZEEL's FD was without authorization or not was not germane to the present issue as it was only dealing with the none genuine transactions.

(iii) The transfer of funds by six associate entities are not genuine transactions.

(iv) Prior to the said transfer of funds by associate entities a substantial deposit had been made by related parties of ZEEL. In one such instance it was made by Pan India Infraprojects Pvt. Ltd. and in four instances by Sprit Infrapower & Multiventures Private Limited in the account of associate entities and consequently the promoter of ZELL, namely,

Sprit Infrapower & Multiventures Private Limited were involved in five instances.

(v) These associate entities had negligible balance prior to the proposed transfer they were to make to ZEEL and in three of the five instances the difference in the receipt and transfer of money ranged from 7 minutes to 27 minutes.

(vi) Sprit Infrapower & Multiventures Private Limited who transferred the money to the associate entities had received it from Churu Enterprises LLP on the same day or just a day prior to the transfer the amount to associate entities who, in turn, further paid it to ZEEL.

(vii) Sprit Infrapower & Multiventures Private Limited and Churu Enterprises LLP are closely connected with each other. The former is the promoter of ZEEL and the later is a partnership firm in which the mother of the appellant has a controlling 89% partnership interest.

(viii) Bank statements by themselves can never lead to a conclusion that the transfer of money was pursuant

to a sham transaction or on account of circuitous transaction. However, the attending circumstances and the entities involved in the transaction *prima facie* leads to a conclusion on a preponderance of probability that the transactions were circular initiated by ZEEL and ended with ZEEL.

(ix) A *prima facie* scheme was orchestrated to the effect that ZEEL had received money from its six associate entities equivalent to the FD amount wherein circular fund transfers had taken place to show receipt of funds from ZEEL to associate entities which was a sham transaction on account of the fact that the entire set of transactions were completed within a few days and at each stage / leg of the scheme, the funds had moved immediately upon receipt of the same by the transferee.

(x) Merely by explaining the first leg of transfer made by ZEEL to associate entities is not sufficient to exonerate the appellant inasmuch as there are a plethora of circumstances which are inextricably linked with the fund transaction which *prima facie* leads to a conclusion as not genuine transactions.

(xi) The transactions made by ZEEL to its associate entities being backed by necessary documentation such as memorandum of understanding and agreements only indicates a long standing commercial relationship between ZEEL and associate entities but the said memorandum of understanding and agreements does not carry weight since no material has been brought on record to demonstrate that the impugned fund transfer was pursuant to the agreements and therefore the funds transfers *prima facie* are not genuine in nature.

(xii) The contention by associate entities, namely, Living Entertainment Enterprises Pvt. Ltd. that it had received funds from Sprit Infrapower & Multiventures Private Limited towards subscription of Optionally Convertible Debentures is not supported by any documentary evidence such as details of the issue, correspondence, subscribers to the said issue, etc.

(xiii) The evidence relating to the transactions were disbelieved on the preponderance of probability that

receipt of funds and transfer by the associate entities was made almost immediately which cannot be brushed aside on the ground of mere coincidence.

(xiv) Agreements relating to fund transfers with Pen India Ltd. were disbelieved on the ground that when fresh agreement for Remake Rights was executed the reason for making such strategic call to obtain Remake Rights and the necessary correspondence regarding the same was not produced. The credit notes also could not be believed as the amount of Rs. 72.57 crore shown in the credit notes did not match with the impugned transfer of Rs. 71.34 crore nor the invoice was shared and therefore cast a doubt on the genuineness of the transaction.

(xv) The documents submitted by the appellant does not establish that the fund transfer was pursuant to the agreement as certain details / information are missing to establish the whole chain of transaction between ZEEL and Pen India Ltd.

(xvi) The contention of the appellant that he has nothing to do with Dish Infra Services Pvt. Ltd. and had no

access to their records regarding fund transfer was disbelieved in spite of contending that it is not an associate company of ZEEL.

(xvii) Payment made by ZEEL for valuable consideration and subsequent utilization of funds by entities does not constitute diversion of funds was disbelieved.

(xviii) The appellant was in control of day to day transactions of related parties and *prima facie* a scheme was employed to wipe off the debt of the seven associate entities against the fixed deposit of Rs. 200 crore.

(xix) The scheme was employed to benefit the seven associate entities and ultimately the appellant who is an integral part of Essel Group.

(xx) The Entity No. 1, namely, Mr. Subhash Chandra who was the then Chairman was actively involved in designing and execution of the scheme which was in violation of the securities laws and since the appellant Entity No. 2 was the Managing Director and Chief Executive Officer during the period when the scheme was designed, he was aware of the

liquidation of the fixed deposit by Yes Bank Ltd. and the fact that ZEEL was involved in three of the impugned transactions which *prima facie* are not found to be genuine transaction. The appellant being involved in the designing and execution of the scheme was also found to be *prima facie* in violation of the securities laws.

(xxi) The impugned fund transactions *prima facie* was not genuine in nature and consequently the disclosure made by ZEEL in its annual reports was incorrect.

(xxii) The appellant *prima facie* have benefited at the expense of ZEEL and its public shareholders and that appellant not acted in good faith, due diligence and care and in the best interest of ZEEL and its shareholders and therefore the conduct of the appellant was in violation of Regulation 4 of the LODR Regulations.

19. We have heard Dr. Abhishek Manu Singhvi, the learned Senior Counsel with Shri Navroz Seervai, Senior Counsel, Shri Somasekhar Sundaresan, Shri Amit Bhandari, Shri Nitesh Jain, Ms. Shruti Rajan, Shri Mudit Jain, Shri Vivek Shah,

Shri Anubhav Ghosh, Shri Hari, Mr. Jitendra Motwani, Shri Abhiraj Arora, Shri Deepanshu Agarwal and Ms. Samreen Fatima, the learned counsel for the appellant and Shri Darius Khambatta, the learned Senior Counsel with Shri Aditya Mehta, Ms. Vidhi Shah, Shri Mihir Mody and Shri Arnav Misra, the learned counsel for the respondent.

20. Dr. Singhvi, the learned senior counsel for the appellant contended that the impugned order is full of errors and that the findings given are based on surmises and conjectures. It was urged that there was no real urgency in passing the *ex parte ad interim* order inasmuch as the transactions in question were made in the year 2019 whereas the *ex parte ad interim* order was passed on June 12, 2023. It was urged that the *ex parte ad interim* order was passed without meeting the test of "urgent prevention action" which has been erroneously confirmed by the impugned confirmatory order.

21. The learned senior counsel contended that the findings given by the Chairperson regarding urgency in issuing an *ad interim* order in paragraph 89 of the impugned order is untenable and contrary to the established meaning and impact of the term "urgency". It was urged that a perverse attempt has

been made to justify an unsustainable *ex parte ad interim* order and if the reasoning employed in paragraph 89 of the impugned order is to be accepted then it would give a license and a *carte blanche* to the respondent to pass urgent *ex parte interim* orders for "egregious nature of the transaction". The Chairperson in paragraph 89 contends that the urgency in issuing the interim order was not on the basis of the transactions but on the egregious nature of the transaction which clearly indicates that there was no urgency in passing the *ex parte ad interim* order and therefore the said order constituted a gross abuse of power.

22. It was urged that there is a substantial variance in the stand of the respondent while passing the *ex parte ad interim* order and while passing the impugned order. It was urged that the reason attributed in the *ex parte ad interim* order was on different ground and now by the impugned order the *ex parte ad interim* order has been confirmed based on totally different ground which is at complete variance of the ground given in the *ex parte ad interim* order. It was urged that the basic reason for issuing the *ex parte ad interim* order in restraining the appellant to hold any position of a Director in a listed company or its subsidiaries was to obviate the possibility of further diversion of funds. This aspect has been given a complete go by and was not

considered as a necessary ingredient for confirming the confirmatory order but the restraint order was allowed to continue on the ground that the continuation of the appellant as the Managing Director could impede a fair and transparent investigation.

23. The learned senior counsel contended that there is no material on record to demonstrate that the appellant or any of the entities connected with him have failed to cooperate with the respondent in the investigation or have in any manner impeded the progress of the investigation. On the other hand, the respondent had earlier investigated the LoC and the LODR issue and voluminous correspondence was made between ZEEL and SEBI and the Stock Exchanges regarding various issues including the Letter of Comfort. ZEEL had provided the information sought from the respondent pursuant to which show cause notice was issued and the adjudicatory proceedings are pending. Thus, it was urged that the question of the appellant interfering in the investigation or would impede in the fair and transparent investigation is not based on any evidence.

24. Further, the Chairperson has itself held in paragraph 39 and paragraph 41 of the impugned order that the digital

footprint of the transaction when traced along with attending circumstances would show the involvement of the entities involved in the transaction and which can determine whether it was part of a circular transaction or not. Dr. Singhvi contended that in the light of this observation made by the Chairperson there is no question of impeding the investigation as the same is based on documents which at this moment cannot be tampered with nor interfered with. The learned senior counsel urged that the Chairperson was bound to examine the directions passed in the impugned order on the touch stone of the findings given therein and the case of the appellant could not have imported fresh reasoning which was alien to the interim order.

25. The learned senior counsel further contended that the impugned order proceeds on the basis that the root cause was the Letter of Comfort. In this regard the Board of Directors had taken corrective steps and placed robust checks and balances even prior to the receipt of the SEBI's letter dated June 17, 2021 and the steps taken by ZEEL was duly disclosed to the Stock Exchanges vide disclosure letter dated July 30, 2021. Further, the LoC and its veracity is under consideration in adjudication proceedings pursuant to the issuance of the show cause notice which is pending consideration before the Adjudicating Officer

(AO). Thus, the presumption that the appellant may abuse his position and cause risk to the assets of the listed company is patently erroneous inasmuch as after the alleged LoC and the transactions of 2019 there is no repetitive such transactions. It was urged that there was no allegation of similar incidence having taken place after 2019.

26. It was urged that the merger of ZEEL with Sony after the passing the *ex parte ad interim* order reposes the faith of the 99.997% of the shareholders of ZEEL in the appellant as Managing Director of the merged company and therefore the finding that the appellant appears to be operating a listed company like sole proprietorship firm is patently erroneous and based on surmises and conjectures. Further, pursuant to the merger as approved by the scheme of merger, a completely different entity has come into existence and its corporate structure would be completely different and independent from the erstwhile ZEEL. It was urged that the resultant merger entity will have necessary corporate governance measures in place being a subsidiary of a global conglomerate Sony Corporation, Japan which would be listed on the Tokyo Stock Exchange. Further 50% of the shareholding will be held by the Sony Group. It was thus contended that the finding given in the

impugned order that the appellant would be entrusted with substantial powers of management with regard to the affairs of the management company and that the appellant should be kept out of the management till the final outcome of the investigation is purely erroneous, harsh and, at the same time, without any merit.

27. The learned senior counsel contended that out of 9 directors 5 directors would be nominees of shareholders of Culver Max Entertainment Pvt. Ltd. (i.e. Sony) and there would be independent directors of stellar reputation and stature who would be identified and recommended by the Sony Group. The Chairman of the board will be one of the independent directors who will be recommended by the Culver Max Entertainment Pvt. Ltd. (i.e. Sony). Further, the Chief Financial Officer would be a nominee of Culver Max Entertainment Pvt. Ltd. and that the Chief Compliance Officer, Company Secretary, General Counsel will be approved by the board of the resultant with the merged entity. Thus, the finding that the substantial powers of the management would be given to the appellant is incorrect and the Chairperson has come to an incorrect conclusion that the appellant's interest would be in conflict with the interest of the merged entity or that of ZEEL. It was urged that the merger

scheme was approved by overwhelming majority of 99.97% shareholders of ZEEL and as part of the composite scheme both Sony and ZEEL shareholders have approved the appointment of the appellant as Managing Director and Chief Executive Officer of the merged company. It was thus urged that the appellant being the architect of the merger and created wealth for the shareholders with infusion of USD 1.7 billion into the company which merged entity would become as one of the largest media company in India would be without MD and the CEO if the impugned order is allowed to continue and which would not be in the interest of its shareholders.

28. Dr. Singhvi, the learned senior counsel contended that the findings of the Chairperson that the appellant was involved in the impugned transaction on the ground that Essel Group Company was under its control is based on erroneous presumption of facts. It was contended that the appellant is exclusively involved as MD and CEO of ZEEL since 2010 and is not involved with the management or control of any borrower entity or Essel Group Entity. It was urged that the appellant has not participated in the affairs of the Essel Group Entity nor is an authorized signatory nor is the Director and that there was no material on record to demonstrate any actual control being

exercised by the appellant on the borrower entities or other Essel Group Companies.

29. It was urged that there was also no evidence of the appellant's involvement either in the transactions in question or in orchestrating the alleged scheme. The presumption drawn is based on surmises and conjectures. It was urged that the findings that Living Entertainment Enterprises Pvt. Ltd. (LEEPL) entity was under the influence of the appellant since the appellant and one Anil Chougule worked together is patently erroneous and is against the material evidence on record in as much as the appellant had never worked with Anil Chougule. Further, the appellant only held 2% shareholding in Sprit Infrapower & Multiventures Private Limited which in turn held 50% shareholding in New Media Broadcasting Pvt. Ltd. which in turn further held 100% shareholding of LEEPL. It was, thus, urged that the appellant effectively held 1% indirect shareholding of LEEPL and consequently, the finding that the appellant exercised influence over the group entities is patently erroneous. It was also urged that similarly the appellant did not exercise any control through its shareholding interest either in Sprit Infrapower & Multiventures Private Limited or in Churu Enterprises LLP.

30. The findings that the appellant had prior knowledge of the appropriation of Fixed Deposit by Yes Bank is again based on surmises and conjectures and is not based on any material document. Such finding on the basis of presumption or on the basis of preponderance of probability is not permissible.

31. It was urged that the Chairperson has completely ignored / overlooked the material evidence filed to show that the transactions entered with related entities was pursuant to long standing commercial relationship. In the case of transactions of ZEEL with LEEPL and Essel Business Excellence Services Pvt. Ltd. (EBESPL), it was submitted that there was long standing commercial relationship with both the companies since 2016 much prior to the alleged transaction. It was further stated that the amount of Rs. 8.35 crore paid to LEEPL and Rs. 9 crore paid to EBESPL was for valuable consideration pursuant to the relevant agreements which transactions were approved by the audit committee. It was urged that the transactions were genuine but the same has been ignored for irrelevant consideration.

32. It was urged that Pen India Ltd. is an independent company engaged in the business of distribution of movies etc. and is not part of the Essel Group of Companies. This fact was

completely ignored by the Chairperson and for no valid reason it was treated to be a related entity or a group company of Essel Group. Similarly, Dish Infra Services Pvt. Ltd was not a related entity and was an independent company which factor was also not considered. It was contended that payments made to Pen India Ltd. and payments made by Dish Infra Services Pvt. Ltd. were pursuant to memorandum of understanding, agreements and relevant invoice details and GST bills were also produced but the same was ignored. Similarly, transactions of ZEEL with KCPL was also made pursuant to an agreement and memorandum of understanding was produced and GST data for the last 5 years have been provided to show the long term commercial relationship and that payments were made in the ordinary course of business.

33. The learned senior counsel contended that a plethora of documents were filed to show that the transactions with seven entities were for valid consideration pursuant to memorandum of understanding / agreement but the same has been ignored and disbelieved on the test that it does not satisfy the genuineness beyond a reasonable doubt. On the other hand, it was contended that the findings given in the impugned order is based on preponderance of probability. It was urged that this clearly

demonstrate non-application of mind. It was urged that there was an incorrect application of the principles of preponderance of probability and that the impugned order failed to accord appropriate weightage to the material furnished by the appellant.

34. Dr. Singhvi, the learned senior counsel contended that doctrine of preponderance of probability was wrongly applied and that the impugned order has drawn inferences based on hypothetical facts while disregarding the material evidence on record. It was contended that before applying the principles of preponderance of probability and to draw any inference it was necessary to establish the foundational facts which did not exist in the instant case. It was urged that the foundational facts must be established before the presumption could be made.

35. It was also urged that preponderance of probability invoked in the impugned order was contrary to the contemporaneous events and the principle of *ante lite motam* was not considered in the impugned order though the same was argued before the Chairperson. It was, thus, urged that applying the principle of *ante lite motam* certain events had no connection with the concerned Letter of Comfort or the alleged misappropriation of the Fixed Deposit by Yes Bank and

repayment by borrower entities. It was urged that there was no violation of PFUTP Regulations as there was no fraud and therefore the direction could not be sustained. It was urged that the directions issued under the impugned order are against the larger interest of shareholders of the merged entity and is not in the interest of other stakeholders.

36. In the end it was urged that the direction restraining the appellant from holding any position of a Director in a listed Company was grossly disproportionate in the light of the fact that subsequent to the passing of the *ad interim* order, ZEEL entity is now merged with another entity which has been approved by NCLT.

37. It was urged that the impugned order has failed to make out a *prima facie* case against the appellant. The balance of convenience and irreparable injury lay in favour of the appellant and if the impugned orders are not set aside it will cause irreparable harm and injury which cannot be compensated in terms of money. It was also urged that the interim order restraining the appellant for an indefinite period was wholly arbitrary. The restraint order will continue for a minimum of eight months from the date of the impugned order i.e. till the

completion of the investigation. It was contended that such directions is not reasonable and the said period of eight months only encompasses the investigation period and does not include the enforcement process such as issuance of a show cause notice, reply, hearing and a final order and therefore in the absence of any rationale directing the investigation to be completed in 8 months the restraint order is harsh and disproportionate.

38. In support of his submissions the learned senior counsel has placed reliance in ***Bacha F. Guzdar vs CIT, (1955) 1 SCR 876, Vodafone International Holdings BV vs Uniion of India and another (2012) 6 SCC 613, Securities and Exchange Board of India and Ors. vs Kanaiyalal Baldevbhai Patel and Ors. (2017) 15 SCC 753, Balram Garg vs Securities and Exchange Board of India (2022) 9 SCC 425, Murugan alias Settu vs State of Tamil Nadu (2011) 6 SCC 111, M/s. Subhkam Ventures (I) Pvt. Ltd. vs. SEBI 2010 SCC OnLine SAT 35, ArcelorMittal India Private Limited vs. Satish Kumar Gupta (2019) 2 SCC 1, Ramesh Chandra Sharma and Ors. vs State of Uttar Pradesh and others (2023) SCC Online SC 162, Zenith Steel Pipes and Industries Limited vs SEBI (Appeal No 554 of 2021 decided on February 21, 2023), Apar Industries Ltd. Vs***

Union of India Through Ministry of Railways and Others (2023) SCC Online Bom 350 and SEBI vs Kishore Ajmera (2016) 6 SCC 368.

39. On the other hand, Shri Darius Khambatta, the learned senior counsel for the respondent contended that the five transactions in question clearly indicates round tripping of the funds from ZEEL to ZEEL and consequently *prima facie* there appears to be a diversion of funds to the detriment of the shareholders. The learned senior counsel urged that the *ad interim* order which has now been merged with the confirmatory order does not suffer from any error of law and that the said confirmatory order should continue during the pendency of the investigation.

40. It was urged that the appellant has neither produced any material nor denied the flow of funds among the entities in the manner set out in the interim order. The learned senior counsel contended that the fund flow in the five transactions along with the proximity in the timings of the transactions indicates a prior meeting of minds which action was totally fraudulent under the PFUTP Regulations. It was contended that the flow of funds as depicted in the impugned orders in relation to the five

transactions has not been disputed by the appellant nor the proximity in the timings of the transactions has also not been disputed.

41. It was also contended that the seven associate entities (namely, the borrower companies and the promoter companies as well as conduit entities) had negligible bank balance before and after the receipt of funds originating from ZEEL or listed entities of Essel Group or wholly owned subsidiaries of ZEEL which factor has also not been denied by the appellant. Further, the seven entities are admittedly related parties and promoter companies of ZEEL and that these seven associate companies are controlled by the key managerial personnel of ZEEL and their relatives. The fact that these seven associate companies are related parties of ZEEL is admitted and is also indicated in the annual report of ZEEL for the financial year 2020-2021 and 2021-2022. It was urged that these annual reports also show the appellant as a key managerial personnel of ZEEL and therefore contended that the seven associate entities who are borrower entities were admittedly controlled by the appellant.

42. It was also urged that in addition to the seven associate companies the appellant had also admitted that Sprit Infrapower

& Multiventures Private Limited, Churu Enterprises LLP and Khoobsurat Infra Private Limited are also related party entities and that seven associate entities had received funds from Churu Enterprises LLP and / or Sprit Infrapower & Multiventures Private Limited before the alleged repayment to ZEEL.

43. It was, thus, urged that the appellant being the Managing Director of ZEEL which is one of the flagship companies of Essel Group had knowledge of the five transactions in question. It was also urged that the appellant was aware of the loan of Rs. 200 crore advanced by Yes Bank to Essel Green Mobility Limited and was also aware of Yes Bank enforcing the Letter of Comfort issued by Mr. Subhash Chandra. It was urged that it cannot be disputed nor can the appellant urge that being the Managing Director he was not aware of the fixed deposit created by ZEEL and its encashment by Yes Bank towards the alleged loan taken by the seven associates companies.

44. The learned senior counsel contended that the appellant had full knowledge about the diversion of funds and its circuitous routing which was solely for the benefit of the promoter group as the appellant was the Managing Director and

was not only in control over ZEEL but, being a key managerial personnel, was also in control of the seven associate entities.

45. In support of his submissions the learned senior counsel placed reliance upon a decision of the Supreme Court in ***Official Liquidator, Supreme Bank Ltd v. P.A. Tendolkar (1973) 1 SCC 602*** wherein the Supreme Could held that the conduct of the founder Directors was such that an inference of their complicity could not be ignored. Reliance was also made of another decision of Supreme Court in ***N Narayan v. AO, SEBI (2013) 12 SCC 152*** in which it was held that the directors occupying a certain position in a company were deemed to have knowledge of certain information and events. On this basis, the learned senior counsel for the respondent urged that the appellant, being in a position of Managing Director and Chief Executive Officer of ZEEL and being key managerial personnel in the seven associate companies, had deemed knowledge of the transfer of funds through layered transactions. It was, thus, urged that even on strong preponderance of probability test there was sufficient evidence for the respondent to charge the appellant under Regulation 4 of the PFUTP Regulations and Regulation 4 of the LODR Regulations.

46. Shri Khambatta, the learned senior counsel for the respondent contended that it was incumbent upon the appellant to demonstrate the legitimacy of the entire circular transaction and not just limit itself to justify the validity of the first leg of the transaction. It was submitted that considering the timings of the transactions, related parties involved and interconnectedness of the transactions the entire transaction has to be considered as a whole. It was urged that in order to ascertain the legal nature of a transaction it must be looked at as a whole and not dissected. It was urged that if it can be seen that a transaction was intended to have an effect as part of a nexus or series of transactions then the Court must look at the entire series and prefer substance over form and therefore the entire series of layered transaction should be looked at as a whole instead of considering only the first leg of the transaction.

47. In support of his submission the learned senior counsel placed reliance on the decision of the Supreme Court in ***Vodafone International Holdings B.V. v. UOI & Anr (2012) 6 SCC 613, Craven v. White [1989] AC 398, True v. United States 190 F.3d 1165 (10th circuit), Relfo Limited v. Varsani [2014] EWCA Civ 360, Investment Trust Companies v.***

Revenue & Customs Commissioners [2017] UKSC 29 and Jean D 190 Fed 3d 1165.

48. The learned senior counsel contended that the proximity of timings is a key category of substantial evidence to indicate prior meeting of minds. In support of his submission, the learned senior counsel placed reliance on a decision of the Supreme Court in ***SEBI v. Kishore Ajmera (2016) 6 SCC 368***. The learned senior counsel submitted that the proximity of timings in the transfer of funds showed a fraudulent intent coupled with the fact that the transactions occurred between the parties which had a close relationship and the financial condition of the parties before and after the transaction clearly showed fraudulent intention. It was, thus, urged that the transaction between ZEEL and the first entity in the five transactions must be viewed in the context of the larger transactions involving circular rotation of funds and should not be divorced from its context particularly proximity in timings and interconnectedness of the transaction and related status of the parties involved.

49. The learned senior counsel further contended that the in any case the appellant did not satisfy the first leg of the

transaction and the documents so filed was not sufficient to establish a valid transaction beyond a reasonable doubt. The learned senior counsel contended that based on the bank statements it was clear that there was a circuitous routing of the funds and that the initial burden was discharged by SEBI and the onus now shifted upon the appellant which he failed to discharge miserably and the documents so supplied was not sufficient to satisfy the genuineness of the transactions. The learned senior counsel pointed out that the Chairperson considered all the documents in the impugned order in great detail and held that first leg of each of the five transactions was invalid giving appropriate reasons regarding insufficiency of the genuineness of the transactions. The learned senior counsel contended that the appellant only produced partial and incomplete information to justify the transaction which in the opinion of the Chairperson was insufficient. It was urged that once the undisputed fact indicates a circular flow of funds in a synchronized manner, the burden shifts to the appellant to show that the entire transaction was genuine and had a commercial basis which in the instant case the appellant failed miserably. It was urged that the burden lay upon the appellant as it was within his knowledge. In support of his submission the learned senior counsel placed reliance upon ***Sections 101-103 and 106***

of the Evidence Act. The learned senior counsel submitted that the appellant did not produce a single invoice justifying the payments made to the associate entities to prove that the payment was made pursuant to the memorandum of understanding / agreement and even the invoices which were filed before the Tribunal still did not justify the genuineness of the transactions. It was urged that the appellant furnished a bunch of invoices for the financial year 2018-2019 and 2019-2020 before the Tribunal but failed to point out a single invoice pursuant to which the impugned transaction took place between ZEEL and the entities concerned. Further GST filings were not produced nor filed nor filed to prove the veracity of the transactions.

50. It was also urged that there was no overlapping in the charges that was leveled in the 2022 show cause notice and in the impugned order and the two are totally different and distinct. It was urged that the show cause notice dated July 6, 2022 issued to ZEEL, Mr. Subhash Chandra and to the appellant was in respect to the contravention under the LODR Regulations whereas the impugned order is with regard to the circuitous routing of funds and synchronization in violation of the PFUTP Regulations.

51. The learned senior counsel urged that on account of the routing of the funds a loss was caused to ZEEL and consequently to its shareholders. On the other hand, the subsidiaries of the Essel Group stood to gain and consequently the appellant.

52. It was, thus, urged that the impugned order issuing the directions was preventive and meets the test of proportionality. The directions and the restrictions so imposed are limited to keep the appellant away from exercising any influence over the management of ZEEL during the investigation. Further, the direction to complete the investigation within eight months was just and proper. It was urged that the period of eight months was required to complete a wider investigation since now the respondent finds that there are a large number of transactions running into Rs. 2000 crore involving companies owned, controlled or otherwise related to promoters. Further additional Letter of Comfort issued by the appellant and his father has come into existence including a LoC to the tune of Rs. 4210 crore issued by Mr. Subhash Chandra in his capacity as Chairman of Essel Group. Therefore, the direction to complete the investigation in eight months is aimed to ensuring a comprehensive investigation in the matter. The five transactions

in question is only part of the wider investigation which is being carried out by SEBI.

53. It was also urged that ZEEL – Sony merger has nothing to do with the passing of the impugned order and the fact that the merger received 99.97% approval from ZEEL shareholders after the passing of the *ad interim* order has no relevance to the alleged *prima facie* findings against the appellant. It was urged that the routing of the funds was not in the interest of the shareholders of the ZEEL as there is a direct conflict of interest between the shareholders of ZEEL and the appellant. Consequently, there was urgency in issuing directions as there was a fear that the appellant may exercise influence over the entities to misrepresent or selectively disclose facts so as to misdirect the course of investigation. It was, thus, urged that immediate action was required to be taken and that is why the *ex parte ad interim* was passed which has now merged into the confirmatory order. It was, thus, urged that the impugned order does not suffer from any error of law and the same is required to be affirmed by this Tribunal and the appeal of the appellant is required to be dismissed.

54. Having heard the learned counsel for the parties at some length and having perused the impugned orders and the documents we find that the impugned order which confirms *ex parte ad interim* order is based on presumptions and assumptions on the basis of the bank statements of associate companies / related parties. The Supreme Court in ***Balram Garg vs Securities and Exchange Board of India (2022) 9 SCC 425*** has held that the foundational facts must be established before a presumption is made. Thus, we are required to see what are the foundational facts which has been established in the instant case.

55. We find that five transactions have been taken into consideration in the *ad interim* order on the basis of which a presumption has been drawn of round tripping of funds from ZEEL to ZEEL thereby causing loss to the shareholders and causing benefits to the associate companies and its promoters. The charge is that Rs. 200 crore was paid by ZEEL to seven entities and the *ad interim* order confines it to Rs. 143.90 crore which came back to ZEEL. At the moment there is no finding of round tripping of the balance amount of Rs. 66.10 crore.

56. The fixed deposit of Rs. 200 crore given by ZEEL was encashed by Yes Bank towards the dues of the seven associate companies of ZEEL group. This amount of Rs. 200 crore was paid by these seven entities to ZEEL on various dates as under:-

Sl. No.	Name of the Associate Entity	Amount repaid (INR in crore)	Date of repayment
1.	Pan India Infraprojects Pvt. Ltd.	14.80	26-Sep-19
2.	Essel Green Mobility Ltd.	17.10	27-Sep-19
3.	Essel Corporate Resources Pvt. Ltd.	22.30	30-Sep-19
4.	Essel Utilities Distribution Company Ltd.	19.20	30-Sep-19
5.	Pan India Infraprojects Pvt. Ltd.	36.90	30-Sep-19
6.	Essel Business Excellence Services Pvt. Ltd.	23.00	10-Oct-19
7.	Pan India Network Infravest Ltd.	49.30	01-Oct-19
8.	Living Entertainment Enterprises Pvt. Ltd.	17.40	01-Oct-19
	Total	**200.00**	

57. The *ad interim* order discloses that Rs. 143.90 crore originated from ZEEL / listed companies of Essel Group and their subsidiaries and the money was received by ZEEL eventually. The round tripping of the funds is depicted here under:-

Sl. No.	Name of Listed Entity/its Subsidiaries	Amount due (INR in crore)	Associate Entity benefited	Amount (INR in crore)
1.	ZEEL	17.1	Essel Green Mobility Ltd.	40.1
		23	Essel Business Excellence Services Pvt. Ltd.	

2.	Zee Studios Ltd. (wholly owned subsidiary of ZEEL)	17.4	Living Entertainment Enterprises Pvt. Ltd.	66.7
		49.3	Pan India Network Infravest Ld.	
3.	Zee Akaash News Pvt. Ltd. (wholly owned subsidiary of Zee Media Corporation Ltd., a listed company and part of Essel Group)	14.8	Pan India Infraprojects Pvt. Ltd.	14.8
4.	Dish Infra Services Pvt. Ltd. (wholly owned subsidiary of Dish TV India Ltd., a listed company and part of Essel Group)	22.3	Essel Corporate Resources Pvt. Ltd.	22.3
	Total	**143.9**		**143.9**

58. The movement of funds of Rs. 143.90 crore has been depicted in paragraphs 14, 17, 20, 23 and 26 of the *ad interim order*. The appellant filed various documents to show that the funds given by ZEEL or its subsidiaries were for valid consideration pursuant to existing agreements / memorandum of understanding which evidence was discarded by the Chairperson while confirming the *ad interim* order. It therefore becomes necessary for this Tribunal to consider as to whether the documents submitted by the appellant satisfies the test of genuineness of the transactions.

59. With regard to the transactions of ZEEL with LEEPL and EBESPL, the flow of funds as depicted in paragraph 14 of the *ad interim* order is extracted here under:-



60. The appellant had submitted in its reply that Rs. 8.35 crore was paid to LEEPL and Rs. 9 crore was paid to EBESPL for valuable consideration pursuant to relevant agreement, approvals etc. It was stated that LEEPL was engaged in the business of broadcasting since 2015 and had a long-standing commercial relationship with ZEEL since 2016. LEEPL had entered into an agreement on August 1, 2016 which granted ZEEL exclusive license to distribute five channels, namely, Living Foodz, Living Zen, Living Travelz, Living Homez and Living Rootz.

61. As per agreement ZEEL would withhold 7% of the subscription revenue received from the distribution of the channels and remaining 93% would be paid by LEEPL. In

paragraph 73 of the reply, the appellant contended that Rs. 8.35 crore that was paid to LEEPL was part of the channel subscription agreement entered on August 1, 2016 which was amended on March 29, 2019. It was also stated that the audit committee of ZEEL in its meeting of March 28, 2019 had approved related party transactions with LEEPL amounting to Rs. 34 crore for the financial year 2020. The annual audited financial statements for the financial year 2018-19 and 2019-20 indicated the payment made to LEEPL. It was contended that the transaction with LEEPL was not a stand-alone payment but was part of the ongoing contractual payments over several years. The details of payment made in the financial year 2018-19 and 2019-20 was depicted in paragraph 76 of the reply. It was contended that the transactions with LEEPL was backed by all necessary documents including agreements, addendums and invoices after obtaining appropriate payment authorization.

62. Similarly, EBESPL was formed on July 10, 2013 and was engaged in managing business support functions such as finance and accounting, back-office transaction, processing services and other IT and IT enabled shared services. ZEEL entered into a Master Service Agreement with EBESPL on September 16, 2016 as amended on May 19, 2017 for outsourcing of various

business processes such as finance, accounts, human resource etc. In paragraph 82 of the reply it was stated that Rs. 9 crore was paid to EBESPL on September 26, 2019 under the master service agreement. The payments were duly recorded in the audited financial statement for the financial year 2018-19 and 2019-20. The payment of Rs. 9 crore was not a stand-alone payment but was part of the ongoing contractual payments and details of payments made in the previous financial year 2018-19 and 2019-20 was also indicated in paragraph 84. It was contended that the transactions were backed by all necessary documents, agreements, addendums and invoices and approved by the audit committee.

63. We have perused the agreements / master service agreement, the approvals made by the audit committee, etc. and we find that the genuineness of these documents has not been doubted by the respondent in the impugned order. These documents indicate that the ZEEL had a long standing commercial relationship with LEEPL and EBESPL since 2016 and that huge sum of payments were paid to these two entities by ZEEL in the financial year 2018-19 and 2019-20. These payments were made after due approval by the audit committee and was also reflected in the annual returns for the year 2018-19

and 2019-20. The genuineness of these documents thus cannot be doubted. The Chairperson found that though the agreements with LEEPL and EBESPL indicates a long standing commercial relationship with ZEEL but holds that there is no material on record to demonstrate that the fund transfer was pursuant to the agreements and whether any invoices has been raised is not known and therefore holds that fund transfers were not genuine considering the linkage between the entities and the circumstances surrounding the timings of transfers.

64. Before this Tribunal the invoices have been placed which were issued for services rendered to ZEEL pursuant to the agreements. These invoices have not been disputed by the respondent. The only contention raised was that it does not indicate absolute proof of transfer of the monies to LEEPL and EBESPL.

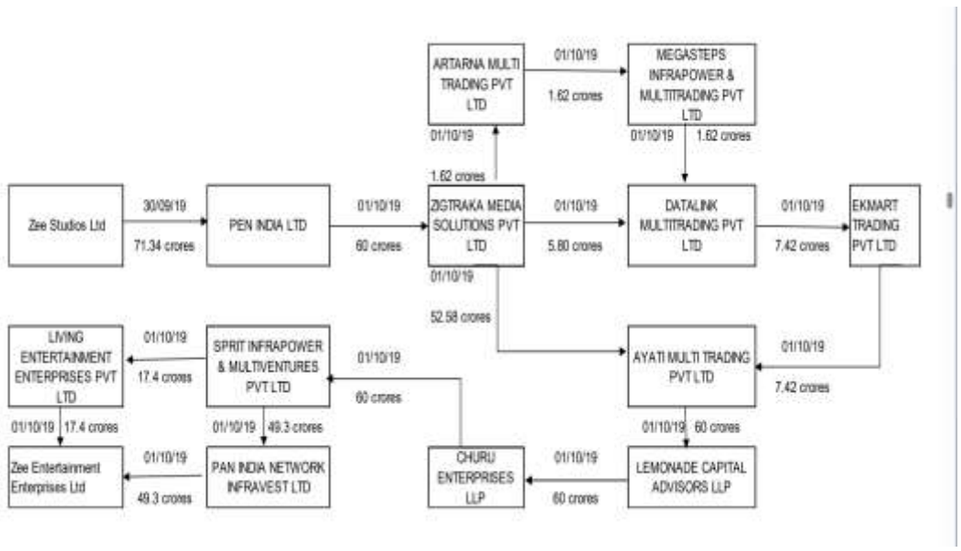
65. Considering the aforesaid we find that the documents filed by the appellant are genuine documents and have not been manufactured for the purpose of the case. We are of the opinion that there was a long standing commercial agreement with LEEPL and EBESPL since 2016. The financial statements of LEEPL makes it clear that it had receivables funds from ZEEL

to the tune of Rs. 42.66 crore in financial year 2019-20, Rs. 31.08 crore in financial year 2018-19 and therefore payments of Rs. 8.35 crore made to LEEPL towards channel subscription in terms of the master agreement appears to be genuine at this stage. The annual reports of the previous financial years shows transactions between ZEEL and LEEPL. The invoices which has been issued for services rendered to ZEEL pursuant to these agreements are proof that the agreements were genuine and valid and that monies were transferred pursuant to these agreements. In addition the transactions were audited by the statutory auditors and further the transactions were also approved by the audit committee. Similarly payment of Rs. 9 crore from ZEEL to EBESPL was also made pursuant to the Master Service Agreement and professional service agreement. The invoices produced before this Tribunal indicates that it was issued for services rendered to ZEEL pursuant to these agreements. We are, thus, satisfied the transfer of funds of Rs. 8.35 crore from ZEEL to LEEPL and Rs. 9 crore to EBESPL was genuine and was made pursuant to the agreement which was executed in the year 2016.

66. The Chairperson has doubted the aforesaid transactions on the presumption that ZEEL paid Rs. 8.35 crore to LEEPL and

Rs. 9 crore to EBESPL when it was supposed to receive an amount of Rs. 17.4 crore from LEEPL and Rs. 23 crore from EBESPL. In this regard, we are of the opinion that there was an ongoing contractual relationship between the two parties and hence withholding payment was not required. Even otherwise, the mere fact that some monies was required to be received from the two entities does not in any manner cast doubt on the genuineness of the transaction, namely, the payment made by ZEEL to LEEPL and EBESPL.

67. The flow of funds of the second transaction depicted in paragraph 17 of the *ad interim* order is extracted here under:-



68. From the above it can be seen that Zee Studio Limited (ZSL) paid Rs. 71.34 crore to Pen India Limited (PIL) and

eventually the said sum was received from LEEPL and Pan India Network Infravest Limited (PINIL).

69. The *ex parte ad interim* order states that ZSL which is wholly owned subsidiary of ZEEL paid Rs. 71.34 crores to Pen India Limited (PIL) and that portion of the money came back to ZEEL through LEEPL (Rs. 71.34 crore) and Pan India Network Infravest Limited (Rs. 49.30 crore). It was urged that ZSL had entered into co-production agreements with Pen India Limited in July and August 2019 and pursuant to the agreement ZSL had paid an advance for a movie production on September 30, 2019 which was as per industry business practice. Such advances are made to the producers, co-artists etc. On account of Covid-19, the entire movie industry came to a standstill. Subsequently, a strategic call was taken to cancel this co-production agreement and thereafter it was mutually decided between ZEEL and PIL to settle the co-production advance paid against remake rights purchased. For this purpose, co-production agreements, invoices, remake rights, agreements etc. were filed before the Chairperson. It was urged that payment made by ZSL to PIL was a bonafide business transaction backed by agreement, invoices and requisite approvals for the purchase of intellectual property rights was Rs. 71.34 crore and the

acquisition of the intellectual property rights was appropriately accounted for in the inventory in the books of ZSL. Further, the transaction of payment of Rs. 71.34 crore by ZSL was backed by appropriate documents, agreements and invoices.

70. In the *ex parte ad interim* order PIL was shown to be an associate company of ZEEL and therefore it was presumed that the money was routed through layered transactions from associate companies of ZEEL to ZEEL. Before the Chairperson it was urged that PIL is an independent company which is in business of n production, distribution and movie aggregation, broadcasting, digital media etc. for the past 30 years. This company was started by Dr. Jayantilal Gada who is a reputed personality in the industry and has made several successful and award-winning movies in the past. It was contended that the PIL is a professionally managed company and has nothing to do with ZEEL. PIL is neither an associate company nor a related party of ZEEL and therefore the appellant nor ZEEL nor ZSL had any control over the affairs of the PIL.

71. The fact that PIL was an independent company and was not an associate nor group company nor subsidiary nor related party of ZEEL has not been considered by the Chairperson and

the same has been conveniently ignored for reasons best known to the Chairperson. On the other hand, the Chairperson tried to dissect the agreements that was entered between ZSL and PIL contending that the details regarding how much work was done on the first agreement when this strategic call was obtained to make remake rights and the correspondence in this regard has not been enclosed and therefore there is nothing to show that the amount paid under the first agreement would be adjusted under the second agreement. Further, the credit notes shows a transaction of Rs. 72.57 crore whereas the transfer was for Rs. 71.34 crore and therefore the credit notes cannot be relied upon. Further no invoice was produced to show such transactions and the GST filing does not indicate that such a transaction against the said invoice was made. The Chairperson came to the conclusion that the said invoice having not been filed with GST cast doubts on the genuineness of the transactions and therefore the documents so filed by the appellants does not establish that the fund transfer was pursuant to the agreement as certain details were missing to establish the full chain of transaction in ZEEL and PIL.

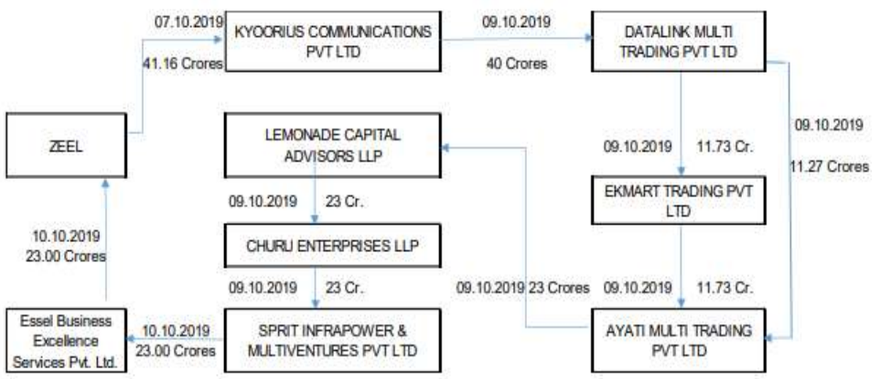
72. The finding of the Chairperson is totally perverse. In the first instance, when PIL is an independent company and is not

an associate company or related party or group company of ZEEL then the allegation that there was round tripping of the funds from ZEEL to ZEEL through layered transactions from associate companies and / or group companies of ZEEL is not proved and the matter falls their itself and there was no need to proceed further embarking on the mechanics of the two agreements to show that the fund transfer was not in pursuanance to the agreement. Even otherwise, the findings are purely based on surmises and conjectures and on presumptions which is against the material evidence that has been filed. Further, the credit note for Rs. 72.57 crore was adjusted against fresh invoice for Rs. 76.11 crore. PIL has duly paid the GST on this invoice and the ZSL had got the credit of this GST. The finding of the Chairperson that there is discrepancy in the amount shown in the credit note and the transfer is on account of the fact that the transfer of Rs. 71.34 crore was made after deduction of TDS. This factor has not been considered.

73. On a perusal of the documents produced before us we are satisfied that ZSL transferred some money to PIL pursuant to an agreement. The credit notes were given and the difference has been validly explained, GST filings and proof has been submitted. Further, the fact that the PIL is an independent

company and is not an associate company or related party of ZEEL has not been disputed. Consequently the transfer of funds from ZSL to PIL ends there itself and subsequent transfer by PIL to other entities is not on the basis of movement of funds or routing of funds by ZEEL. Thus the findings of the Chairperson that the genuineness of the transaction is doubtful and that the documents so filed does not establish the transfer of funds pursuant to the agreement is patently erroneous.

74. The flow of funds of the third transaction as depicted in paragraph 20 of the *ad interim* order is extracted here under:-



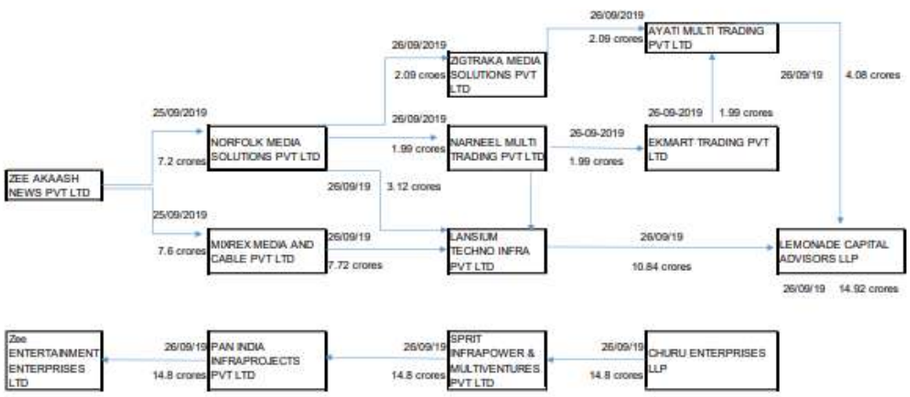
75. From the aforesaid it can be seen that ZEEL paid Rs. 41.16 crore to Kyoorius Communications Pvt. Ltd. (KCPL) and eventually ZEEL received Rs. 23 crore from EBESPL. In this regard it was contended that KCPL was founded by one Mr. Rajesh Kejriwal who is an expert in branding, design management and innovative marketing. Over the years KCPL

has been organizing marquee events such as kyoorius design awards, kyoorius creative awards etc. Its design platform has evolved to become India's largest and world's second largest design conference as on date. These events are organized in association with large media companies like Viacom18, ABP News, ZEEL etc. KCPL is, thus, engaged in advertising and publicity business. ZEEL in the past had entered multiple commercial transaction with KCPL since financial year 2017. ZEEL had been sponsoring events which had been curated by KCPL. In subsequent years the contours of Media and Entertainment (MNE) industry started changing rapidly. Accordingly, ZEEL started a digital platform called ZEE5 in the financial year 2018 and launched four regional channels in the second half of the financial year 2020. ZEEL for the purpose of marketing and advertisement decided to collaborate with KCPL and entered into an exclusive partnership with KCPL through a Memorandum of Understanding on October 23, 2019 along with an addendum dated December 9, 2019. In furtherance to the aforesaid, a service agreement between the two was executed on January 23, 2020. A tax invoice for payment of Rs. 42 crore was also issued and relevant GST filings for the financial year 2019-20 and 2020-21 was also filed. Pursuant to the service agreement KCPL had received advance money and thereafter

provided services / material to ZEEL. These facts have not been disputed by the respondent. We find that payments were made as per Schedule–II of the agreement which captures that advance payment has been received in full by KCPL. Further payments were made as per terms of memorandum of understanding within two weeks from October 1, 2019 which is the effective date and which is also duly captured in the memorandum of understanding. The fact that earlier contracts were also executed between the two is proved by the GST data for last five years that was filed showed long term commercial relationship and proof of the fact that there were earlier contracts with KCPL and that payments were made in the ordinary course of business. The Chairperson has rejected such contentions on the ground that proof of ZEEL's earlier contract with KCPL has not been submitted nor any correspondence has been submitted without considering the GST filings. We are of the opinion that GST filings indicate proof that payments were made and appropriate GST was paid to the authorities. The stand of appellant has been disbelieved on the ground that advance payment was made to KCPL whereas agreement provided that payment would only be made after services were provided by KCPL and therefore such transfer of funds was not in pursuance of the agreement. We are of the opinion that if the

aforesaid finding is accepted then the corollary would be that the services received by ZEEL from KCPL was for no consideration. In any case we find that these agreements so executed with KCPL is not a fictitious document and same are genuine documents and payments have moved pursuant to these agreements. Further, we find that Rs. 41.16 crore was paid by ZEEL to KCPL and only Rs. 23 crore is alleged to have been received by ZEEL from EBESPL and therefore there is a discrepancy and complete routing of funds has not been found.

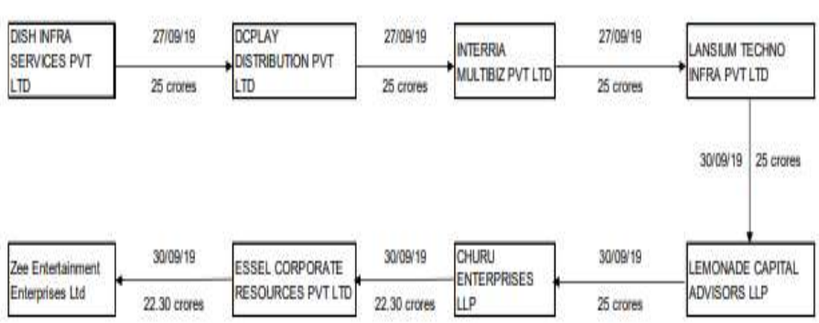
76. The flow of funds of the fourth transaction which is depicted in paragraph 23 of the *ad interim* order is extracted here under:-



77. From the aforesaid it can be seen that Zee Akaash News Pvt. Ltd. is a wholly owned subsidiary of Zee Media Corporation Ltd. and part of Essel Group and had paid Rs. 7.2

crore to Norfolk Media Solutions Pvt. Ltd. and ZEEL has received a sum of Rs. 14.8 crore from Pan India Infraprojects Pvt. Ltd. (PIIPL). In this regard we find that Zee Akaash News Pvt. Ltd. paid a security deposit of Rs. 7.2 crore to Norfolk Media Solutions Pvt. Ltd. to acquire certain capital goods. The transactions did not materialize and the money was returned. Zee Akaash News Pvt. Ltd. also paid Rs. 7.6 crore to Midrex Media and Cable Pvt. Ltd. for purchase of certain capital goods. The bank statement of Zee Akaash News Pvt. Ltd. was filed as evidence for the period September 1, 2019 to September 30, 2019 which showed the refund of money by Norfolk Media Solutions Pvt. Ltd. This aspect has not been considered by the Chairperson.

78. The flow of funds of the fifth transaction which is depicted in paragraph 26 of the *ad interim* order is extracted here under:-



79. It will be seen that Dish Infra Services Pvt. Ltd. has paid Rs. 25 crore to Dcplay Distribution Pvt. Ltd. and ZEEL has received Rs. 22.3 crore from Essel Corporate Resources Pvt. Ltd. In this regard, it was specifically urged that Dish Infra Services Pvt. Ltd. is not part of the Essel Group and the appellant is nowhere connected to Dish Infra Services Pvt. Ltd. It was urged that neither ZEEL nor appellant were connected in any manner with Dish Infra Services Pvt. Ltd. which is a subsidiary of Dish TV India Ltd. which is another listed entity and that the appellant nor ZEEL have anything to do with Dish Infra Services Pvt. Ltd. It was specifically urged that Dish Infra Services Pvt. Ltd. is an independent entity and that appellant does not have access to their records. This submission was disbelieved by the Chairperson on the ground that the annual report of ZEEL for the year ended March 2020 indicated that Dish Infra Services Pvt. Ltd. was a related party till March 31, 2019 and therefore disbelieved that the appellant had no connection with Dish Infra Services Pvt. Ltd. We may observe here, that the alleged transaction is alleged to have taken place in September 2019 when Dish Infra Services Pvt. Ltd. was not a related party and therefore it was not possible for the appellant to have any access to the records of Dish Infra Services Pvt. Ltd. Consequently, the finding that money had originated from

ZEEL or its listed or related entity is patently false and against the material evidence on record. We further find that there is no finding that the appellant was in control of Dish Infra Services Pvt. Ltd. and, therefore, the finding that there was routing of funds from ZEEL to ZEEL is not proved.

80. The WTM while passing the *ad interim* order held in paragraph 29 that:-

> *"the funds had originated from ZEEL/other listed companies of Essel Group, which moved through multiple layers of Promoter Family owned/controlled entities and was ultimately transferred to ZEEL, in order to show the fulfillment of payment obligations of the Associate Entities towards ZEEL".*

81. This was the alleged foundational fact which was *prima facie* evidenced by the WTM and this *prima facie* observation led the WTM to pass an order restraining the appellant from holding any position in a listed company. This foundational fact in our opinion is not established. Out of five transactions two transactions relate to PIL and Dish Infra Services Pvt. Ltd. We find that PIL is an independent company and is not a listed company of Essel Group nor is it promoter family owned entity nor is it an associate company nor is it a related party entity. Similarly, Dish Infra Services Pvt. Ltd. is also no longer a

related party entity and has nothing to do with the Essel Group since March 2019. Thus, the foundational fact that the funds had originated from ZEEL and through group companies and that the funds moved through layers of associate companies of ZEEL and eventually found its way back to ZEEL has not been established.

82. Once the foundational fact has not been established, the Chairperson committed a manifest error in confirming the *ad interim* order on the ground of presumptions, assumptions / preponderance of probability. The Supreme Court has categorically held in a catena of cases that foundational facts must be established first before a presumption is made.

83. Out of Rs. 200 crore that was alleged to be repaid by the seven associate companies to ZEEL, the *ad interim* order only refers to only five transactions totaling Rs. 143.90 crore. No evidence till date has been found with regard to the balance Rs. 66.10 crore. Admittedly, PIL and Dish Infra Services Pvt. Ltd. are not associate companies or related party entities of ZEEL. PIL has received Rs. 71.34 crore for valid consideration. Similarly, the Dish Infra Services Pvt. Ltd. has paid Rs. 25 crore for valid consideration. Total amount comes to Rs. 96.34 crore. This payment admittedly on the face of it, at this *prima facie*

stage of investigation cannot be included for round tripping of funds and therefore if the amount of Rs. 96.34 crore is further reduced from Rs. 143.90 crore, then a balance of Rs. 47.56 crore at best could be alleged to have originated from ZEEL and its other associate companies and through layered transaction to find its way back to ZEEL. For this Rs. 47.56 crore the impugned order does not meet the test of the doctrine of proportionality and, in our opinion, the direction restraining the appellant from being associated as director or key managerial personnel in any listed company becomes harsh and inappropriate.

84. Even otherwise, as discussed in previous paragraphs we find that sufficient explanation has been given showing that the funds were paid pursuant to certain agreements, memorandum of understanding and contracts for which the invoices and GST was paid and TDS was evidenced in one case. The genuineness of the documents has not been disputed by the respondent. We find from the perusal of these documents that the allegation of round tripping of funds has been adequately rebutted and that money was paid for valid consideration in the usual course of business. Thus, the finding of the Chairperson on the basis of preponderance of probability cannot be sustained.

85. The learned senior counsel for the appellant relied upon the doctrine of "*ante lite motam"* as enunciated by the Supreme Court in ***Murugan alias Settu vs State of Tamil Nadu (2011) 6 SCC 111*** and contended that documents which were executed much before the alleged transactions in question has to be considered and cannot be brushed aside on mere *ipse dixit*. The words "*ante lite motam"* means "before the law suit was started". The doctrine is, that if something was done before a legal dispute arose, then it was done at a time when the declarant had no motive to lie. In our view the said principle is squarely applicable. The document which was in existence before the date of the alleged transactions can be relied upon safely as held by the Supreme Court in ***Murugan alias Settu (supra)***. The Chairperson should have examined the probative value of the contents of the document instead of brushing it aside on the sole ground that it does not provide proof of the movement of funds.

86. We are, thus, satisfied that the first leg of the transaction has been validly explained through documents which has not been disputed by the respondent and which are genuine. We are satisfied that at this stage the transfer of funds moved pursuant

to long standing commercial business relationship through memorandum of understanding / agreements / service agreements etc. and that these transactions are not sham transactions. The appellant has validly explained the first leg of the transaction and consequently discharged the burden and, at this stage of the investigation, it was not necessary for him to prove the subsequent chain in the movement of the funds. The investigation would investigate and find out as to on what basis the said funds moved from one entity to another entity but so far as the appellant is concerned, he has satisfied the genuineness of the first transaction.

87. Subsequent transfer of funds through layered entities coupled with proximity of timings may create a suspicion and may also raise an eye brow but it does not mean that the movement of funds through banking channels was a fictitious transaction or a sham transaction. On the basis of bank statement, it cannot be held that the transactions were fictitious or sham transactions which fact is admitted by the Chairperson in the impugned order.

88. The contention of Shri Khambatta that the appellant has not filed any documentary evidence to show that there was no

round tripping of funds is misconceived. The contention that the movement of funds and the proximity of timing in the movement of funds clearly showed a round tripping of the funds and therefore the initial burden was discharged by SEBI and the onus shifted upon the appellant which he failed to discharge, in our opinion, is erroneous as we find that substantial documents were filed which were required to be looked at. The genuineness of these documents was not disputed by the respondent which showed that there was long standing commercial business relationship between the ZEEL and the other entities through memorandum of understanding / agreements etc.

89. The contention that the entire transaction has to be looked at as a whole and that the first leg of the transaction alone is not sufficient to prove that there was no round tripping of the funds is erroneous. The contention that it was incumbent upon the appellant to demonstrate the legitimacy of the entire circular transaction and not just limit or confine it to justify the validity of the first leg of transaction in view of the close proximity of the timings of the transaction, related parties involved and interconnectedness of the transactions, in our opinion, is not correct as we have held earlier that complete round tripping of funds has not been found by the respondent. Two of the entities

are not related or associate entities of ZEEL. These two entities are independent entities and therefore the allegation that there was round tripping of funds from ZEEL to ZEEL through layered transactions from associate companies / related companies / group companies of ZEEL is incorrect. Once this fact is writ large then the burden has not been discharged by SEBI and still remains with SEBI to prove through some semblance of evidence that there was round tripping of funds. Proximity of timing is a factor to be considered but that alone cannot be the sole factor to come to a conclusion of any fraudulent transactions being carried out by ZEEL.

90. In the light of the aforesaid, the contention that the entire transaction has to be looked at as a whole is not correct in the given facts of the present case. At the threshold, we reiterate that the burden was upon SEBI to allege round tripping of funds. SEBI may invoke “substance over form” principle or “piercing the corporate veil” test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction was a sham or a fictitious transaction. In the given case, we find that nothing has come to light to hold that there was a round tripping of funds on the basis of any documentary evidence.

91. The "look at" principle enunciated in ***W.T. Ramsay Ltd. vs IRC 1982 AC 300*** in which it was held that the Revenue or Court must look at a document or a transactions in a context to which it properly belongs to in order to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach is not attracted in the instant case at this stage as we find that the documents so filed by the appellant has not been considered and has been brushed aside on the pretext that it does not prove that the funds moved pursuant to these documents. The Chairperson was required to consider the contents of the documents and find out the corporate business purpose of the transaction as evidenced by the documents supplied by the appellant and that the impugned transactions was undertaken as a result of those documents or was not undertaken as a colourable or artificial device. In the instant case, we find that the Chairperson has failed to consider the documents and, on the basis of proximity of timing, has concluded that there was round tripping of funds. Such approach was totally in violation of principles enunciated in ***Ramsay (supra)*** followed in various decisions of the Supreme Court. Reliance by the respondent in ***Vodafone International Holdings BV (supra), Craven v. White***

[1989] AC 398, Reflo Ltd. v Varsani (2014) EWCA Civ 360 Jean D. vs United states of America are not applicable in the facts and circumstances of the present case.

92. Much emphasis was made by the learned senior counsel for the respondent on the proximity of time as a facet to examine the genuineness of the transaction in the light of the observation made by the Supreme Court in paragraph 341 in ***Vodafone International Holdings BV (supra)*** wherein it was stated:-

> *"341. One of the tests to examine the genuineness of the structure is the "timing test", that is, timing of the incorporation of the entities or transfer of shares, etc…"*

93. As stated earlier, that it is only one such test and it is not the sole test. Proximity of time can raise an eyebrow and may point to a needle of suspicion but beyond that it does not prove that the transaction was fictitious nor can it prove round tripping of funds. In this regard, we provide an example as under:-

> A customer checks into a hotel and asks for a room. The receptionist informs the customer that a room is available for Rs. 2000/- per day. The customer wants to see the room before he checks in. The receptionist asks the customer to deposit Rs. 500/- in advance.

The customer deposits Rs. 500/- in advance. The receptionist calls a waiter and tells him to show the customer the room in question.

The receptionist owes Rs. 500/- to the chef in the hotel and he accordingly pays the chef with that Rs. 500/- which was deposited by the customer. The chef owes Rs. 500/- to the butcher and pays Rs. 500/- to the butcher. The butcher gives Rs. 500/- to his wife who in turn pays Rs. 500/- to the milkman who had supplied milk on credit. The milkman owed Rs. 500/- to the receptionist and accordingly pays Rs. 500/- to the receptionist.

All this happens within a few minutes. The customer comes back after seeing the room and says that he was not satisfied with the condition of the room and asks the receptionist to refund the advance he had given. The receptionist pays back Rs. 500/- to the customer and the customer leaves.

94. The above round tripping of funds happened in a few minutes. Can it be said that each of the transaction was a sham

or a fictitious transaction? There was a reason for making the payments. Everyone owed someone, the receptionist paid his debt, the chef paid his debt, the wife paid her debt and the milkman paid his debt. Everything works on credit and through the aforesaid payments everyone was happy. This is how the system works. Can it be said that the entire transaction done by the aforesaid entities was a sham transaction on account of proximity of time?

95. Considering the aforesaid, we find that the transaction between the ZEEL and the first entity was validly explained and therefore, at this stage, it was not necessary to go into the context of a larger transaction involving the circular rotation of funds. The decisions cited by the respondent in this regard are not applicable at this stage.

96. We also find that the Chairperson has proceeded on the presumption that the appellant was involved in the affairs of the Essel Group companies including the borrower entities other than ZEEL. We find that this finding is based on pure surmises and conjectures. There is no material whatsoever which would demonstrate that the appellant was involved in the alleged transactions. The finding that Essel Group companies were

involved in the layering of the funds transactions and were under the influence / control of the appellant by virtue of its shareholding and shareholding of his family members is patently erroneous. There is nothing on record to show that the appellant had participated in the affairs of the borrower entities or any other Essel Group entity. We find that the appellant is neither an authorized signatory nor a director in the borrower entities and was not involved in the operation, financing or day to day management of the affairs of the borrower entities. In the absence of any active role of the appellant in Essel Group companies / borrower entities, the presumption drawn by the Chairperson that the appellant had exercised control over borrower entities is patently erroneous.

97. The word "control" has been mostly used by the Chairperson to show that the appellant had an active role in the borrower entities Essel Group companies which is based on presumptions. The Supreme Court in ***ArcelorMittal India Private Limited vs. Satish Kumar Gupta (2019) 2 SCC 1*** explained the expression "control" as under:-

> ***"51.*** *Thus, the expression "control", in Section 29-A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with "management", means de facto control of actual management or policy*

decisions that can be or are in fact taken. A judgment of the Securities Appellate Tribunal in Subhkam Ventures (I) (P) Ltd. v. SEBI [Subhkam Ventures (I) (P) Ltd. v. SEBI, 2010 SCC OnLine SAT 35] , made the following observations qua "control" under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, wherein "control" is defined in Regulation 2(1)(e) in similar terms as in Section 2(27) of the Companies Act, 2013. The Securities Appellate Tribunal held : (SCC OnLine SAT para 6)

> *"6. ... The term control has been defined in Regulation 2(1)(c) of the Takeover Code to "include the right to appoint majority of the Directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner". This definition is an inclusive one and not exhaustive and it has two distinct and separate features : (i) the right to appoint majority of Directors or, (ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary (Eighth Edn.) at p. 353 where this term has been defined as under:*
>
> > *'Control—The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.'*
>
> *Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the board of Directors that is in control. If an acquirer were to have power to appoint majority of Directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control*

> *the management or policy decisions of a company, he would be in control. This could happen by virtue of his shareholding or management rights or by reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."*

98. In view of the aforesaid, the finding that the appellant exercised control over the borrower entities / Essel Group companies was based on presumptions in the absence of any material evidence to show that the appellant was actually in positive control of the Essel Group companies / borrower entities.

99. The finding that the appellant had exercised control over Sprit Infrapower & Multiventures Private Limited Churu Enterprises LLP through shareholding interest and designated partners is again stretching the matter a bit too far in the absence of material evidence to show that the appellant was actively involved in the day to day management of these two entities.

100. We further find that the direction that if the appellant is allowed to continue as the Managing Director in ZEEL it would impede or tamper with the investigation is erroneous in as much as we do not find any single incident to show that the appellant has obstructed in the investigation conducted so far.

101. We are also of the opinion that the impugned order relies upon the bank statement which cannot be tampered and which cannot be changed and therefore the presumption that if the appellant is allowed to continue as Managing Director in ZEEL it would impede or tamper with the investigation is patently erroneous. The finding that the appellant should be kept away from the helm of affairs of ZEEL so that the appellant may not exercise his influence over relevant entities to misdirect the course of investigation is patently erroneous. In the first instance, we find that nothing has come to notice that the appellant had adequately exercised any influence over any relevant entities. On the other hand, there is material to show that appellant has always been cooperating with SEBI and whatever information was sought was duly supplied. The movement of funds is based on documentary evidence which can be easily verified and the question of tampering with such evidence does not arise. The finding that appellant may abuse

his position causing risk to the assets of the listed entity is patently erroneous and has been done with the view to keep the appellant away from the merger of ZEEL with Sony. In this regard we find that the finding of the Chairperson that post merger the appellant would be entrusted substantial powers of the management in the affairs of the merged company and therefore the appellant should be kept outside such role is patently erroneous. The Chairperson has not realized that the post merger, the resultant merged entity would be managed by a separate corporate structure which is different and distinct from the structure of ZEEL. 50% of the shareholding would be held by the Sony Group. Five directors would be nominees of Sony and independent directors would be of stellar reputation and stature. Further the Chief Financial Officer would be nominees of Sony. These aspects has not been considered by the Chairperson while presuming that the appellant being responsible for the round tripping of the funds is not fit to hold the position of a Managing Director in the merged entity.

102. We also find that the Chairperson has applied different yardstick regarding the alleged transaction arising out of ZEEL. On one hand the Chairperson has based its finding on a preponderance of probability while on the other hand has

refused to accept the evidence filed by the appellant and has rejected the same on the ground that the documents do not prove the genuineness of the transaction beyond a reasonable doubt. This contrary stand taken by the Chairperson is, in our opinion, arbitrary. In any case, an incorrect application of the principles of preponderance of probability has been applied.

103. This Tribunal by its earlier order dated July 10, 2023 had directed the respondent to consider the proportionality of the directions given in the *ex parte ad interim* order. The Chairperson has considered the doctrine of proportionality in paragraphs 76 to 85 of the impugned order holding that the directions given in the *ex parte ad interim* order is preventive and not punitive in nature and that such directions does not violate Article 19(a)(g) of the Constitution of India. The Chairperson further held that the direction is only a temporary restraint which is aimed at preventing the appellant from impeding or obstructing in fair and transparent investigation in the matter. Further, the conduct of the appellant is such that he is not suitable to be part of a listed company.

104. The approach adopted by the Chairperson is misplaced. The Chairperson has not understood the concept of the doctrine

of proportionality which is a facet of Article 14 of the Constitution of India. In ***Ramesh Chandra Sharma and Ors. vs State of Uttar Pradesh and others (2023) SCC Online SC 162***, Supreme Court while considering the principles of proportionality held:-

> *"**52.** Although the fifth prong, as mentioned in the Gujarat Mazdoor Sabha (Supra) has not been expressly mentioned in Puttaswamy, Chandrachud J (as His Lordship then was), in our view, rightly has read that in in the Gujarat Mazdoor Sabha case (supra) to complete the test. State action that leaves sufficient room for abuse, thereby acting as a threat against free exercise of fundamental rights, ought to necessarily be factored in in the delicate balancing act that the judiciary is called upon to do in determining the constitutionality of such state action - whether legislative, executive, administrative or otherwise. The relevant paragraph of the judgment has been mentioned herein:*
>
> > *"The principle of proportionality has been recognized in a slew of cases by this Court, most notably in the seven-judge bench decision in K S Puttaswamy v. Union of India. The principle of proportionality envisages an analysis of the following conditions in order to determine the validity of state action that could impinge on fundamental rights:*
> >
> > > *(i) A law interfering with fundamental rights must be in pursuance of a legitimate state aim;*
> > > *(ii) The justification for rights-infringing measures that interfere with or limit the exercise of fundamental rights and liberties must be based on the existence of a rational connection between those measures, the situation in fact and the object sought to be achieved;*
> > > *(iii) The measures must be necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfil the aim;*
> > > *(iv) Restrictions must not only serve legitimate purposes; they must also be necessary to protect them; and*
> > > *(v) The State should provide sufficient safeguards against the abuse of such interference.*

> *We are unable to find force in the arguments of the learned counsel for the Respondent. The impugned notifications do not serve any purpose, apart from reducing the overhead costs of all factories in the State, without regard to the nature of their manufactured products. It would be fathomable, and within the PART G 30 realm of reasonable possibility during a pandemic, if the factories producing medical equipment such as life-saving drugs, personal protective equipment or sanitisers, would be exempted by way of Section 65(2), while justly compensating the workers for supplying their valuable labour in a time of urgent need. However, a blanket notification of exemption to all factories, irrespective of the manufactured product, while denying overtime to the workers, is indicative of the intention to capitalize on the pandemic to force an already worndown class of society, into the chains of servitude."*

105. This Tribunal in ***Zenith Steel Pipes and Industries Limited vs SEBI (Appeal No 554 of 2021 and other connected appeals decided on February 21, 2023)*** held:-

> *"14. Undoubtedly, the doctrine of proportionality is now well established in our jurisprudence and is a recognised facet of Article 14 of the Constitution of India. In* ***Andhra Pradesh Dairy Development Corporation Federation vs. B. Narasimha Reddy and Others (2011) 9 SCC 286****, the Supreme Court held:*
>
> > *"29. It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive actions, but also applies to legislature. Thus, a party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rational, and has been done according to reason or judgment, and certainly does not depend on the will alone. However, the action of legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be a case of substantive*

> *unreasonableness in the statute itself for declaring the act ultra vires of Article 14 of the Constitution. (Vide: Ajay Hasia etc. v. Khalid Mujib Sehravardi, Reliance Airport Developers (P) Ltd. v. Airports Authority of India, Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board, Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited, and State of T.N. v. K. Shyam Sunder.)"*

> *15. In matters relating to punitive measures the emphasis has shifted from the wednesbury principle of unreasonable to one of proportionality. A disproportionate punitive measure which does not commensurate with the offence would be violative of Article 14 of the Constitution of India. We are of the opinion that in the rapid growth of administrative law it has become the need and necessity to control possible abuse of discriminatory power by administrative authorities. In this regard, certain principles have been evolved by Courts, namely, that if an action is taken by an authority which is contrary to law or which is improper or where the action taken is unreasonable then the Court of law is duty bound to interfere with such action and one such mode of exercising power is to exercise the doctrine of proportionality. Where the punitive measure is harsh or disproportionate to the offence which shocks the conscience it is within the discretion of the Court to exercise the doctrine of proportionality and reduce the quantum of punishment to ensure that some rationality is brought to make unequals equal."*

106. Similarly, the Bombay High Court in ***Apar Industries Ltd. Vs Union of India Through Ministry of Railways and Others (2023) SCC Online Bom 350*** held:-

> ***"30.*** *The scope of the proportionality principle came to be examined in Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Association. The Supreme Court said:-*
>
> > *17. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts.* ***If an action***

> ***taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the "doctrine of proportionality".***
>
> *18.* ***"Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.***
>
> *...*
>
> *21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no "pick and choose", selective applicability of the government norms or unfairness, arbitrariness or unreasonableness.* ***It is not permissible to use a "sledgehammer to crack a nut". As has been said many a time; "where paring knife suffices, battle axe is precluded"****.*
>
> *(Emphasis added)*

107. Considering the aforesaid we have to see whether a proper balance has been made by the impugned directions on the rights, liberties or interest of the person keeping in mind the purpose which it was intended to serve. In this regard, no doubt discretion or a range of choices is given to the authority while issuing directions. If the directions or a choice made by the authority infringes the rights of the person it is for the Court to consider as to whether the discretion or the range of choice

exercised by the authority was within the ambit of the doctrine of proportionality or not. Considering the aforesaid, the Supreme Court in ***Coimbatore District Central Cooperative Bank vs Coimbatore District Central Cooperative Bank Employees Association (2007) 4 SCC 669*** held that it is not permissible to use a sledgehammer to crack a nut when where paring knife would suffice.

108. Considering the aforesaid we are of the opinion that the doctrine of proportionality has not been correctly applied and a correct balance has not been made. Considering the genuineness of the documents so produced by the appellant, the first leg of the transaction was validly explained which indicates that the funds moved pursuant to a long standing commercial business relationship. The entries in the bank statement are not fictitious or sham transactions and therefore proceeding and issuing directions on the basis of preponderance of probabilities is, in our opinion, at this stage arbitrary and excessive. The directions *ex facie*, is punitive and not preventive and is based on incorrect apprehensions and on the basis of preponderance of probabilities.

109. Further, the restrictions are continuing since June 2023 by the impugned order. The Chairperson has directed that the investigation should be completed within eight months and under the garb of temporary restraint the appellant is expected to disassociate from ZEEL and its subsidiaries as well as with the merged entity for ten months or more after which proceedings may be initiated by issuance of a show cause notice. Thus, the directions so issued during the pendency of the investigation is harsh and clearly punitive. In ***SEBI vs Kishore Ajmera (2016) 6 SCC 368*** the Supreme Court held that proof of an allegation must be in the form of direct substantive evidence and in the absence of direct substantial evidence proof may be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations. The Supreme Court held that Courts cannot be helpless and it is the judicial duty to take note of the immediate and proximate facts surrounding the events on which the charges are founded. Applying the aforesaid test we find that a heavy burden of proof was upon the respondent. Merely on the basis of bank entries and proximity of time cannot lead to a conclusion to hold that the transactions were fictitious or sham or that the flow of funds was not on the basis of genuine transactions. Considering the evidence that has been filed which is in the form of direct

substantive evidence, *prima facie*, at this stage, it indicates that the funds moved pursuant to long standing commercial business arrangement between the entities which evidence has been disregarded on flimsy grounds.

110. We find that the reasoning given by the Chairperson regarding the urgency in issuing an interim direction pending investigation is erroneous. The Chairperson finding that the urgency in the issuance of the interim directions is not to be assessed from the view point of the transaction but rather it is egregious nature of the transaction which displays the total disregard to the accountability of the Managing Director is, in our opinion, an incorrect approach. In fact, this approach is not only untenable but constitutes a strange and perverse attempt to justify its unsustainable passing of the urgent *ex parte interim* order. If the reasoning adopted by the Chairperson is to be accepted it would give a license and a *carte blanche* to pass urgent *ex parte ad interim* order for the alleged "egregious nature of the transactions". In our opinion, in view of what we have stated in the preceding paragraphs with regard to the five transactions there was no urgency in passing the *ex parte ad interim* order.

111. The rationale of urgency adopted in the impugned order is also vitiated on the ground that same is in substantial variance from the *ex parte ad interim* order. The WTM while passing the *ex parte ad interim* order was of the view that the directions were necessary in order to obviate the possibility of further diversion of funds whereas in the order passed by the Chairperson urgency has been considered on the ground that a fair and transparent investigation would not be possible if the appellant remains a Managing Director as he may impede and obstruct the investigation. In our opinion the reasoning given in the *ex parte ad interim* order as well as in the impugned order passed by the Chairperson are bereft of any merit. Till date, no evidence has come forward of any further diversion of funds. Further, the scope of investigation has now been enlarged and is not confined to the LoC of Rs. 200 crore but has been enlarged to investigate other LoCs issued by ZEEL. Considering the aforesaid, when investigations is being done on mere possibilities without any concrete evidence as on date then, in our opinion, passing an *ad interim* order was wholly unjustified and, in any case, the continuation of the interim order till the completion of the investigation is *per se* arbitrary and cannot be sustained.

112. The finding in the impugned order that the appellant would impede or tamper the investigation is patently erroneous. Such directions cannot be passed on mere presumptions in the absence of any material being brought on record which demonstrates that the appellant or any of the entities connected with him have failed to cooperate with the investigation or impeded in any manner in the progress of the investigation. The apprehension expressed in the impugned order is without any factual basis. We are further of the opinion that the Chairperson was bound to examine the directions passed in the *ad interim* order on the touch stone of the finding contained therein but could not have imported fresh reasoning which were alien to the interim order.

113. The entire investigation is based on bank account statements which cannot be tampered by the appellant and therefore the question of impeding in the investigation does not arise. Further, it would be absurd to say the least that the investigation would suffer if the appellant remains at the helm of affairs.

114. We are also of the view that there is a delay in the issuance of an *ex parte ad interim* order. The alleged transaction

is of the year 2019. No further evidence has come on record to indicate any further diversion of funds. Consequently, in our opinion the impugned order is harsh and unwarranted as there was no real urgency at this late stage in passing the *ad interim* order. Passing a restraint order at this stage virtually restrains the appellant his right to continue as a Managing Director on the basis of a needle of suspicion which in our opinion is unfounded.

115. In ***Liberty Oil Mills & Ors. vs. Union of India & Ors. AIR (1984) SC 1271***, the Supreme Court held that the urgency must be infused by a host of circumstances and further held that the regulatory agency must move quickly in order to curb further mischief and take action immediately in order to instill and restore confidence in the capital market. There is no doubt that only under emergent circumstances and spelling out a case of urgency that an *ad interim ex parte* order can be passed. Such exercise of regulatory measures in the form of *ad interim ex parte* orders can only be done upon the existence of circumstances warranting such a drastic measure.

116. Based on the aforesaid decision this Tribunal in ***North End Foods Marketing Pvt. Ltd. vs SEBI (2019) SCC SAT OnLine 6*** held:-

> *"17. In our opinion, the impugned order is harsh and unwarranted. We are of the opinion that there was no real urgency at this late stage in passing an ex-parte restraint order which virtually amounts to passing a final order. The period of trades is 2017-2018. At the time when the impugned order was passed the future contracts had been executed. The lean season was over. There is nothing on record to indicate that the sales made by the appellants was on a higher side indicating manipulation in the price nor there is any prima-facie, finding that by accumulating large stocks of Mentha Oil, the appellant had dominated the market without making any comparison with the total volume of trades in the physical market. In our opinion, the basis of urgency was purely on account of presumption and was not based on any piece of evidence. There should be some shred of evidence to come to a prima-facie conclusion that the appellants are indulging in unfair trade practices in cornering the market with a manipulative intent to manipulate the price. Passing a restraint order which virtually puts a stoppage on the appellants right to trade based on a needle of suspicion, in our opinion, is harsh and unwarranted.*
>
> *18. In the absence of in depth analysis based on evidence, we are of the opinion that in the facts and circumstances of the present case, it was not such an urgent case where the WTM should have exercised its powers. In our opinion, the respondent is empowered to pass an ex-parte interim order only in extreme urgent cases and that such power should be exercised sparingly. In the instant case, we do not find that any extreme urgent situation existed which warranted the respondent to pass an ex-parte interim order. We are, thus, of the opinion that the impugned order is not sustainable in the eyes of law as it has been passed in gross violation of the principles of natural justice as embodied in Article 14 of the Constitution of India. Accordingly, the appellants are entitled to the reliefs claimed."*

117. In ***Dr. Udayant Malhoutra vs. SEBI, Appeal no. 145 of 2020 decided on June 27, 2020***, this Tribunal held as under:-

"9. ……. In our opinion, the reasoning given by the WTM justifying its action to pass an ex parte interim order is patently erroneous and cannot be sustained. On one hand, we find that only a show cause notice has been issued and the matter has not been adjudicated on merits but the appellant, on the other hand, has been directed to deposit the possible disgorgement amount in advance. We are of the opinion that no amount towards disgorgement can be directed to be deposited in advance unless it is adjudicated and quantified unless there is some evidence to show and justify the action taken. An order of the like nature can only be passed during the pendency of the proceedings and such orders cannot be passed at the time of initiation of the proceedings. Further, no order of the like nature can be passed without recording its satisfaction and cannot be based on the basis of possibility."

"10. In this regard, we may refer to the provisions of Order 38 Rule 5 to 13 of the Code of Civil Procedure, 1908 which lays down the parameters for attachment before judgment. The said principles are fully applicable in the instant case. The object of attachment before judgment is to prevent any attempt on the part of the appellant to defeat the realization of the final order on disgorgement that may be passed against the appellant. But this principle applies only when it is found that the appellant is about to dispose of the property in question. Further, this principle can only be applied when there is evidence to show that the appellant has acted, or is about to act with the intent to obstruct or delay the adjudication of the proceedings that may be passed against him. We are of the opinion that there is no finding that the appellant will remove the property or will dispose of all the property or that he would obstruct the proceedings or that he would delay the proceedings pursuant to the show cause notice. In the absence of any such finding, the ex-parte interim order cannot be sustained especially when the trades were of 2016 and from 2016 till the date of the impugned order there is no evidence to show that the appellant was trying to divert the alleged notional gain/loss."

118. In ***Arshad Hussain Warsi & Ors. vs SEBI, Appeal no. 284 of 2023***, decided on March 27, 2023, this Tribunal held:-

"29. From the aforesaid, it is clear that ad-interim orders can be passed in case of urgency or where it is found that the noticee is about to dispose of the property. In the absence of any finding that the appellants will defalcate the unlawful

> *gains, the impounding order constitutes malice in law. Further, the power must be exercised with extreme care and caution and should be resorted to only as a last resort or measure. Merely by stating that the appellants may divert the unlawful gains is not based on any cogent evidence rather on surmises and conjectures and formation of unguided subjected satisfaction which is not permissible".*

119. Considering the aforesaid we are of the opinion that the *ex parte ad interim* order could have been passed in extreme urgent cases and that such power should be exercised sparingly and should not be exercised in a routine manner. Considering the facts and circumstances of the present case, we do not find that any extreme urgent situation existed in 2023 which warranted the WTM to pass an *ex parte ad interim* order with regard to a certain set of transactions which occurred in the year 2019.

120. We find that 99.97% of the shareholders of ZEEL had reposed complete faith in the appellant as recent as into 2022 to continue as Managing Director and Chief Executive Officer of the merged entity between ZEEL and Sony. Pursuant to the *ex parte ad interim* order NCLT has approved the scheme of amalgamation in which the appellant would hold the post of a Managing Director of the merged entity. This aspect has wrongly been construed by the Chairperson that it will wield substantial power of management of the affairs of the merged

company upon the appellant which he cannot be permitted to do so. In our opinion such approach is unwarranted apart from the fact that there is no evidence to show that the appellant exercised positive control over the borrowed entities. The fact that greater responsibility (if any) has come upon the appellant pursuant to the merger, then all the more reason that the appellant should be allowed to continue rather than putting the merger to continue headless when 99.97% of the shareholders reposed faith in the appellant to continue as Managing Director of the merged entity.

121. We also find that the structure of the merged entity is that Sony Group would have the majority shareholding in the merged entity and will also have majority members in the board of directors and would have right to appoint key managerial personnel like Chief Financial Officer, Chief Compliance Officer, Company Secretary etc. the appellant would be just one of the nine directors of the merged entity. Hence, his continuation as the Managing Director in the merged entity would have no impact on the investigation.

122. The Chairperson while confirming the *ad interim* order directed the investigation to be completed in eight months. No

reason was given as why eight months is required to complete the investigation especially when only bank transactions are to be looked into. During the course of arguments, it has been stated by the respondent that other LoCs given by the promoter group of the appellant including the LoC given by the father of the appellant to the tune of Rs. 4210 crore are now being scrutinized and therefore comprehensive investigation is being done and consequently these five transactions which is impugned in the order is only part of the wider investigation. In view of the aforesaid, we are of the view that *prima facie* the diversion of funds has not as yet been proved. Sufficient explanation backed by genuine document have been shown by the appellant and having validly discharged their burden. The investigation is going on and considering the track record of SEBI for which we take judicial notice, no investigation is completed within the stipulated period. We have seen that on numerous occasions whenever this Tribunal or the superior Court has directed SEBI to complete the investigation within a stipulated period, the same has not been done and applications after applications are being filed by SEBI seeking time to extend the period of investigation. Considering the fact that a wider investigation is now being undertaken by SEBI to consider the various LoC issued by ZEEL and its promoter

companies, we are of the opinion that there is no real urgency and therefore this Tribunal will not place any impediment in restricting the period of investigation but considering the peculiar circumstances that has been brought on record and, in view of the fact that the foundational facts have not been established coupled with the fact that the respondent has restrained the appellant on a preponderance of probabilities while rejecting the genuine documents on the ground that it does not prove the transactions beyond a reasonable doubt, we are of the opinion that continuation of the interim order would be harsh and unwarranted and thus, cannot be allowed to continue any further.

123. In view of the aforesaid, the impugned order cannot be sustained and is quashed insofar as it relates to the appellant. The restraint order passed by the respondent pursuant to the *ad interim* order and the confirmatory order restraining the appellant to function as a Managing Director and as directed in paragraph 108(ii) of the impugned order is set aside. The appeal is allowed. The appellant shall, however, cooperate in the investigation. In the event any material comes out against the appellant during the course of investigation then appropriate

procedure can be adopted by SEBI in accordance with law. In the circumstances of the case, parties shall bear their own costs.

124. We also make it clear that any observation made in this order is only a *prima facie* observation and will not influence the investigation nor will be utilized by either of the parties.

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

30.10.2023
msb