BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Order Reserved On : 14.09.2016
Date of Decision : 25.10.2016

Appeal No. 126 of 2013

1. PAN Asia Advisors Limited
(now known as Global Finance and Capital Limited)
International Corporate Finance Minster House,
42 Mincing Lane, London,
United Kingdom

2. Mr. Arun Panchariya
Villa No. 29, Street No. 2,
The Meadows-6,
Emirates Hills Living III,
Dubai, UAE …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 Ms. Mona Vora, Advocate i/b Joby Mathew & Associates for Appellants.

Mr. Shyam Mehta, Senior Advocate with Mr. Harekrishna Ashar and Mr. Saurabh Bachhawat, Advocates i/b K. Ashar & Co. for the Respondent.

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

Per: Justice J.P. Devadhar

1. This appeal is filed to challenge the order passed by the Whole Time Member ("WTM" for short) of Securities and Exchange Board of India ("SEBI" for short) on 20.06.2013. By that order appellants as

persons connected to the Indian Securities Market are debarred from rendering services in connection with instruments that are defined as securities under Section 2(h) of the Securities Contracts (Regulation) Act, 1956 ("SCRA" for short) for a period of 10 years and further the appellants are prohibited from accessing the capital market directly or indirectly for a period of 10 years.

2. Initially, by a majority decision of this Tribunal dated 30.09.2013 the appeal was allowed and the impugned decision of the WTM of SEBI was set aside on ground that SEBI had no jurisdiction to initiate proceedings against the appellants in relation to the role played by appellants as Lead Managers to the Global Depository Receipts ("GDRs" for short) issued by several Indian Companies outside India.

3. On appeal filed by SEBI, the Apex Court by its decision dated 06.07.2015 set aside the majority decision of this Tribunal and held that SEBI had jurisdiction to initiate proceedings against the appellants if the appellants as Lead Managers to the GDRs had violated the provisions of SEBI Act and the Regulations framed thereunder and remanded the matter for fresh decision on merits. Accordingly, the appeal is heard afresh and disposed of by this decision.

4. Facts relevant for this appeal as per the documents available on record are as follows:-

a) Mr. Arun Panchariya, Appellant No. 2 ("AP" for short), a Non- resident Indian was the

Promoter/Managing Director of Appellant No. 1, i.e. PAN Asia Advisors Limited, now known as Global Finance and Capital Limited ("PAN Asia" for convenience) holding 100% shares of PAN Asia. AP has stepped down as Managing Director of PAN Asia with effect from 29.09.2011.

b) PAN Asia was appointed as Lead Manager to the GDRs issued by six entities namely; (i) Asahi Infrastructure & Projects Ltd. ("Asahi" for short), (ii) IKF Technologies Ltd. ("IKF" for short), (iii) Avon Corporation Ltd. ("Avon" for short), (iv) K Sera Sera Ltd. ("K Sera" for short), (v) Cat Technologies Ltd. ("Cat" for short) and (vi) Maars Software International Ltd. ("Maars" for short). All these companies are hereinafter referred to as 'issuer companies'.

c) Since the appellants had adopted the same modus operandi in all the six companies, for convenience, we set out facts relating to the GDRs of Asahi. Prior to the GDR issue, Asahi had issued 3,71,96,000 fully paid up equity shares. By appointing PAN Asia as Lead Manager, Asahi decided to raise funds from investors outside India through the issuance of GDRs.

d) Appellants have contended before the Apex Court (see para 89 of the judgement dated 06.07.2015) that the role played by PAN Asia as Lead Manager to the GDRs were, inter-alia,

i) Conducting due diligence in collecting and evaluating all possible information which may have a bearing on the issue for the purpose of listing the GDRs abroad.

ii) Assessing the market for the purpose of the issue and marketing the issue.

iii) Obtaining confirmation of acceptance of subscription from the initial investors to the GDR issue.

iv) Assisting the issuer company at all stages from preparing the documentation, making investor presentation selection of other managers etc.

v) Receipt of confirmation of subscription monies received in the issuer companies ESCROW account, opened/maintained by the companies with the ESCROW account holding bank.

vi) Receipt of Depository Banks confirmation of issue of instructions to the clearing systems of the GDR subscribers and confirmation from the requisite foreign stock exchange of the listing of the GDRs issue.

vii) Ensuring that the issuer companies comply with applicable legal formalities of the countries where the GDRs are listed.

e) On 29.04.2009 Asahi issued 29,91,00,000 equity shares which resulted in allotment of 21,91,000 GDRs having total value of 5.98 Million USD. The above GDRs issued by Asahi were fully subscribed and closed on 29.04.2009 itself.

f) Eight days prior to the issuance of GDRs i.e. on 21.04.2009 Vintage FZE ("Vintage" for convenience) an entity situate at Dubai entered into a loan agreement with European American Investment Bank AG ("Euram Bank" for convenience). It is relevant to note that the object of the loan was to fund Vintage with 5.98 Million USD to take down GDR issue of Asahi and the said loan amount was to be transferred

to the Euram A/c No. 540030. To secure the Euram Bank's claims and entitlements against Vintage, arising on account of the said loan liability or any future liability, Vintage agreed to pledge the securities held by it in its Account No. 540030 with the Euram Bank. It is equally important to note that Vintage was controlled by AP and in fact the loan agreement between Euram Bank and Vintage was signed by AP on 22.04.2009 as Managing Director of Vintage.

g) On the same day i.e. on 21.04.2009 apart from the Loan Agreement between Vintage and Euram Bank, Asahi entered into a Pledge Agreement with Euram Bank wherein it was recorded that Vintage has borrowed 5.98 Million USD from Euram Bank under a loan agreement dated 21.04.2009 and that Asahi acknowledges and agrees to the terms and conditions of the said loan agreement. By the said Pledge Agreement, Asahi pledged to the Euram Bank following assets as collateral security to the Bank i.e.-

i) All rights, title and interest of Asahi in the securities deposited by Vintage in its securities Account No. 540030 (referred as 'Pledged Securities Account") up to the amount of 5.98 Million USD existing

at the time of executing the Pledge Agreement or thereafter.

ii) All right, title and interest of Asahi in and to the balance of funds existing on the date of the said agreement or thereafter in the Account No. 540030 (referred to as "Pledged Time Deposit Account").

By the said Pledge Agreement Asahi agreed to deposit with the Euram Bank all dividends, interest and other payments, distributions of cash or other property resulting from the pledged securities and funds. Thus, Asahi by executing the Pledge Agreement on 21.04.2009 secured the loan of 5.98 Million USD taken by Vintage on 21.04.2009 from the Euram Bank for taking down the GDRs of Asahi valued at 5.98 Million USD.

h) Till October 2010, 100% shares of Vintage were held by Arun Pancharia (AP) and thereafter 100% shares of Vintage are held by Alkarni Holdings Ltd. It is not in dispute that 100% shares of Alkarni Holdings Ltd. are held by AP and his relatives. Thus, AP on one hand got GDRs of Asahi (valued at 5.98 Million

USD) issued as Lead Manager and on the other hand as a Shareholder, Managing Director and Authorized Signatory of Vintage took loan of 5.98 Million USD from Euram Bank for subscribing (take down) to GDRs to be issued by Asahi and made Asahi to sign a Pledge Agreement, whereby Asahi inter alia agreed to secure the loan of 5.98 Million USD taken by Vintage from Euram Bank for subscribing to the GDRs of Asahi.

i) On 01.06.2009 Asahi informed BSE about the creation and allotment of 29,91,00,000 equity shares which were converted into 29,91,000 GDRs valued at 5.98 Million USD and that the said GDRs were claimed to have been fully subscribed by foreign investors.

j) Investigation carried out by SEBI revealed that during the investigation period there was heavy trading in the scrip of above six issuer companies due to conversion of GDRs into equity shares by certain Foreign Institutional Investors/ sub accounts viz:-

   i) India Focus Cardinal Fund. ('IFCF' for convenience)
   ii) KII Ltd.

k) Investigation carried out by SEBI further revealed that equity shares generated on conversion of GDRs sold by above FIIs/sub accounts were bought by a set of clients, viz:-

i) Alka India Ltd. ("Alka" for short)

ii) Basmati Securities. ("Basmati" for short)

iii) S.V. Enterprises. ("SV" for short)

iv) JMP Securities. ("JMP" for short)

v) Oudh Finance and Investments Ltd. ("Oudh" for short)

Investigation carried out by SEBI further revealed that AP was connected with IFCF and KII Ltd. which converted GDRs into equity shares and AP was also connected with the above entities which purchased the shares generated out of conversion of GDRs in the Indian Securities Market. Thus, the investigation revealed that AP, as Managing Director of PAN Asia got the GDRs issued, as Managing Director of Vintage subscribed to the GDRs and thereafter transferred the GDRs to the entities controlled by AP and on conversion of GDRs into equity shares ensured that the said equity shares of the issuer companies are bought by the entities with whom AP was connected.

l) In view of above facts SEBI had initially passed an ad-interim ex-parte order on 21.09.2011 thereby restraining the appellants from entering the securities market. Thereafter, confirmatory order was also passed on 17.01.2012. On conclusion of investigation show cause notice was issued to the appellants and by the impugned order passed on 20.06.2013 appellants are debarred from rendering services in connection with instruments defined as securities under SCRA for 10 years and the appellants are also debarred from entering the securities market for a period of 10 years.

m) As noted earlier, this Tribunal by a majority decision set aside the impugned order on ground that SEBI had no jurisdiction to initiate action against appellants in relation to GDRs issued outside India. Apex Court by its order dated 06.07.2015 reversed the majority decision of this Tribunal and held that SEBI has jurisdiction in such cases to pass debarment order if the allegations levelled against the appellants fall within the scope of Section 12A(a), (b) & (c) of SEBI Act and under the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (“PFUTP Regulations, 2003” for convenience) and to determine the aforesaid

question, the Apex Court remanded the matter to this Tribunal.

5. Accordingly, we have heard counsel on both sides extensively on the question as to whether the appellants have violated the provisions contained in the SEBI Act read with SCRA and the Regulations framed thereunder as also the question as to whether SEBI is justified in debarring the appellants from rendering services in relation to securities defined under the SCRA for 10 years and further debarring the appellants from accessing the securities market for a period of 10 years.

6. Mr. Sancheti learned Senior Advocate argued on behalf of the appellants and Mr. Mehta learned Senior Advocate argued on behalf of the respondent.

7. Argument of Mr. Sancheti, learned Senior Advocate appearing on behalf of appellants may be summarized as follows:-

a) Allegations held proved against the appellants in the impugned order remain unsubstantiated in as much as, there is no finding recorded in respect of the said allegations in the impugned order. In fact, finding recorded in the impugned order that the appellants have violated Section 77(2) of the Companies Act, 1956 is now admitted to be beyond the show cause notice and hence not pressed by SEBI. Similarly, during the course of arguments, counsel for SEBI has

not pressed the charge that in fact it is the Indian Investors who actually funded the GDR issue which is most crucial allegation on merits as well as on the aspects of SEBI exercising jurisdiction for investor protection. Similarly, the allegation that there were dealings between the subsidiaries of the issuer companies and the entities belonging to AP are ex-facie based on conjectures and surmises. In these circumstances, it is submitted that the impugned order is liable to be quashed and set aside.

b) It is settled in law that where the allegation of fraud is to be adjudicated, all concerned persons/ parities to the fraud must be before the Court/Concerned Authority. Deciding the issue of fraud in the absence of all parties allegedly involved in the fraud would be in breach of the principles of natural justice. Moreover, if separate proceedings are initiated against the persons allegedly involved in the fraud, there is likelihood that different conclusions may be drawn and it is possible that there may be conflicting decisions as to the alleged commission of fraud. In the impugned order it is held that the appellants have committed fraud on Indian Investors in collusion with the issuer companies, Euram Bank and Overseas Depository Banks (Viz:- Bank of New York, Mellon

and Deutsche Bank). Since none of these entities were parties to the show cause notice issued to the appellants and since the impugned order is passed without impleading the aforesaid parties to the proceedings initiated against the appellants, the impugned order is liable to be quashed and set aside. In support of the above contentions counsel for appellants placed reliance on the decisions of the Apex Court in case of Mutha Associates & Ors. vs. State of Maharashtra & Ors. reported in (2013) 14 SCC 304, Manohar Joshi vs. Nitin Bhaurao Patil & Anr. reported in (1996) 1 SCC 169, J. Jose Dhanapaul vs. S. Thomas & Ors. reported in (1996) 3 SCC 587, decision of the Madras High Court in the case of P. Vinmani vs. The General Manager, SBI reported in 2011 (2) CTC 260 and Oswal Agro Mills Ltd. vs. The custodian & Ors. reported in 2004 (2) All MR 491.

c) The impugned order suffers from manifest errors, in an much as, proper investigation has not been carried out with reference to the records of the concerned overseas Depository Banks viz. Bank of New York, Mellon & Deutsche Bank to find out as to who were the original subscribers or original allottees of GDRs when issued. Admittedly, no action has been initiated against those depository banks and no enquiry has

been initiated in respect of initial subscribers to whom GDRs were issued. Similarly, no investigation has been carried out with Euram Bank to ascertain as to how the issuer companies were able to make 'a Time Deposit' from the GDR issue amounts and who received the accruals/ benefits by way of interest etc. on such fixed deposits. Relying on a decision of this Tribunal in case of BPL Ltd. vs. SEBI reported in (2002) SAT 19 it is submitted that failure to investigate all entities involved in the alleged fraud has materially affected the outcome of the investigation and hence the impugned order cannot be sustained.

d) In the impugned order it is erroneously held that except by way of few book entities there is no real movement of funds from the GDR issue. Admittedly, each issuer company had a bank account with Euram Bank and admittedly GDR subscription amounts were deposited in those accounts. Merely because two or more entities had bank account in the same bank and funds were transferred from one entity to another it cannot be said that there is no receipt of payment on issuance of GDRs and the entries are merely book entries.

e) In the impugned order it is erroneously held that the source of funding for the GDRs were done by converting the GDRs into equity shares and after selling the said equity shares in the Indian Market, the sale proceeds were repatriated abroad to repay the loan taken by Vintage. In fact in case of Asahi only 10.57% GDRs were sold and converted into shares and therefore, there is no justification for drawing a conclusion that it is only upon conversion of GDRs and sale of shares released on conversion of GDRs in the Indian Market, the sale proceeds were repatriated for repaying the loan taken by Vintage. It is not in dispute that the GDRs issued by the Indian Companies have two way fungibility i.e. conversion of equity shares into GDRs and conversion of GDRs into equity shares. In the absence of any restriction on sale and purchase of GDRs and/or conversion of GDRs into shares or vice versa and/or sale and purchase of shares, merely because, some of the GDRs have been converted and sold cannot be a ground to hold that the GDRs were issued fraudulently from inception.

f) Findings recorded in the impugned order that the alleged fraudulent arrangement resulting in full subscription of GDRs of the issuer companies acted as

an inducement for other persons to buy the shares of the issuer companies in the Indian Market is clearly misconceived, because, firstly, in the present case, GDRs were in fact issued and the issuer companies have received requisite funds and GDRs have thereafter been listed on the Stock Exchanges outside India and continue to be listed. Secondly, till date, SEBI has not initiated any action for cancellation of or to nullify the GDRs on ground of alleged fraudulent arrangement. Thirdly, the issuer companies have retained the funds and continue to have the benefits of the funds received under the GDR process without having been called upon to refund or repay the same or called upon to pay any amount to Euram Bank towards alleged loan repayment. Fourthly, Vintage has repaid its loan to Euram Bank on its own and not through the sale of shares in the Indian Market. Therefore, the AO of SEBI is not justified in holding that the appellants by fraudulent arrangement have induced investors in Indian Market to buy shares of issuer companies.

g) Names of persons who initially subscribed to the GDRs and whether such persons had subscribed to the GDRs out of their own funds or out of borrowed funds is of no consequence. After subscribing to the

GDRs, it was open to subscribers either to sell the GDRs or to seek conversion of GDRs into equity shares and sell the said shares in the Indian Securities Market. There is no requirement in law that the subscriber must disclose the details of loan availed or such other facts to the issuer company or to any other person. Equally, there is no requirement for the issuer company to disclose any such information to public at large. In any event, in the absence of any particulars to establish that the shares sold on conversion of shares has affected the equity market, SEBI is not justified in passing the impugned order against the appellants.

h) In the impugned order it is held that not disclosing to the investors that Vintage took loan from Euram Bank and after subscribing to the GDRs pledged the GDRs in favour of Euram Bank and non disclosure of the fact that the issuer companies had pledged the funds received from GDRs in favour of Euram Bank constitutes fraud on the Indian Investors. This finding of SEBI is unsustainable, because, firstly, these transactions were entered into outside India and no fault has been found with those transactions by the regulators under whose jurisdiction the said transactions took place and even RBI has not found

any fault with those transactions. Secondly, SEBI has ignored the opinion of the solicitors of the relevant Countries and has failed to prove that the said transactions were in fact illegal as per the applicable Foreign Law. Thirdly, the practice of taking a loan for 'take down' of an issue of securities like GDRs and to pledge the proceeds of the same is legal and permitted under the relevant law. Fourthly, no action has been taken against the banks which are part of the alleged illegal loan truncations and yet the impugned order is passed against the appellants holding them guilty of fraud. Fifthly, neither the appellants have given any guarantee for the loans availed by Vintage nor the appellants have provided any funds to the issuer companies to buy their own shares. Thus, in the absence of any illegality committed under the Indian Laws, SEBI is not justified in passing the impugned order against the appellants.

i) There was no obligation on part of the appellants to make disclosure of the loan taken by Vintage or the pledge created by the issuer companies and it is not the case of SEBI that the appellants have misled the issuer companies. In the ordinary course, the issuer companies would in their quarterly/yearly results have shown the mortgage/pledge created by them and

therefore, there is no question of such information being suppressed. Grant of loan for 'take down' of GDRs by creating pledge is not per se illegal and in fact such transactions are openly permitted and hence SEBI is not justified in treating the transactions to be fraudulent transactions.

j) Fact that Vintage effectively became the sole subscriber of the GDRs issued by the issuer companies cannot be a ground to hold that Vintage became the major shareholder of the issuer companies (as the GDRs accounted for a major portion of the capital of the issuer companies) because, firstly GDR holders do not have any voting rights. Secondly, there is no allegation of any nexus between the promoters of the issuer companies and the appellants as to management rights/ controlling interest/ takeover code, valuation etc.

k) In para 5.3.3.9 of the impugned order it is recorded that none of the issuer companies have provided SEBI with adequate explanation in relation to transfer of funds to their foreign subsidiaries and as such detailed investigation could not be carried out. Fact that the issuer companies failed to furnish information could not be a ground to presume that financial transactions

between the foreign subsidiaries and entities controlled by AP could be a route for the issuer companies to compensate AP. Thus, the impugned decision is based on conjectures and surmises and hence cannot be sustained. In support of the above submission reliance is placed on the decisions of the Apex Court in case of Mutha & Associates vs. State of Maharashtra reported in (2013) 14 SCC 304 & M.S. Bindra vs. Union of India reported in (1998) 7 SCC 310.

l) In the impugned order it is held that Pan Asia had deliberately provided false information to the effect that certain other foreign investors were the initial subscribers of the GDRs. The above finding is clearly incorrect and misleading, because, firstly under the applicable law/regulation, the appellants were not required to communicate with the Indian Stock Exchanges or make any announcements in India regarding the GDR subscription. Secondly, as a matter of fact appellants have not made any such announcement before any authority. Thirdly, the Apex Court in its judgement dated 06.07.2015 has recorded that in fact Asahi had provided information to BSE that the entire GDRs were allotted to foreign entities, namely Greenwich & Tradetec and

accordingly BSE gave that information to public/retail investors on BSE website. Thus, the finding recorded in the impugned order that the appellants furnished false information is wholly unsustainable.

m) Under the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme 1993, GDRs are created and issued by the Overseas Depository Banks. In the present case, the Overseas Depository Banks were Deutsche Bank and Bank of New York, Mellon who had created and issued the GDRs. Therefore, any verification relating to issuance and subscription of GDRs could be made through the Overseas Depository Banks. Having failed to make any such enquiry, SEBI is not justified in drawing adverse inference against the appellants.

n) Alleged dispute regarding the names of initial subscribers has resulted in catch 22 situation for the appellants, because, if it was informed to the BSE that Vintage having taken loan was the initial subscriber, then, it could be alleged that actual/ initial subscribers were some other persons and hence the information furnished was not correct. On the other hand, if names of other persons are shown as the initial

subscribers, then, it would be alleged that in substance Vintage had subscribed to the GDRs. Fact that the initial subscribers after receipt of GDRs immediately transferred the GDRs to the demat account of Vintage cannot change the factual position as to who were the initial subscribers. Assuming that Vintage was the initial subscriber, that cannot and does not amount to a charge of misdisclosure, because, the names of the subscriber per se are not shown to be of any consequence in the context of investors being fraudulently misled.

o) Assuming that instead of giving the name of Vintage, fake names were given as initial subscribers, there is no reason as to how giving such wrong information has misled the investors. It is not the case of SEBI that the initial subscribers were such persons like Tata's or Birlas or Ambani's who could induce the investors in buying the shares of issuer companies.

p) Without prejudice, it is submitted that out of the total 15 initial subscribers to the GDRs of six issuer companies, three initial subscribers were not available at the addresses provided and the fact that the address of two other initial subscribers were not be found

could be a ground to conclude that all the initial subscribers were fictitious entities.

q) As a Lead Manager, the appellants were not required to physically verify as to who were the initial subscribers and what was their addresses. Moreover, due to efflux of time, it is possible that original subscribers might have changed their addresses. Thus, in the present case, all transactions were genuine and in fact, foreign capital was genuinely received by the issuer companies and the same is available till date for their use and benefit. Therefore, SEBI is not justified in holding that there was any fraudulent scheme or design to deceive the investors in India.

r) The Apex Court in para 74 of its judgement has enumerated the case put forth by SEBI alleging various violations committed by the appellants. In the impugned order, some of the allegations as reported to the Apex Court by SEBI are not to be found. Some of the allegations which are recorded in the impugned order are not pressed before this Tribunal. In these circumstances, the impugned order which is based on conjectures and surmises is liable to be quashed and set aside.

8. On careful consideration of the aforesaid submissions made on behalf of the appellants, we see no merit in the aforesaid submissions.

9. Object of creating and trading in GDRs outside India has been succinctly summarized by the Apex Court in para 60 of its judgement dated 06.07.2015 which read thus:-

> *"60. On a consideration of the 2000 Regulations, the 1993 Scheme and the Master Circular issued by RBI periodically one can discern that for creation of GDRs which can be traded only at the global level, the issuing company should have developed a reputation at a level where the marketability of its investment creation potential will have a demand at the hands of the foreign investors. Simultaneously, having regard to the development of the issuing company in the market and the confidence built up with the investors both internally as well as at global level, the issuing company's desire to raise foreign funds by creating GDRs should have the appreciation of investors for them to develop a keen interest to invest in such GDRs. Mere desire to raise foreign investments without any scope for the issuing company to develop a market demand for its GDRs by increasing the share capital for that purpose is not the underlying basis for creation of GDRs. In fact for*

> *creating of GDRs apart from the desire of the issuing company to raise foreign funds, the marketability of such shares in the form of GDRs should have an applicable potential at the global level. To put it differently, by artificial creation of global level investment operation, either the issuing company on its own or with the aid of its Lead Manager cannot attempt to make it appear as though there is scope for trading GDRs at the global level while in reality there is none. The above fact has to be kept in mind when dealing with an issue relating to creation of GDRs, in as much as, when the GDRs gets fully subscribed at the global level providing scope for huge foreign investment, the same will have a serious impact at the internal investment market in the form of high appreciation of share value whereby the issuing company and the investor will be greatly benefited mutually. Such a real growth structurally and financially is the underlying principle in the creation and trading of GDRs at the global level."*

10. In the light of the aforesaid decision of the Apex Court, the question to be considered is, whether the appellants as Lead Managers to the GDR issue, either on their own or with the aid of issuer companies attempted to make it appear to the investors in India that in the global market foreign investors have found great investment potential in the

issuer companies and accordingly subscribed to the GDRs of Asahi valued at 5.98 Million USD and similarly subscribed to the GDRs of other issuer companies.

11. Before considering the aforesaid question, it would be appropriate to deal with the preliminary issue raised by the appellants viz. SEBI could not have proceeded against the appellants in the absence of other persons with whom the appellants are alleged to have colluded. It is contended on behalf of the appellants that if fraud is allegedly committed by the appellants in collusion with the issuer companies, Euram Bank, Overseas Depository Banks, Vintage and various other entities, then, unless all those entities were made parties to the show cause notice issued against the appellants, the impugned order could not be passed against the appellants.

12. There is no merit in the above contention. Concept of "fraud" in relation to the parties to the contract set out under Section 17 of the Indian Contract Act is different from the concept of "fraud" set out in the PFUTP Regulations, 2003. The expression "fraud" is defined under the PFUTP Regulations as follows:-

> *"(c) "fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include-*

(1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;

(2) a suggestion as to a fact which is not true by one who does not believe it to be true;

(3) an active concealment of a fact by a person having knowledge or belief of the fact;

(4) a promise made without any intention of performing it;

(5) a representation made in a reckless and careless manner whether it be true or false;

(6) any such act or omission as any other law specifically declares to be fraudulent,

(7) deceptive behaviour by a person depriving another of informed consent or full participation;

(8) a false statement made without reasonable ground for believing it to be true;

(9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.

And "fraudulent" shall be construed accordingly;"

13. From the aforesaid definition it is absolutely clear that if a person by his act either directly or indirectly causes the investors in the securities market in India to believe in something which is not true and thereby induces the investors in India to deal in securities, then that person is said to have committed fraud on the investors in India. In such a case, action can be taken under the PFUTP Regulations against the person committing the fraud, irrespective of the fact any investor has actually

become a victim of such fraud or not. In other words, under the PFUTP Regulations, SEBI is empowered to take action against any person if his act constitutes fraud on the securities market, even though no investor has actually become a victim of such fraud. In fact, object of framing PFUTP Regulations is to prevent fraud being committed on the investors dealing in the securities market and not to take action only after the investors have become victims of such fraud. Therefore, in the facts of present case, if fraud is committed by the appellants on the investors in India, then without making the investors as party to the proceedings, SEBI could take action against the appellants.

14. Similarly, if fraud is said to have been committed by AP on the investors in India by subscribing to the GDR outside India by entering into Loan Agreement/ Pledge Agreement outside India through the entities with which AP was connected, then, even if the GDRs were validly issued and even if the Loan Agreement/ Pledge Agreement were valid, proceedings could be initiated against AP for committing fraud on the investors in India without impleading the entities who issued the GDRs and without impleading the entities who were parties to the Loan Agreement/ Pledge Agreement. In other words, whether the Loan Agreement/ Pledge Agreement were validly entered into or not, proceedings could be initiated against AP if the very act of AP in subscribing to the GDRs through his connected entities constituted fraud on the investors in India. In such a case, the entities which issued the GDRs viz. Overseas Depository Banks or the entities who were parties to the Loan Agreement/ Pledge Agreement are not required to be impleaded

as parties to the proceedings initiated against AP for committing fraud on the investors in India. Therefore, the argument of the appellants that without impleading the Overseas Depository Banks/ parties to Loan Agreement & Pledge Agreement as parties to the proceedings initiated against the appellants, no order could be passed against the appellants cannot be accepted.

15. Reliance placed by the appellants on the decision of the Apex Court in case of Mutha Associates (Supra) is misplaced. In that case, land acquisition proceedings initiated by the State Government for the benefit of APMC were sought to be withdrawn without giving an opportunity of hearing to APMC. On facts of that case, the High Court while holding that the withdrawal of the acquisition without giving an opportunity of hearing to APMC was bad in law held that the order passed by the Minister withdrawing the acquisition was actuated by malafides. In that context, while upholding the decision of the High Court that the withdrawal of the acquisition was bad in law, the Apex Court held that when the charge of malafides was levelled against the Minister, it was mandatory to implead the Minister as a party to the proceedings and give an opportunity to refute the charge against the Minister. As no such opportunity was given, the charge against the Minister was set aside. In the present case, the appellants were called upon to show cause as to why action should not be taken against the appellant for committing fraud on investors and opportunity of hearing was granted to the appellants. Therefore, the decision of the Apex Court in case of Mutha Associates has no bearing on the facts of present case.

16. Similarly, decision of the Apex Court in case of Manohar Joshi (Supra) is distinguishable on facts. In that case, in an Election Petition, the returned candidate was alleged to be guilty of a corrupt practice in the commission of which another person was alleged to have participated with him. In that context it was held that the returned candidate can be held vicariously liable for a corrupt practice committed by any other person with his consent only at the end of the trial i.e. after the trial against the returned candidate and trial against the other person with whose consent the returned candidate had committed the corrupt practice. In the present case, findings recorded in the impugned order regarding the legality of GDRs issued and legality of the Loan Agreement and Pledge Agreement were in the context of AP committing fraud on the investors in India by subscribing the GDRs meant to be sold to foreign investors. It is not the case of SEBI that the GDRs were issued illegally or that the Loan Agreement/ Pledge Agreements were per se illegal. In other words, what is held in the impugned order is that PAN Asia and AP (Managing Director of PAN Asia) by their acts made the investors in India to believe that foreign investors have found it prudent to invest in the GDRs of issuer companies when in fact the GDRs were subscribed by an entity wholly owned by AP. Therefore, the decision of the Apex Court in case of Manohar Joshi has no relevance to the facts of present case. Similarly, other decisions of the Apex Court and other Courts relied upon by the counsel for appellants are also distinguishable on facts.

17. Strong reliance was placed by counsel for the appellants on the decision of this Tribunal in case of BPL Ltd. (Supra). That decision is

also distinguishable on facts. In that case, SEBI had held that BPL Ltd. had created a false market and manipulated the price of its scrip in connivance with Shri Harshad Mehta and accordingly debarred BPL Ltd. from accessing the securities market for a period of four years. This Tribunal noticed that nowhere in the order impugned therein it was recorded that BPL Ltd. had transacted in its shares either directly or indirectly. It was further noticed, that BPL Sanyo Finance Ltd. ("BSFL" for short) an associate company of BPL Ltd. was found to be involved in the matter. Since BSFL was not investigated and since no action was taken against BSFL, this Tribunal held that the said omission has materially affected the outcome of the investigation and accordingly set aside the debarment order passed against BPL Ltd. In the present case, it is the case of SEBI that the appellants by their acts have committed fraud on the investors in India and accordingly action is taken against the appellants. Thus, the decision of this Tribunal in case of BPL Ltd. has no bearing on the present case. Accordingly, we see no merit in the contention of the appellants that SEBI could not have proceeded against the appellants without impleading the entities involved in issuing t he GDRs or the entities involved in the Loan Agreement/ Pledge Agreement.

18. Question then to be considered is, whether SEBI is justified in holding that the appellants have committed fraud on the investors in India. Admittedly, PAN Asia was appointed as a Lead Manager to the GDR issue and as a Lead Manager it was the duty of PAN Asia to make reasonable endeavours to procure investors outside India and inform the

ESCROW agent in writing of any deposit made by the investors in the ESCROW account. It is not in dispute that prior to the issuance of GDRs of Asahi, AP as a Managing Director and Authorized Signatory of Vintage had entered into a Loan Agreement dated 21.04.2009 with Euram Bank and had obtained loan of 5.98 Million USD to take down the GDRs of Asahi. Thus, AP on the one hand as Managing Director of PAN Asia got the GDRs of Asahi issued for subscription by foreign investors and on the other hand as Managing Director of Vintage took loan to take down entire GDRs of Asahi.

19. Apart from taking loan of 5.98 Million USD from Euram Bank under the Loan Agreement dated 21.04.2009, a Pledge Agreement dated on 21.04.2009 was executed between Asahi and Euram Bank, wherein Asahi agreed to abide by the terms and conditions of the Loan Agreement dated 21.04.2009 between Euram and Vintage and further agreed to pledge all its right, title and interest in and to the securities deposited in the pledged securities account and Pledged Time Deposit account so as to secure the present and future obligation of Vintage to the Euram Bank to the Extent of 5.98 Million USD or any other amount that may thereafter become payable by Vintage to Euram Bank.

20. In the reply to the show cause notice issued by SEBI, AP had categorically stated that Vintage intended to make profit through a take down of the GDRs issued by the Indian Companies and at the same time ensure successful placement of the GDRs with the investors outside India. It is further stated by AP that for the aforesaid purpose Vintage

took loan from Euram Bank and upon closure of the GDR issue, Vintage paid the take down amount to the issuer companies by transferring the loan proceeds from Euram Bank to the ESCROW accounts of the issuer companies which was then transferred to the accounts of issuer companies.

21. Thus, instead of ensuring that the foreign investors subscribe to the GDRs of Asahi, AP as Managing Director of PAN Asia planned to subscribe to the GDRs of Asahi through Vintage and in fact as Managing Director of Vintage took loan of 5.98 Million USD from Euram Bank for subscribing to the GDRs of Asahi and made Asahi to pledge to the Euram Bank the GDR subscription amount of 5.98 Million USD as security for the loan taken by Vintage. Similar modus operandi was adopted in case of other issuer companies. Thus, the investors in India were made to believe that in the global market the issuer companies have acquired high reputation in terms of investment potential and hence the foreign investors have fully subscribed to the GDRs, when in fact, the GDRs were subscribed by AP through Vintage which was wholly owned by AP. In other words, PAN Asia as a Lead Manager and AP as Managing Director of PAN Asia attempted to mislead the investors in India that the GDRs have been subscribed by foreign investors when in fact the GDRs were subscribed by AP through Vintage. Any attempt to mislead the investors in India constitutes fraud on the investors under the PFUTP Regulations.

22. Fact that the appellants had not informed the Stock Exchanges about the GDRs being fully subscribed cannot be a ground for the appellants to avoid action being taken for misleading the investors in India, because, under the PFUTP Regulations, action can be taken even against a person who has caused the investors in India to believe in something which is not true. In the present case, it is apparent that prior to the issuance of GDRs, AP as Managing Director of PAN Asia had designed a plan to subscribe to the GDRs of Asahi and in implementation of that plan AP took loan of 5.98 Million USD as Managing Director of Vintage specifically for subscribing (take down) GDRs of Asahi and in fact on issuance GDRs, 5.98 Million USD was transferred to the account of Asahi with Euram Bank as GDR subscription amount. Thus, AP as Managing Director of PAN Asia was the root cause in creating artificial impression that the GDRs have been subscribed by foreign investors when in fact GDRs were purchased by AP through Vintage. Such an act is clearly prohibited under the PFUTP Regulations.

23. It is interesting to note that even though AP through Vintage had subscribed to the GDRs of Asahi by taking loan of 5.98 Million USD from Euram Bank, PAN Asia had informed SEBI that initial subscribers to the GDRs of Asahi were foreign investors other than Vintage. Investigation carried out by SEBI revealed that in the records Greenwich Management Inc ("Greenwich for convenience) and Tradetec Corporation ("Tradetec" for convenience) were shown as the initial subscribers to the GDRs of Asahi. Greenwich situated at Hong Kong is supposed to have acquired 49.85% GDRs of Asahi and Tradetec situated

at Hong Kong is supposed to have acquired 50.15% GDRs of Asahi. Investigation revealed that immediately after subscribing to the GDRs, both Greenwich and Tradetec are supposed to have transferred all the GDRs to Vintage and on the same day Vintage transferred the loan amount of 5.98 Million USD to the account of Asahi. If Vintage had actually acquired GDRs of Asahi from Greenwich and Tradetec, then Vintage would have paid the loan amount of 5.98 Million USD to Greenwich and Tradetec and would not have transferred the loan amount to the account of Asahi. Very fact that AP as Managing Director of Vintage got the loan amount transferred to the account of Asahi clearly shows that Greenwich & Tradetec were not the initial subscribers and the initial subscriber to the GDRs of Asahi was Vintage (wholly owned by AP).

24. It is equally interesting to note from the investigation carried out by SEBI that the alleged initial subscribers to the GDRs were non-existent entities because, e-mails and summons issued to those entities were return back undelivered. Moreover, the respective securities market regulators of the Countries in which the alleged initial subscribers were supposed to be situated have informed SEBI that the addresses of the initial subscribers are either non-existent or do not belong to those entities. In case of Tradetec the address shown was 'level 47, Prudential Tower, 30 Cecil Street, Singapore, 049712'. Investigation carried out by SEBI through the Monetary Authority of Singapore revealed that there was no level 47 and the highest floor of Prudential Tower was level 30 and that Tradetec is not even listed in the office directory of Singapore.

One of the alleged initial subscriber known as Rexflex Ltd. was found to be controlled by AP and admittedly the name of Rexflex Ltd. has now been changed PAN Asia Management Ltd. Even in case of other issuer companies, the WTM of SEBI has recorded a finding in para 15 of the impugned order that those entities do not exist at the given address and the names of those entities do not exist in the official directory of the Countries in which the said entities were supposed to be situated. In these circumstances, findings recorded in the impugned order that the names of initial subscribers exist only in fiction and that the appellants have artificially sought to create an impression that the GDRs were initially subscribed by foreign investors other than Vintage cannot be faulted.

25. It is apparent that the appellants knew that if the investors in India come to know that the GDRs of the issuer companies have not been subscribed by foreign investors but by the entities controlled by the Managing Director (AP) of PAN Asia, then it would not generate interest in minds of the investors in India to subscribe to the shares of issuer companies. Therefore, in order to create an artificial impression that global investors have shown keen interest in investing in the issuer companies by subscribing to the GDRs, appellants by a dubious method introduced fictitious and non-existent initial subscribers to the GDRs of the issuer companies so as to mislead the investors in India in believing that the global investors have shown keen interest in investing in the GDRs of issuer companies. In these circumstances, decision of SEBI

that the appellants attempted to committed fraud on the investors in India by introducing fictitious initial subscribers cannot be faulted.

26. Argument of the appellants that due to efflux of time the initial subscribers might have changed their address is unsustainable, because, it is established beyond doubt that some of the addresses of the alleged initial subscribers itself do not exist. If the address itself is not existent it obviously means that even the initial subscribers were non-existent. Apart from above, it is established by SEBI through the Regulatory Authorities of the Countries in which the alleged initial subscribers were situated that the names of those initial subscribers do not exist in the official directory of those Countries. These facts conclusively establish that Vintage was the initial subscriber to the GDRs and names of fictitious entities were introduced only to make it appear that the GDRs have been subscribed by various foreign investors.

27. It is equally important to note that immediately after subscribing to the GDRs, Vintage (controlled by AP) sold some of the GDRs to FIIs/sub accounts such as IFCF & KII which were also controlled by AP. IFCF & KII admittedly converted GDRs into underlying equity shares of the issuer companies from the domestic custodian bank in India and sold the said shares on the Stock Exchanges in India. It is also recorded in the impugned order that the shares sold by IFCF and KII were bought by entities such as Alka, Oudh, Basmati & SV with which AP was connected. Thus, at every stage of the GDR issue i.e. from the stage of issuing GDRs, subscribing to the GDRs, transferring the GDRs to FII/sub

accounts for conversion of GDRs into equity shares and acquiring the said shares through the Stock Exchanges in India, Managing Director of PAN Asia was involved. In other words, apart from making it artificially appear that GDRs have been subscribed by foreign investors when in fact the GDRs were subscribed by AP through Vintage, AP ensured that the GDRs were sold by Vintage to the entities controlled by AP and further ensured that the equity shares generated on conversion of GDRs were acquired by the entities with which AP was connected. Even though all GDRs were not converted and sold, it is apparent that the modus operandi adopted by the appellants was not only to create an artificial impression that the GDRs have been subscribed by foreign investors, but also to create an impression that after the GDR issue, investors in India have started subscribing to the shares of issuer companies when in fact the shares were sold and acquired by the entities controlled by AP. In these circumstances inference drawn by SEBI that at every stage of the GDR issue, the acts committed by the appellants constituted fraud on the investors in India cannot be faulted.

28. Argument of the appellants that the AO was not justified in holding that there was no fund movement after the GDR issue is without any merit. Even though 5.98 Million USD was transferred by Vintage to the account of Asahi as GDR subscription amount, on account of Asahi pledging the aforesaid amount to secure the loan of 5.98 Million USD, taken by Vintage from Euram Bank under the Pledge Agreement dated 21. 04. 2009, Asahi could not utilize that amount till the loan was repaid by Vintage to Euram Bank. Whether Asahi and other issuer companies

were justified in entering into a Pledge Agreement with Euram Bank is a question that would be decided in the proceedings initiated against Asahi and other issuer companies. Thus, there can be no dispute that the GDR subscription amounts running into several Million USD were not available to the issuer companies till the loan taken by Vintage for subscribing to GDRs were repaid to Euram Bank. Admittedly, the loans were repaid by Vintage after a long period of time. Therefore, in the facts of present case, findings recorded by SEBI that in reality there was no fund movement after the GDRs were subscribed, cannot be faulted.

29. Argument of the appellants that the AO has erroneously held that source of funding for the GDRs were done by converting the GDRs and thereafter selling the shares in the Indian Market and repatriating the sale proceeds to repay the loan taken by Vintage is not entirely correct. It is a matter of record that Vintage by a Loan Agreement entered into with Credo Investment Holdings Ltd. ("Credo" for short) advanced loan of 2 Million USD for on-lending it to its associate company KII Ltd. so as to enable KII to purchase GDRs of the issuer companies, convert the GDRs into equity shares and sell those shares in the Indian Market and utilize the sale proceeds to buy further GDRs on the Luxembourg Stock Exchange and repeat the said process until KII elects to terminate such activities. Admittedly, KII acquired GDRs from Vintage and after converting the GDRs in to equity shares sold the equity shares in the Indian Market. In that context it was held that source of funding the GDRs was by converting the GDRs and selling the shares in the Indian

Securities Market. It is not the case of SEBI that all the GDRs of all the issuers companies were converted into equity shares and sold in the Indian Market and the sale proceeds were utilized for repaying the loan taken by Vintage.

30. Fact that some of the findings recorded in the impugned order have not been pressed by SEBI cannot be a ground for the appellants to escape action being taken for the fraud committed on the investors in India. It is on record that even in the past AP has been found to be violating the Securities Laws and in fact by an order dated 13.11.2009 monetary penalty has been imposed on AP. Creating artificial impression with a view to mislead the investors in India either directly or indirectly is a serious offence and in the present case, since AP holding 100% shares of PAN Asia has committed fraud on the investors in India in relation to GDRs of several issuer companies, we see no reason to interfere with the debarment order passed against the appellants.

31. For all the aforesaid reasons we see no merit in the appeal and the same is hereby dismissed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

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

25.10.2016
Prepared & Compared By: PK