BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 254 of 2014
With
Misc. Application No. 104 of 2014

Pancard Clubs Limited
111/113, Kalyandas Udyog Bhawan,
Near Century Bhavan, Prabhadevi,
Mumbai – 400 025. …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

WITH

Appeal No. 255 of 2014
With
Misc. Application No. 105 of 2014

1. Ms. Shobha Ratnakar Barde
   Residing at A6/19-50,
   Jeevan Beema Nagar, Borivali (West),
   Mumbai – 400 103.

2. Mr. Manish Kalidas Gandhi
   Residing at B/8, Jay Kunj Apartment,
   Agashi Cross Road, Above Dalvi
   Hospital, Virar (West), Vasai,
   Thane – 401 303.

3. Mr. Ramachandran Ramakrisshnan
   Residing at 601/Bldg. No. 1A,
   Shree Amimsadham CHS Ltd.
   Off New Link Road,
   Malad (West), Mumbai – 400 064.

4. Mr. Sudhir Shankar Moravekar
   Residing at 9/10, Utkarsh Co-op. Hsg.
   Soc., Plot No. 1035, J.A. Raul Marg,
   Botadkarwadi, Prabhadevi,
   Mumbai – 25.

5. Ms. Usha Arun Tari
   Residing at A-3, Prakash Nagar,
   Mogul Lane, Mahim,
   Mumbai – 400 016.

6. Mr. Chandrasen Ganpatrao Bhise
Residing at Gopal Niwas, Plot No. 14,
Room No. 4, 1st Floor, Sion (West),
Mumbai – 400 022. …Appellants

Versus

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

Mr. Pradeep Sancheti, Senior Advocate with Mr. Prakash Shah and Mr. Sanjay Agarwal, Advocates for the Appellant in Appeal Nos. 254 and 255 of 2014.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Advocate for the Respondent in Appeal Nos. 254 and 255 of 2014.

Order Reserved On : 04.09.2014

Date of Decision : 17.09.2014

CORAM : Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
A.S. Lamba, Member

Per : Jog Singh

1. These two appeals have been filed against an ex parte interim order dated July 31, 2014 passed by Securities and Exchange Board of India (hereinafter referred to as Respondent) under Sections 11(1), 11B and 11(4) of the Securities and Exchange Board of India Act, 1992 (SEBI Act) read with Regulation 65 of the CIS Regulations. The Appeal No. 254 of 2014 has been filed by Pancard Clubs Ltd. (hereinafter referred to as Appellant) and Appeal No. 255 of 2014 has been filed by its six Directors. Since both these appeals involve a common question of law and fact, with the consent of the parties, we have heard these appeals together and are disposing them off by this common order by taking Appeal No. 254 of 2014 as the lead case.

2. The question posed before us by the Appellant is that even before deciding the question as to whether time sharing business carried on by the

Appellant is covered under the Collective Investment Scheme or not, whether SEBI on the basis of its prima facie view is justified in directing the Appellant to virtually close their business by way of an ex parte interim order? The Appellant's one of the contentions is that by said ex parte interim Impugned Order, time sharing business of the Appellant being carried out by it for the last 15-16 years is abruptly brought to standstill, while a company carrying on similar business continues to carry on business pursuant to an order passed by Hon'ble High Court of Gauhati by its orders dated August 1, 2013 and November 6, 2013. Moreover, the Impugned Order was passed without hearing the Appellant by invoking powers under Sections 11(1), 11B and 11(4) of the SEBI Act read with Regulation 65 of CIS Regulations, 1999, inter alia, seeks to prohibit the Appellant from collecting any fresh money from its prospective customers; from launching any new schemes or floating any new company, submitting inventory of the assets, disposing of or alienating any of the properties / assets, diverting any funds raised from its members or public at large and directs the Appellant to furnish details within 15 days. According to the Appellant all these directions are of serious nature and have definite civil consequences not only on the business of the Appellant but its existing customers, its employees and several intermediaries.

3. The Appellant primarily submits that the time / room sharing business in hotels, resorts etc. carried on by the Appellant does not fall within the ambit of CIS as defined by Section 11AA(1) and 11AA(2) of the SEBI Act read with Regulation 65 of the CIS Regulations, 1999. Therefore, unless the issue of CIS was decided on merit by a detailed enquiry as per procedure established by law, the Respondent should not have passed such an order without hearing Appellant. Moreover, on their own showing, the Respondent has taken a conscious decision to revisit its earlier view on the issue of time sharing

business after the judgment of Hon'ble Supreme Court in PGF Ltd. (12th March, 2013) and the letter dated 2nd July, 2013 of one Member of Parliament Mr. Patil. It clearly means that the Appellant was carrying on business since 2001 or so under a bonafide belief that the business of time sharing was not covered by CIS. Under these circumstances, if the Appellant had continued the business for another six months or so, no prejudice would have been caused to the case of the Respondent in holding a full and proper enquiry. Therefore, the Impugned Order needs to be interfered with by this Tribunal in appeal.

4. Brief facts leading to the present dispute are that the Appellant is an unlisted public limited company registered under the Companies Act, 1956. Its shares are, thus, not listed on any of the Stock Exchanges. The Appellant is in the time sharing business i.e. selling of rooms for a fixed duration of nights / days depending upon the scheme opted by its customers who are termed as Members. Accordingly, the Appellant owns, develops and operates hotels and resorts all over India and even abroad, along with offering time (room) sharing options to those who wish to avail of holidays and hospitality services. The Appellant has been engaged in this business for the last one and a half decades.

5. At the outset, the Appellant submits that it addressed a letter dated February 27, 2001 to the Respondent outlining the terms and conditions of the structure of its business. This was done with a view to assure itself that the Appellant was not accidentally carrying out a CIS. Another letter was issued on June 20, 2002 by the Appellant seeking clarity regarding the same. The Respondent vide letter dated July 19, 2002 sought from the Appellant various details of the Appellant's schemes.

6. Thereafter, no major communication took place between the parties for around 8 years, when SEBI issued a letter to the Appellant stating that some

promotional material of the Appellant carried the statement, ‘approved by SEBI’, and asked for an explanation regarding the same. On November 25, 2010, the Respondent issued a press release stating that no scheme / plan of the Appellant’s had been approved by the Respondent. The public was asked to exercise due care and caution while dealing with the Appellant. The Appellant issued letter dated December 10, 2010 responding to the Respondent’s concerns and also informing the Respondent of the action taken against persons issuing wrong information in the name of the Appellant. Over the next two years several letters were exchanged between the parties, without, however, the Respondent indicating whether the nature of activities carried on by the Appellant constituted a CIS.

7. On July 2, 2013, Mr. Sanjay Dina Patil, a Member of Parliament filed a complaint with the Respondent alleging that the Appellant was carrying out a CIS without certification in violation of CIS Regulations. The Respondent then issued letter dated July 8, 2013 to the Appellant asking it to publish a disclaimer on their website to the effect that the Appellant was not registered with the Respondent under the CIS Regulations. Vide letter dated August 7, 2013 the Appellant responded to the Respondent’s letter dated July 8, 2013 attaching a draft public notice that could be published on the website. The Appellant also issued a public notice that it was not SEBI approved as claimed by some persons with vested interests and this matter was put to a rest by both the parties.

8. Finally, on October 21, 2013, the Respondent sent a letter to said Member of Parliament, and surprisingly not to the Appellant, stating that on examining the Appellant’s matter in 2010-11, the Respondent had concluded that the company’s activities did not attract CIS Regulations. Said MP was also informed that in light of recent complaints received by it, the Respondent was

re-examining the matter to determine whether or not the Appellant's activities fall within the ambit of CIS Regulations. On June 26, 2014, having ostensibly completed its re-examination, the Respondent issued a Show Cause Notice (SCN) dated June 26, 2014 accusing the Appellant of carrying on activities in the nature of a CIS without obtaining a certificate from the Respondent as required by the CIS Regulations. The Appellant has filed a Writ Petition (Lod.) No. 2090 of 2014 in the Hon'ble Bombay High Court challenging the SCN issued by the Adjudicating Officer of SEBI and the Hon'ble Bombay High Court directed the Appellant to file reply to the Show Cause Notice so that SEBI could take final decision on merits after hearing the Appellant. However, during the pendency of the Show Cause Notice issued by the Adjudicating Officer of SEBI, the Whole Time Member of SEBI has passed the impugned ex parte interim order.

9. The Appellant in the present appeal, preferred under section 15T of the SEBI Act, 1992, submits that the Impugned ex parte interim order dated 31st July, 2014 fails to set out any reason for the urgency with which it was passed. The Impugned Order is in complete breach of the principles of natural justice and should be treated as void. The Impugned Order should not have been passed ex parte particularly in view of the fact that the Appellant had not only been in constant communication with SEBI since 2001, but also initiated it and was co-operating with the Respondent all along.

10. The alleged non-provision of names and details of the Appellant's customers does not justify passing of the order. Even though the Appellant had sought for clarification regarding whether or not its activities fall within the ambit of CIS Regulations as far back as in 2001, it was only in 2013 that SEBI in fact clarified that the Appellant's business did not fall within the provisions of CIS Regulations. It was an arduous task to compile details of few lac

Members. However, as soon as the same was done, the details were furnished to the Respondent during the course of hearing of the present appeal before this Tribunal.

11. It is submitted by the Appellant that nothing in the order points towards any kind of injustice done to any of the Appellant's Members in the last 17 years. Therefore, the Respondent cannot justifiably claim to pass a hurried ex parte order to protect the interests of investors. Further, the Appellant states that the information sought by SEBI has been provided to it time and again. Considering the fact that the Appellant itself has been in touch with the Respondent regarding its activities since 2001 and that the Respondent never indicated that the Appellant's activities were in the nature of CIS. The Appellant was under a bonafide belief that the Respondent did not have any problems with the Appellant's business, and, inter alia, on the basis of this belief the Appellant grew its business over the last one and a half decades. Moreover, the Appellant has been in the hotel time sharing industry since last many years without ever receiving any complaints.

12. The Appellant puts forth that it is a fact noteworthy that since the day Respondent had concluded that the Appellant is not carrying out any CIS, the Appellant's activities have not undergone any change. Therefore, it is unreasonable to treat the same activities as illegal few years down the line, particularly in view of the fact that the Impugned Order fails to point out any way in which the business of the Appellant has undergone any drastic change.

13. The Appellant submits that no emergent situation has been elucidated in the Impugned Order which would justify the passing of such an adverse order, without ever giving the Appellant an opportunity of being heard. This itself is a blatant breach of the principles of natural justice. Further, the SCN is still pending which requires due application of mind by the Respondent and

determination of issues for which the Appellant has been sought to be punished unilaterally. The Appellant submits that no grievance of any of its customers has come to light which would warrant the passing of the Impugned Order allegedly to secure interests of investors. The only change in circumstance is the complaint received from an MP. SEBI cannot be allowed to harass the Appellant purely to satisfy the whims and fancies of an MP. It is important to note that the Respondent admits in its counter affidavit that prior to 2013, SEBI was of the view that time share schemes did not come within the purview of Section 11AA of the SEBI Act.

14. The Ld. Senior Counsel, Mr. Pradeep Sancheti, on behalf of the Appellant has relied upon following judgments in support of his arguments:-

(a) Commissioner of Customs vs. National Shipping Agency reported in 2008(226) E.L.T. (Bom);
(b) Babaji Shivram Clearing & Carriers Pvt. Ltd. vs. Union of India reported in 2011 (269) E.L.T. 222 (Bom);
(c) Commissioner of Customs (General) vs. Burigih International reported in 2008 (226) E.L.T. (Bom);
(d) Commissioner of Customs (General) vs. S.D. Dalal & Co. reported in 2008 (221) E.L.T. 488 (Bom);
(e) Cosmic Radio vs. Union of India & Another reported in 1983 (12) E.L.T. 84 (Bom);
(f) Mohindhr Singh Gill & Another vs. Chief Election Commissioner of New Delhi and Others reported in (1978) 1 Supreme Court Cases 405;
(g) Order dated 23.7.2013 passed by Securities Appellate Tribunal, Mumbai in the case of Zenith Infotech Limited vs. Securities and Exchange Board of India;
(h) Order dated 19.8.2014 passed by Supreme Court of India in the case of Securities and Exchange Board of India vs. Zenith Infotech Ltd. & Ors.;
(i) SBQ Steels Ltd vs. Commissioner of Cus. C. Ex and S.T. Guntur reported in 2014 (300) E.L.T. 185 (A.P.);
(j) Oryx Fishers Private Ltd. vs. UOI reported in 2011 (266) E.L.T. 422 (S.C.);
(k) Siemens Ltd. vs. State of Maharashtra reported in 2007(207) E.L.T. 168 (S.C.);
(l) Commissioner of Customs, Mumbai vs. Toyo Engineering India Limited reported in 2006 (201) E.L.T. 513 (S.C.);
(m) SACI Allied Products Ltd. vs. Commissioner of C. Ex Meerut reported in 2005 (183) E.L.T. 225 (S.C.);
(n) Institute of Chartered Accountant of India vs. L.K. Ratna & Others reported in (1986) 4 Supreme Court Cases 537;

(o) Krishna Shipping Agency vs. Commissioner of Cus (Airport & Admn) reported in 2014 (306) E.L.T. 352;
(p) Order of SEBI in the case of M/s. Rose Valley dated July 10, 2013;
(q) Interim order dated August 1, 2013 and November 6, 2013 passed by Hon'ble Gauhati High Court in Writ Petition (C) No. 4298 of 2013 in the case of M/s. Rose Valley;
(r) Hon'ble Supreme Court order dated April 15, 2014 in the case of SEBI vs. Rose Valley in SLP (C) No. 3725 of 2014.

15. Judgments at serial nos. (a) to (d) have been cited by the Ld. Senior Counsel for the Appellant Mr. Pradeep Sancheti to bring home the point that discretion / powers conferred by Sections 11(1), 11B and 11(4) ought to be used only in appropriate cases where due to a prevailing emergency, time cannot be wasted even by offering the right of being heard to the affected party against whom such an ex parte interim order can be made. Mr. Sancheti submits that although these judgments are passed by the Hon'ble High Court of Bombay in the context of suspension of license of Custom House Agents as per the powers and discretion conferred by the Regulations 20 and 22 of Customs House Agents Licensing Regulations, 2004, the ratio laid down in these judgments is clear that it is only when prompt action is required that such powers of suspension are to be invoked at once. Mr. Sancheti also submits delay of even one to two months in suspending a CHA under Regulation 22 of the said CHAL Regulations, 2004 has been condemned by the High Court and considered fatal and such arbitrary decisions have been consistently quashed by the Hon'ble High Court. Mr. Sancheti, pertinently, has drawn our attention towards paragraph 9 of **Babaji Shivram (supra)** at serial no. (b) decided by the Division Bench of Hon'ble Bombay High Court in WP (LOD) No. 694 of 2011 on 21st April, 2011 which reads as under:-

> "……
> *9. Apart from the above, suspension of a CHA license under Regulation 20(2) of the 2004 Regulations can be ordered where* ***immediate action is necessary.*** *In the present case, the Customs Authority in the middle of January, 2011 were aware of the fact that the documents submitted by the*

Petitioners were fabricated, however, the impugned order has been passed belatedly on 28th March, 2011."

In furtherance of his argument on the scope and ambit of the nature of power conferred by the Parliament on SEBI under Sections 11(1), 11B and 11(4) of SEBI Act, Mr. Sancheti has brought to our notice a judgement of this Tribunal in **Zenith Infotech (supra)** decided on July 23, 2013 in Appeal No. 59 of 2013. This Tribunal was dealing with a situation where an ex parte interim order was passed by the SEBI invoking powers / discretion under Section 11(1), 11B and 11(4) of the SEBI Act calling upon the Appellant therein, inter alia, to deposit a bank guarantee of USD 33.9 within 30 days. The Tribunal held that such a mandatory direction could have been passed by the Respondent only after affording an opportunity of being heard to the Appellant in that appeal. It was, therefore, considered to be non-sustainable in the eyes of law as it was passed in gross violation of the principles of natural justice. The Tribunal also held that SEBI was duly empowered to pass an ex parte interim order in urgent cases but this power was to be exercised sparingly in most deserving cases of extreme urgency. The Impugned Order in Zenith was passed almost after a delay / lapse of 15 months from the date of the main occurrence, i.e., drastic fall in the price of that scrip from Rs. 199 on September 23, 2011 to Rs. 45 on November 30, 2011, within a period of just 45 days. SEBI did not do anything at the relevant time and abruptly passed an ex parte interim order on March 25, 2013. It is submitted by Mr. Sancheti that although the facts are different in the case of Zenith, its ratio is duly applicable to the present case so far as the exercise of the discretion conferred upon SEBI to pass ex parte interim orders in deserving and emergent cases is concerned. Mr. Sancheti submits that it would be a mockery of the discretion conferred upon SEBI if it were to be invoked in the ordinary and routine cases. It would, therefore, amount to gross misuse of power rather than proper use in a given

case. Mr. Sancheti also pointed out that Civil Appeal No. 7134 of 2011 preferred by SEBI before the Hon'ble Supreme Court has since been disposed of by order dated 19th August, 2014 by stating that "……..the order dated 23rd July 2013, passed by the SAT in the said appeal had been challenged before this Court. By virtue of the said order, the case was remanded to the SEBI for fresh consideration. During the pendency of this appeal, the SEBI decided the case on 11th April, 2014. The order dated 11th April, 2014, passed by the SEBI has now been challenged before the SAT and the SAT is to hear the appeal on 20th August, 2014. In the aforesaid circumstances, we are of the view that this appeal has become infructuous. The appeal is disposed of as having become infructuous. It is clarified that it would also be open to the SAT to pass an appropriate interim order in accordance with law so as to protect the interest of the concerned investors."

16. Similarly, on the strength of the judgement of the Bombay High Court in the case of **Cosmic Radio (supra)** at serial no. (e), Mr. Sancheti argued that mere non-communication of an order does not take away its effect so as to enable the department to pass fresh order. The submission made by Mr. Sancheti is that an order taken on file by an authority is sufficient and its communication is merely an administrative act and that in the absence of formal communication of the same, the legal sanctity of the order is not lost and the parties are bound by it. This submission is made to emphasize the point that the Respondent had already taken a decision quite some time ago on file to the effect that the time sharing scheme business of the Appellant did not fall within the purview of the definition of CIS as mentioned in the Section 11AA of the SEBI Act read with the one given in the CIS Regulations of 1999.

17. The case of **Mohindhr Singh Gill (supra)** at serial no. (f) above is relied upon by Mr. Sancheti to emphasize that when an authority makes an

order based on certain grounds, its validity has to be judged on the reasons so mentioned in the order and cannot be supplemented by fresh reasons in the form of an affidavit. Relying upon the observation of the Hon'ble Supreme Court at paragraph 8 of Mohindhr Singh Gill that "Orders are not like old wine becoming better as they grow older", Mr. Sancheti submits that there has been no change in the nature of the business of room / time sharing undertaken by the Appellant in the past years. Therefore, in the absence of any changed circumstances, the Respondent is precluded from changing its stand by unilaterally reviewing the whole matter on the question of applicability of CIS to the Appellant's case.

18. Referring to a matter relied upon by Ld. Senior Counsel Mr. Shyam Mehta, namely, **Rose Valley**, the only other instance of time sharing business in which an ex parte interim order dated July 10, 2014 has been passed by SEBI under similar circumstances. Mr. Sancheti brought to our notice that the said order of SEBI in Rose Valley has since been stayed by the Hon'ble High Court of Gauhati by its orders dated August 1, 2013 and November 6, 2013 and the SLP preferred by SEBI before the Hon'ble Supreme Court has since been dismissed on April 15, 2014. Mr. Sancheti drew our attention to the following paragraphs of the Hon'ble Gauhati High Court's stay order, which is admittedly in operation till date:-

"In the circumstances indicated above, if the SEBI itself happens to conclude tomorrow that the petitioners' business does not fall within the ambit of the expression Collective Investment Scheme, as envisaged by Section 11AA(1) of the Securities and Exchange Board of India Act, 1992, the petitioners, because of the embargoes placed on them by the impugned order, would have suffered irreparable loss inasmuch as the SEBI does not undertake to make good the loss or losses, which the petitioner may suffer, if the SEBI concludes, in future, that the business of the petitioners does not fall within the ambit of expression Collective Investment Scheme.

What is, however, important to note is that we are prima facie of the view that the submission, made on behalf of the petitioners, that all the four

ingredients, which have been mentioned in Section 11AA(1), are required to be satisfied before treating a scheme as Collective Investment Scheme, has considerable force. We are also of the view that the petitioners have prima facie shown that their scheme of time share, which is the subject matter of controversy in the present writ petition, does not fall within the meaning of the expression of Collective Investment Scheme and that the SEBI does not have, unless can be shown otherwise, the jurisdiction to take any action in the affairs of the business of the petitioners.

Situated thus, we are of the view, though tentative, that in the facts and attending circumstances of the present case and taking into account, more particularly, the fact that the State of Assam has not been able to present before this Court, at this stage, any clear material to show that the SEBI has jurisdiction to interfere with the affairs of the petitioners' business and the SEBI, having not concluded till date that the business of the petitioners falls within the meaning of the expression Collective Investment Scheme as defined in Section 11AA(1), the nature of directions, which the SEBI has passed by the impugned order, need to be suitably interfered with so that the SEBI's directions do not completely restrain the petitioners from carrying out their day to day business.

Considering, therefore, the matter in its entirety and in the interest of justice, it is hereby directed, as an interim measure, that, until returnable date, the operation / execution of the directions, contained in the Clauses (a) and (d) of paragraph 10 of the impugned order, dated 11.07.2013, shall remain suspended and, while the petitioners shall not divert the fund, they shall remain free to operate their bank accounts.

As we have suspended the SEBI's direction given to the petitioners not to collect more money from investors under the existing schemes, we hereby also direct, as an interim measure, that, until returnable date, the record of the collections of money, which may be made by the petitioners, shall be maintained separately so that the collection of money, which may be made by the petitioners, can be easily traced out for consequential actions, if any, which may be required to be taken, should this Court decides to rescind its interim directions. We further direct that until returnable date and without leave of this Court, no further coercive action shall be taken by any of the respondents against the writ petitioners in respect of the matters covered by the present writ petition. Liberty is given to the respondents to seek cancellation / modification, etc. of the interim directions, which we have passed above."

(emphasis supplied)

19. We shall now deal with the Respondent's submissions in brief. The Respondent submits that no confirmation in the form of an order was given to the Appellant in 2001 to the effect that the Appellant's activities were not in the nature of a CIS. The Appellant is alleged to have relied upon a fabricated document, being letter dated October 21, 2013 addressed by the Respondent to

MP Mr. Sanjay Dina Patil. Differences between the original letter and the fabricated document have been brought to the Court's notice. According to Mr. Mehta, it is a case of perjury and hence the appeal should be dismissed on this count alone.

20. The Respondent submits that prior to 2013 it was of the view that time share schemes were not covered by Section 11AA of the SEBI Act and hence did not constitute a CIS. The Respondent came to this conclusion via a macro examination of the activities of the, as opposed to an in-depth micro examination of every scheme of the Appellant individually. However, a development took place in the law related to Section 11AA when the Hon'ble Supreme Court, in the matter of PGF Limited observed that Section 11AA of the SEBI Act would not be restricted to any particular type of commercial activity, and any scheme floated by a particular company would be capable of being construed as a CIS as long as that scheme satisfied the conditions prescribed by Section 11AA. Moreover, Mr. Mehta submits that estoppel lies against governmental action.

21. The Respondent further submits that in April 2013 an investor query was received by the Respondent regarding activities of the Appellant, followed by the reference from MP Mr. Sanjay Dina Patil in July 2013. Thereafter, a CBI enquiry was received in July 2013 regarding the schemes of the Appellant. Mr. Sachin Pilot, the then Minister of State in the Ministry of Corporate Affairs had informed the Parliament regarding the receipt of representations / complaints of financial frauds committed by various companies. All these developments made the Respondent reconsider its former view regarding the nature of the Appellant's activities. In September 2013, the Respondent sought information from the Appellant regarding its schemes.

22. The Respondent states that the communication between the Respondent and MP Mr. Sanjay Dina Patil was not a representation to the Appellant but private communication between the Respondent and Mr. Patil. Moreover, the Respondent had already issued letter dated September 17, 2013 to the Appellant alleging it of carrying on activities in the nature of CIS without SEBI's approval, much prior to letter dated October 21, 2013 addressed to MP Mr. Patil. Therefore, the Respondent states that the re-examination of the Appellant's business was not prompted by any communication between the Respondent and MP Mr. Patil.

23. It is the Respondent's submission that the Respondent was completely within its rights to re-open the matter if it deemed fit. After a thorough examination of the Appellant's activities the Respondent concluded that the schemes examined by the Respondent were covered by Section 11AA of the SEBI Act. The Appellant is alleged to have suppressed material information and not having any intention of co-operating with the Respondent's investigation. The Appellant is totally wrong in saying that the Appellant's Time Share Agreement does not qualify as a value or return bearing proposition but is a simple agreement for provision of services. It is also submitted by the Respondent that the financial statement of the Appellant in respect of the year 2012-13 shows that the Appellant has sufficient revenue to meet its operating expenses and that the Impugned Order should not come in the way of its future operations.

24. Mr. Shyam Mehta, Ld. Senior Counsel for the Respondent also produced an order dated July 10, 2013 passed by the Ld. WTM of SEBI under Sections 11(1), 11B and 11(4) of the SEBI Act, 1992 in a similar case of time sharing scheme in the case of Rose Valley to emphasize that the Appellant is

not being discriminated against and similarly placed other such companies are also being investigated.

25. The major submissions of the Respondent as advanced by the learned Senior Counsel Mr. Shyam Mehta can be summarised hereinafter. **Firstly**, that it is the prerogative of the Respondent to pass ex parte interim orders at any point of time as may be necessary in any given case by invoking powers under Sections 11, 11(4) and 11B of the SEBI Act, and hence no illegality or irregularity was committed in issuing the present Impugned Order without affording any opportunity of hearing to the affected party, i.e. the Appellant. **Secondly**, an irregularity or lacuna, if any, would get cured by granting a post-decisional hearing and holding a full and proper enquiry, as per the provisions of the SEBI Act, to conclude whether the Appellant's activities come within the purview of a CIS as defined by Section 11AA of the SEBI Act and **Thirdly**, no estoppel would act against the Respondent though there is a lapse of around 10 years between the Appellant seeking the Respondent's advice on whether its activities might be covered under CIS on one hand; and the Respondent's decision to initiate action against the Appellant in the year 2013 on the other.

26. The Ld. Senior Counsel for the Respondent has relied upon following rulings in support of the Respondent's case:-

(a) Karnataka Public Service Commission and Others (KPSC) vs. B.M. Vijaya Shankar and Others (1992) SCC 206
(b) Ajit Kumar Nag vs. General Manager (PJ) Indian Oil Corporation Ltd., Haldia and Others (2005) 7 SCC 764
(c) Maharshi Dayanand University vs. Surjeet Kaur (2010) 11 SCC PG.159
(d) M.I. Builders P. Ltd. vs. Radhey Shyam Sahu and Others (1999) 6 SCC 464
(e) M/s. P.G.F. Ltd. & Ors. vs. Union of India and Anr. AIR 2013 Supreme Court 3702

27. We have heard the learned counsel for the parties at length and perused the appeal along with the other documents provided and records of the case summoned by the Tribunal.

28. First of all we deem it appropriate to deal with the contention advanced by Mr. Shyam Mehta, Ld. Senior Counsel on behalf of the Respondent regarding alleged fabrication of a document annexed with the appeal at page 93 of the paper book, i.e., letter dated October 21, 2013 addressed by SEBI to a Member of Parliament, namely, Mr. Patil. It has been strenuously argued that the letter dated October 21, 2013 addressed by the Respondent to Mr. Patil, doesn't tally exactly with the one which has been annexed by the Appellant with the appeal as Exb. 24 as it is a fabricated document. Therefore, the appeal should be dismissed on the ground of perjury, more particularly when such a letter was never issued to the Appellant as it was Respondent's internal correspondence. The submission of the Ld. Senior Counsel Mr. Mehta is that the Appellant is, therefore, precluded from relying upon the said letter in the proceeding before this Tribunal. Keeping in view the insistence of Mr. Mehta on taking action against Appellant for perjury despite an unconditional apology tendered by the Ld. Counsel for the Appellant, we asked the Respondent to produce the entire file pertaining to the case of the Appellant in the Court. On a minute perusal and comparison of copy of the letter dated October 21, 2013 in question as annexed by the Appellant with the appeal at Page 93 of the paper book with the copy of the original letter available in the Respondent's file, it is seen that the contents of both the copies are identical except for a few typographical errors in the copy annexed by the Appellant at Page 93 by utilising the letterhead of SEBI as appearing on the illegible original copy of the said letter. The idea in getting the letter retyped written by SEBI to the Member of Parliament seems only to place on record a legible and neatly typed

copy of the said document. We are, thus, convinced that there was no intention to mislead the Court in any manner. Therefore, we accept the sincere apology tendered by the Ld. Counsel for the Appellant. Similarly, the contention of Respondent that the letter is an internal matter is not tenable. The factum of issuance of letter in question to the MP is admitted by the Respondent. The contents of the letter directly concern the Appellant and not the MP. Therefore, production of such a letter before the Tribunal by the Appellant is not misplaced.

29. Turning to the merit of the case, we note that the present appeal is an offshoot of a larger issue pending before SEBI which relates to the applicability or non-applicability of Section 11AA to the activities of the Appellant. However, since SEBI itself has only come to a prima facie conclusion in the Impugned Order regarding the matter, we too shall refrain ourselves from making any comment regarding the same which may thwart independent enquiry to be made by the Respondent pursuant to SCN dated June 26, 2014 as to whether the activities of the Appellant are covered by CIS or not.

30. One of the issues before us today is whether there were any emergent circumstances justifying an ex parte interim order against the Appellant by invocation of process under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992. Before analysing the nature of powers conferred by the statute on the Respondent by Scheme of Section 11 of the SEBI Act, 1992, we deem it fit to deal with certain undisputed facts which have come to light during the course of the matter. Firstly, on February 27, 2001, the Appellant itself approached SEBI to seek clarification regarding the applicability of CIS Regulations to the Appellant’s membership scheme. Then again on June 20, 2002, the Appellant, after providing SEBI with details of its business asked for SEBI’s advice on

whether or not its activities fell within the purview of a CIS. It is also a matter of record that SEBI did not clarify the situation in any manner whatsoever for shocking period of around 8 years. SEBI in its letter dated October 21, 2013 wrote to MP Mr. Patil that the Appellant's activities did not satisfy the conditions of Section 11AA of the SEBI Act and therefore, none of the schemes time sharing business fell within the ambit of a CIS. A perusal of the original files produced by SEBI as well as that of Reply-Affidavit filed by it undoubtedly points out that the Respondent had taken a view on file that the time sharing business does not fall within the definition of CIS. This view was nurtured by the Respondent till it was changed as a result of either the judgment in the case of PGF Ltd. by the Hon'ble Supreme Court on 12th March, 2013 and/or the intervention of MP Mr. Patil by a letter dated 2nd July 2013 calling upon SEBI to investigate the case of Appellant regarding applicability of CIS to the time sharing business.

31. We have examined Sections 11(1), 11(4) and 11B read with Sections 11AA(1), 11AA(2) of the SEBI Act along with Regulation 65 of the CIS Regulations of 1999, under which the Respondent has passed the Impugned Order to protect the interest of investors.

32. An analysis of the precise legal nature of the discretion conferred by these provisions would reveal that it is not boundaryless. It cannot be resorted to indiscriminately without clearly spelling out the urgency in a given case which is to be determined in each case on its own facts and circumstances. The Appellant who is directly and adversely affected by the ex-parte interim impugned order has atleast a legitimate expectation of being treated reasonably by getting an opportunity of being heard before such findings and directions are issued against him in the peculiar facts and circumstances of the case. Such an unjust action of the Respondent is liable to be struck down

simply on the ground of unfairness and not due to any innuendo of malice or bad-faith although records clearly reveal that it mainly emanated from a letter written by a Member of Parliament and also in the wake of Hon'ble Supreme Court's ruling in the case PGF Ltd. Therefore such a sudden use of extreme regulatory measure in the form of an ex-parte interim order can hardly be countenanced in the case in hand where the Appellant had, on its own, approached the Respondent for guidance, advice and clarity a decade ago. Exercise of discretion in an unruly manner is not envisaged in the scheme of SEBI Act, particularly sections 11(1), 11(4) and 11B thereof. Invocation of discretion under these provisions therefore, has to be rational and be guided by sound principles of natural justice and fair play in action. The Impugned Order is based more on speculative inferences rather than legal conclusions drawn after analysing questions of law and disputed facts after affording an opportunity of being heard to the Appellant.

33. Power of the kind that the Respondent possesses begets a monumental responsibility and needs to be exercised with great care and caution so that no one might question the acts of the sole regulator of the Indian securities market purely on the basis of non-observance of the principles of natural justice. Giving every party an opportunity of being heard is one of the most significant limbs of natural justice. Although, SEBI does have the power to pass ex-parte interim orders in certain cases, it must do so only upon showing the existence of circumstances which warrant such a drastic measure. It is a settled position of law that a decision, be it judicial, quasi-judicial or administrative, on a question, without offering an opportunity of a hearing will suffer from the vice of unfairness. It is well settled that if there is authority to decide and determine to the prejudice of another person, the duty to give a fair hearing is implicit in the exercise of such power.

34. It is indeed accepted that the necessity for speed may call for immediate action in a given case and the need for promptitude may exclude the duty of giving a pre-decisional hearing to the person affected. At the same time, in such situations, there is an inherent need to show that the danger to be averted or the act to be prevented is so imminent that the pre-decisional hearing must be dispensed with. In the present matter, no such urgency has been brought to our notice. In fact, we feel that by asking the Appellant to stop all its activities, the customers who wish to avail of the schemes of the Appellant by going on holiday or vacation, are being put to loss.

35. Where a decision has to be reached by a body acting judicially, there must be a balance between the need for expedition and the need to give full opportunity to the person against whom charges have been levelled. The necessity of striking a pragmatic balance between the competing requirement of acting urgently and fairly can never be ignored.

36. In Zenith Infotech Ltd. vs. SEBI & Ors., this Tribunal has held that although SEBI is empowered to pass ex-parte interim orders, this power is to be exercised sparingly in most deserving cases of extreme urgency. Inter alia it was observed that it is a settled position that if the essentials of natural justice in the sense of granting an opportunity of hearing are ignored in passing an order to the prejudice of a person, the order is a nullity for want of natural justice and no amount of post-decisional hearing can cure the same. It was held that in the facts of the case, the post-decisional hearing was nothing more than an eyewash.

37. SEBI has even today only managed to form a prima facie opinion regarding the applicability of CIS Regulations to the Appellant’s business. In such a situation, if the Respondent, after conducting an in-depth analysis of the

scheme of the Appellant comes to the conclusion that the schemes in fact do not fall within the ambit of CIS, the Appellant would already have suffered irreparable loss due to its Members not being able to avail themselves of the services offered by the Appellant. In such an eventuality, as stated hereinabove, even the customers, would be put to a loss. Strictly speaking, the Impugned Order may not be stigmatic in nature but it has the potential to lower the image and reputation of the Appellant in the field of time share business, particularly when other companies, like Rose Valley etc., are continuing with their business.

38. It is also pertinently noted that since 2001, the nature of the activities of the Appellant has not undergone any change. At any rate, the Respondent has neither brought any such change to our notice during the course of the hearing of the matter nor does the record reveal such a scenario. It is clear that in the letter dated October 21, 2013 addressed to MP Mr. Patil, the Respondent has stated that it is of the opinion that the Appellant's activities do not constitute CIS. In the absence of any change in circumstance or business or nature of the Appellant's activities, we fail to see what prompted the Respondent to lash out at the Appellant with such a harsh order, without first providing them with an opportunity of being heard. Unless the clearest cause of public injury flowing from the least delay is self-evident, nothing should be done to act behind the back of a person by invocation of urgency. The securities regulator should be able to bring its prodigious power to bear on offenders, but always with caution and natural justice. Therefore, the impugned order cannot be sustained in the eyes of law and on fact.

39. We may now deal with certain cases cited by the Respondent:-

40. **Karnataka Public Service Commission and Others (KPSC) vs. B.M. Vijaya Shankar and Others** –

In KPSC case (supra) Hon'ble Supreme Court was confronted with a situation where there was a blatant violation of the instructions issued by the Commission regarding writing of roll numbers on the front page of the answer sheets only in the space provided therefor on the very front page itself. Instead some of the students wrote roll numbers inside the paper book on all the pages contrary to the clear instructions of the Commission. Therefore, the Commission did not evaluate such answer books without according any opportunity of being heard to the affected candidates. In the circumstances, Hon'ble Supreme Court held that competitive exams are required to be conducted by the Commission for public service in strict secrecy to get the best brains and therefore any violation of norms/rules laid down by the Commission for holding the competitive exams had to be viewed seriously. In the facts and circumstances of that case, therefore, the Hon'ble Supreme Court held that pre-action opportunity of hearing was not required to be afforded to the candidates by the Commission before deciding to reject the evaluation of such answer sheets. The facts of this case, thus, are entirely different from the present case and do not advance the case of the Respondent.

41. **Ajit Kumar Nag vs. General Manager (PJ) Indian Oil Corporation Ltd., Haldia and Others (2005) 7 SCC 764** the Hon'ble Supreme Court was concerned with the dismissal of one of the most recalcitrant employees of the Indian Oil Corporation without holding regular enquiry against him and thus without affording any opportunity of hearing being given before passing the impugned dismissal order against him. The Single Bench as well as Division Bench of the High Court upheld the dismissal order, so also the Hon'ble Supreme Court, in view of the exceptional situation contemplated by clause (VI) of standing order 20 of Certified Standing Order of the Corporation, i.e., on satisfaction of the General Manager that immediate action was required, he

could dismiss or remove an employee without giving him an opportunity of being heard. A similar provision is to be found in the second proviso of Article 3(11) (2) of the Constitution of India which has been interpreted by Hon'ble Supreme Court in several cases, particularly from Union Of India vs. Tulsi Ram Patel (1985) 3 SCC 398 onwards that such a power of dismissal/removal of a delinquent employee has to be invoked in grave and extraordinary situations alone. Otherwise the normal rule is to hold an enquiry against the employee concerned and take appropriate action only after giving him reasonable opportunity of being heard in the said enquiry. This is the fundamental rule of audi alteram partem and its exclusion is an exception.

42. In the case of **Ajit Kumar Nag** the gravity of the situation can be gauged from the fact that the appellant Ajith Kumar Nag, an employee of IOCL laid a batch of hooligans to Halidia Refineries Hospital and severely assaulted and abused Dr. Bhattacharya, the Chief Medical Officer. The appellant precisely slapped, kicked and pushed around Dr. Bhattacharya. This resulted in suspension of the hospital services causing inconvenience to the residents of the Refinery Township. In this backdrop, the General Manager of IOCL was convinced that any delay in not dismissing the said disgruntled employee would seriously jeoparadise the interest of the corporation especially when the question of vital requirement of providing medical services to the sick and needy was involved. Therefore, it was held by the Hon'ble Supreme Court that the General Manager was right in invoking the extraordinary power of dismissal without enquiry into the facts of that case.

43. No general rule was laid down by the Hon'ble Supreme Court for exclusion of the principles of natural justice either in the case of **Tulsi Ram Patel** or **Ajit Kumar Nag** but certain instances have been enumerated in which it may not be reasonably practicable or possible to hold a full fledged regular enquiry before passing order of dismissal which, inter alia, include:

> *"activities of terrorising, threatening or intimidating witnesses who might be giving evidence against a civil*

> *servant or threatening, intimidating or terrorising disciplinary authority or his family members or creating an atmosphere of violence or general indiscipline and insubordination."*

This case is also, therefore, totally distinguishable and does not advance the case of the Respondent in any manner.

44. In the case of **Maharshi Dayanand University**, the Respondent Surjeet Kaur before the Hon'ble Supreme Court had appeared in the University exam by pursuing two degrees of M.A. as well as B.Ed simultaneously contrary to the rules of examination. Thereafter, she obtained an order finally from the National Dispute Redressal Commission, New Delhi, directing the University to issue B.Ed degree to the Respondent in contravention of the University rules. In this background, the Hon'ble Supreme Court held that no court has competence to issue a direction contrary to law nor can it direct an authority to act in contravention of the statutory provisions. Indeed, the Respondent Surjeet Kaur's claim was for a direction to the appellant to act contrary to its own rules. This was admittedly not permissible. In this connection the Hon'ble Supreme Court held that even the doctrine of promissory estoppel which is an equitable doctrine, would not apply against the University just because the Respondent was allowed to appear in the examination. The Hon'ble Supreme Court, therefore, simply reiterated the established legal position that there can be no estoppel/promissory estoppel against the legislature in exercise of the legislative function nor can the Government or a Public authority be debarred from changing its stand in a given situation. Thus, the question of estoppel has to be determined on the basis of facts in each case.

45. Advancing his argument further on the doctrine of estoppel, Mr. Shyam Mehta relied upon the judgment of Supreme Court in **M.I. Builders P. Ltd.** wherein the Hon'ble Supreme Court held that decision of the

Municipal Corporation (Lucknow) to handover a park of historical importance under an agreement to a private builder for construction of an air-conditioned underground shopping complex on the pretext of decongesting the area without inviting tender and without obtaining any project report was not an informed objective decision, as it was contrary to statutory provisions. Finding the Corporation's action unreasonable, arbitrary, unfair and opposed to public policy, public interest and the doctrine of public trust apart from being an example of bad-governance, Hon'ble Supreme Court also observed in paragraph 66 of the judgment that the Corporation is a continuing body and it may be estopped in a given case, but when it finds that an action was contrary to law, no estoppel would act as an impediment in the way of the Corporation to change its stand.

46. Applying the ratio of **M.I. Builders P. Ltd. and Maharshi Dayanand University** to the facts of present, we will note that the Respondent itself did not take any action against the Appellant till 2013 as SEBI was not sure whether such Time Sharing Scheme of a Club and Members would come within the ambit of CIS or not. However, it changed its mind thereafter and started investigating a couple of such schemes including the Rose Valley matter. SEBI may be within its right to change its stand on the interpretation of law after a lapse of more than a decade and such a change may not hold to be illegal and bad only on the ground of the principle of estoppel. We will, therefore, repel the contention of the Appellant on this count. But the crucial point to be considered is whether SEBI is entitled to change its stand by taking a somersault and suddenly pass an adverse order with serious civil consequences without affording an opportunity of being heard to the affected person.

47. As held hereinabove, the answer to this has to be in the negative. SEBI may not be bound by estoppel in a given case to change its stand due to changed circumstances or change in policy or law. But Respondent cannot do the same without following principles of natural justice unless necessity or emergency of a grave nature is shown by SEBI to justly take ex parte interim action in the form of extreme directions under sections 11(1), 11(4), 11B of SEBI Act to halt the business of Appellant in question. No such urgency or dire need has been brought on record by SEBI which could justify the passing of the Impugned Order in question. It is seen from the records of SEBI and the pleadings that there are some queries by some prospective investors who intend to be Members of the Appellant's club by investing some money. Even if there are some complaints against the Appellants, as stated by SEBI, they should have been forwarded by SEBI to the Appellant, and only on failure of the Appellant to redress such grievances should the Respondent have taken appropriate action against the Appellant as per law. The Respondent cannot call upon the Appellant to close its business and refund the amount received to its Members without first deciding the issue whether the Appellant's business of time sharing is covered by the definition of CIS.

48. Turning to the case of Rose Valley the Ld. Senior Counsel, Mr. Shyam Mehta submitted that SEBI has initiated action against almost 44 similar cases and that the Appellant was not singled out for this treatment. On being asked by the Tribunal if SEBI had taken action against any other similarly placed schemes, Mr. Mehta could point out only one case of time sharing scheme of one company, namely, Rose Valley. The concerned order dated July 10, 2014 passed by the Ld. WTM of SEBI issuing almost similar directions against Rose Valley was produced before us. However, the Respondent did not bring to our notice that the said order dated July 10, 2013 had been stayed by the Hon'ble

Gauhati High Court in Writ Petition (C) No. 4298 of 2013 by orders dated August 1, 2013 and November 6, 2013 and that the SLP preferred by SEBI against the stay order granted by Hon'ble Gauhati High Court has since been dismissed by the Hon'ble Supreme Court by its order dated April 15, 2014 in SLP (C) No. 3725 of 2014. In all fairness, all these developments and the orders of Hon'ble High Court and Supreme court in question should have been brought to our notice by SEBI which took up the matter to the Hon'ble Supreme Court but the same were produced before us on the next date of hearing by Mr. Sancheti, Ld. Senior Counsel for the Appellant. In a nutshell, the Hon'ble High Court arrived at a prima facie view that the company's activities were not in the nature of CIS. The order also observed that in the absence of a determination by the SEBI regarding whether or not the company's business amounted to a CIS, SEBI ought not to put embargoes on the company. The operation of SEBI directions was suspended and the company was left free to operate its bank accounts.

49. In the case in hand also, therefore, considering the situation that no material has been brought on record to show that SEBI has any justification to interfere with the Appellant's time share business, especially in light of the fact that SEBI has not yet conclusively determined whether or not the provisions of CIS are attracted to the Appellant's business, we are of the view that the impugned order cannot be sustained particularly when SEBI has itself issued SCN dated June 26, 2014 to the Appellant under Rule 4 of SEBI (Procedure for Holding Enquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 read with Section 15I of the SEBI Act, 1992.

50. The SCN dated June 26, 2014, in a nutshell, mentions / alleges that an examination of the affairs of the Appellant was undertaken by the Respondent for "possible violation" of the provisions of the SEBI Act, 1992 read with

connected Rules and Regulations. On the basis of such an examination, the Respondent has leveled an allegation that the Appellant is carrying out a CIS in the name of time share business without obtaining a certificate of registration as required by the provisions of CIS Regulations, 1999.

51. It is, therefore, evident that an enquiry as per procedure established by law through an Adjudicating Officer (AO), who is a quasi-judicial authority, into the vital issue as to whether Appellant's business activities amount a CIS within the meaning of Sections 11AA(1) and 11AA(2) of the SEBI Act, has just commenced and this main issue is yet to be decided by the Ld. AO. Documents in support of their case have not been filed and exchanged by the parties before the Ld. AO. Issues have not been framed by the Ld. AO and witnesses, if any, have not been examined and cross-examined by the parties before the Ld. AO. At this stage, it is, therefore, too premature to halt the business activities of the Appellant on the basis of a tentative view formed by the Respondent. This apart, the potential nature of findings in the Impugned Order is likely to affect a fair trial of the main issue pending before the Ld. AO.

52. Furthermore, Ld. Senior Counsel Mr. Mehta contends that the sudden spurt in activities of the Respondent is the result of the judgment of Hon'ble Supreme Court in PGF Ltd. It is difficult for us to reconcile with this submission because the PGF order was passed by the Hon'ble Supreme Court on March 12, 2013 whereas the Impugned ex parte interim order has been issued after about 16 months of the PGF judgment i.e. on July 31, 2014. The Respondent should have, therefore, exercised restraint in exercising discretion conferred upon him under Sections 11(1), 11B and 11(4) of the SEBI Act in the peculiar facts and circumstances of the present case,

particularly in view of the fact that the SCN had already been issued for holding regular enquiry in the whole mater.

53. It is essential to consider yet another vehement argument advanced by Mr. Shyam Mehta that the Appellant did not furnish the requisite information / document asked for by the Respondent. Ld. Senior Counsel Mr. Pradeep Sancheti, on the other hand, argued that all the information / documents were duly submitted by the Appellant except an exhaustive and detailed list of Applicants / Members and for this purpose some more time was sought by the Appellant. The said list has since been submitted during the course of hearing of the appeal. We have carefully considered the submissions of the Ld. Senior Counsel for the parties on this count. A simple perusal of the entire SCN dated June 26, 2014 points out that there is not even a whisper of non-submission of any relevant information / documents of the Appellant. Paragraph 3 of the SCN in question mentions in clear terms that information / documents sought by SEBI by letter dated September 17, 2013 have been furnished by the Appellant vide letters dated October 01, 2013; October 13, 2013; December 03, 2013, April 02, 2014 and April 14, 2014.

54. Therefore, the records reveal that the Appellant has submitted almost all the information / documents, though in a phased manner, to the Respondent and has, thus, been co-operating with the Respondent in this regard. We fail to understand how the delayed delivery of a list of subscribers / members to SEBI would prove such a big hurdle as to prevent SEBI from taking a final view on the nature of the time share business of the Appellant. If its prima facie view that the time share business was not a CIS could be formed on the basis of details so supplied, there was no reason for SEBI to abruptly order the Appellant to discontinue the scheme till issuance of the SCN dated June 26, 2014. Mr. Sancheti, Ld. Senior Counsel for the Appellant, during the course of

hearing, specifically submitted that if any information / document is still remaining, the same would be furnished within two weeks. The contention of the Respondent that the Appellant has not submitted the information / documents as required by the Respondent, therefore, cannot support passing of an ex parte interim Impugned Order. In the totality of the facts and circumstances of the case, the Impugned Order is quashed and set aside.

55. To sum up, in the present case, Appellant has been knocking on the doors of SEBI since 2001 by seeking its decision on the question as to whether the time sharing business carried on by the Appellant is covered under CIS or not. Although no formal order was issued in the year 2001, it is now admitted by counsel for SEBI that since the very beginning SEBI was of the opinion that time sharing business is not covered under CIS. In fact, in the year 2010, SEBI once again scrutinized the documents relating to the business carried on by the Appellant and it is evident from the letter addressed by SEBI to a Member of Parliament (MP) on October 21, 2013 that even after scrutiny of documents furnished by Appellant in the year 2010 SEBI was of the opinion that the time sharing business carried on by the Appellant was not covered under CIS. However, on the basis of letter addressed by the said MP, SEBI decided to reconsider the issue. From the impugned ex parte interim order it is seen that the basis for such order, is the letter addressed by a Member of Parliament, the Economic Offences Wing etc. Since the dispute relates to the schemes that were floated by the Appellant during the period when SEBI had considered that the time sharing business was not covered under CIS, WTM of SEBI ought to have appreciated that it would be improper to pass any adverse ex parte order against the Appellant on the basis of his prima facie opinion derived from the letters addressed by a Member of Parliament and certain agencies, especially when prima facie opinion of the Gauhati High Court is to

the effect that time sharing business is not covered under CIS. In other words, even though it is open to SEBI to change its stand on new facts coming to light, in the facts of present case, having taken a stand for more than a decade, the Whole Time Member of SEBI could not have changed that stand by way of an ex parte decision based on his prima facie view, especially when prima facie view of Gauhati High Court to the effect that time sharing business is not covered under CIS, is holding the field since August, 2013. It is relevant to note that the Apex Court while disposing of the appeal filed by SEBI has not interfered with the prima facie view of the Gauhati High Court on ground that the matter is listed for final hearing before the Gauhati High Court. Admittedly, the prima facie view of the Gauhati High Court continues to be in force till date. Neither the Whole Time Member in the impugned order has referred to the order passed by Gauhati High Court, nor counsel for SEBI was aware of the order passed by the Gauhati High Court against which SEBI had filed an appeal before the Apex court. In fact, the order of the Gauhati High Court as also order of the Apex Court on the appeal filed by SEBI against the decision of the Gauhati High Court were brought to our notice by the counsel for Appellant. In these circumstances, since the prima facie view of the Whole Time Member of SEBI being contrary to the prima facie view of the Gauhati High Court, we have no option but to set aside the ex parte interim order which is impugned in the present appeal.

56. Admittedly there has been an inordinate delay of about one year on part of Appellant in furnishing all documents that were called for by SEBI. It is not in dispute that during the pendency of the appeal substantial documents have been furnished to SEBI and counsel for Appellant has assured us that remaining particulars/documents would be furnished within a period of two weeks from today. Accordingly, we set aside the impugned ex parte interim order dated July 31,

2014 and direct WTM of SEBI to pass appropriate order on merits after hearing the Appellant as expeditiously as possible, preferably within a period of eight weeks from the date of Appellant tendering all documents / particulars to SEBI. Till then, the Appellant shall not launch any new CIS schemes and both Appellants shall not sell or dispose of or create any third party rights in respect of the assets belonging to them in any manner whatsoever. As noted in the order of High Court of Gauhati, we also direct the Appellant to maintain separate account of amounts which the Appellant may receive in respect of existing schemes in the meanwhile.

57. Appellants in both appeals, who have taken more than a year to furnish requisite particulars called for by SEBI, shall cooperate with SEBI in the matter of tendering all particulars / documents called for by SEBI and in SEBI passing order on merits within the time stipulated herein.

58. Both appeals, thus stand disposed of in terms of above directions. In view of disposal of appeals, the Miscellaneous Application Nos. 104 and 105 of 2014 become infructuous and are accordingly disposed of with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A.S. Lamba
Member

17.09.2014
Prepared and compared by:
msb