

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 22.10.2019

Date of Decision : 05.11.2019

Appeal No. 124 of 2019

Adi Cooper
0/4, 15th Floor, Eden Hall,
Dr. Annie Besant Road,
Worli, Mumbai - 400 018.

..... 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

Mr. Vikram Nankani, Senior Advocate with Ms. Sabeena Mahadik,
Mr. Pankaj Uttaradhi, Mr. Aayush Kothari, Advocates i/b M/s.
Visesha Law Services for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Mihir Mody, Mr. Sushant
Yadav, Advocates i/b K. Ashar & Co. for the Respondent.

With
Appeal No. 300 of 2019

Kishore Hegde
Mars, A-702, Vasant Galaxy,
Bangur Nagar, Goregaon West,
Mumbai - 400 090.

..... 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

Mr. Rajesh Khandelwal, Advocate i/b Juris Link for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Mihir Mody, Mr. Sushant Yadav, Advocates i/b K. Ashar & Co. for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. Two appeals have been filed against a common order and consequently, both the appeals are being decided together.

2. The facts leading to the filing of the present appeals are that M/s. Commex Technology Ltd. (hereinafter referred to as, 'the company') issued Global Depository Receipts (hereinafter referred to as, 'GDR') for subscriptions by the investors. The appellant Adi Cooper in Appeal No. 124 of 2019 claims himself to be a non-executive director of this company but the record suggests that he was a Whole Time Director and Vice Chairman of the company from October 11, 2005 to October 10, 2008. The other appellant Mr. Kishore Hegde, in Appeal No. 300 of 2019 was an independent

director from 2008 to 2013 and was also Chairman of the audit committee of the company.

3. On January 30, 2008, the Board of Directors of the company passed a resolution resolving to open a bank account with European American Investment Bank AG (hereinafter referred to as, 'EURAM Bank') for the purpose of receiving subscription money in respect of the GDR issue of the company. The resolution also authorized the Chairman and Managing Director Ketan Sheth to sign all documents and process necessary transaction in relation to the GDR issue. The resolution further authorized the EURAM Bank to use the subscription money as security in connection with loans, if any. By another resolution of the Board of Directors dated April 4, 2009, the company finalized and resolved to issue the GDR. On April 5, 2009, Ketan Sheth Chairman and Managing Director of the company signed a pledge agreement with EURAM Bank pledging the GDR proceeds as security for the loan taken by Vintage FZE (hereinafter referred to as, 'Vintage'). By another agreement dated May 5, 2009, Vintage signed a loan agreement with EURAM Bank for a loan of US\$ 9.99 Million for the purpose of subscribing to the GDR issue of the company. The pledge agreement signed by Ketan Sheth was made part of the loan agreement. On May 25, 2009, another resolution of the Board of Directors of the company was passed with

respect to the end use of the GDR proceeds. On May 26, 2009, the company made a corporate announcement that the GDR issues were successfully subscribed. The company observed that it had issued 19,06,790 GDR raising US\$ 9.99 Million which was approximately Rs. 55.3 crores. Vintage after receiving GDR from the company subsequently converted it into equity shares and sold it in the Indian capital market.

4. Investigation revealed that the loan agreement and the pledge agreement enabled Vintage to avail loan from the EURAM Bank for subscribing to GDR of the company. The said GDR issue would not have been subscribed, had the company not given such security towards the loan taken by Vintage. The bank account in which GDR proceeds were held was in the name of the company but the amount deposited in the account was not at the disposal of the company as the same was pledged as security against the loan availed by Vintage. Investigation further revealed that the resolution of the company dated January 30, 2008 resolving to issue a GDR was concealed by the company and was not disclosed to the investors of the company. Further, the pledge agreement and making a corporate announcement that the GDRs were successfully subscribed concealed a material fact that the pledge was created on the GDR proceeds and the fact that its GDR subscription was actually financed by a loan arrangement

which was not disclosed to the investors of the company. The concealing of these facts resulting in disclosing misleading information to the stock exchange thereby causing a fraud on the investors. Accordingly, a show cause notice was issued to the company and to the directors calling upon them to show cause as to why suitable directions should not be issued under Section 11, 11B and 11(4) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, 'SEBI Act'). The Whole Time Member (hereinafter referred to as, 'WTM') after considering the replies of the company, the appellants and other noticees, passed the impugned order dated February 28, 2019 under Section 11 and 11B of the SEBI Act restraining the appellant Adi Cooper and Kishore Hegde from accessing the securities market and further prohibiting them from buying, selling and otherwise dealing in securities market directly or indirectly for a period of two years and further freezing their mutual funds for the same period. Both the appellants, being aggrieved by the said order, have filed two separate appeals.

5. We have heard Mr. Vikram Nankani, the learned senior counsel assisted with Ms. Sabeena Mahadik, Mr. Pankaj Uttaradhi, Mr. Aayush Kothari, the learned counsel for the Appellant in Appeal No. 124 of 2019 and Mr. Rajesh Khandelwal, the learned counsel for the Appellant in Appeal No. 300 of 2019 and Mr. Kumar Desai, the

learned counsel assisted with Mr. Mihir Mody, Mr. Sushant Yadav, the learned counsel for the respondent.

6. It was contended by the learned senior counsel for the appellant Adi Cooper that he was only party to the resolution of the Board of Directors of the company dated January 30, 2008 wherein it was decided that the company would issue a GDR and earmarked a bank where the GDR proceeds would be deposited. It was contended that the said resolution by itself did not violate any SEBI laws. Further, the appellant resigned on October 10, 2008 and thereafter had no connection with the affairs of the company. The appellant had nothing to do with the subsequent resolutions of the company dated April 4, 2009 by which the GDR issues were finalized or the resolution of the Board of Directors dated May 25, 2009 finalizing the end use by the GDR proceeds nor had anything to do with the pledging of the GDR proceeds by the Managing Director dated May 5, 2009 nor was involved in the corporate announcement i.e. on May 26, 2009 to the effect that the GDR issues were fully subscribed. It was contended that the appellant has not violated any law as a director and the GDR issues which were issued subsequent to different resolutions of the Board of Directors of the company was made when the appellant had resigned and ceased to be a director of the company. The learned senior counsel further submitted that the

resolution dated January 30, 2008 authorizing the bank to use the funds deposited in the bank as security in connection with a loan must necessarily be read as a loan, if any, taken by the company and not in connection with the loan taken by Vintage.

7. The WTM in the impugned order has admitted that the appellant Adi Cooper ceased to be a whole time director with effect from October 10, 2008 but found him guilty for violating Section 12A of the SEBI Act read with Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as, 'PFUTP Regulations') on the ground that the said appellant was a director and had attended the meeting of the Board of Directors on January 30, 2008 in which the GDR proceeds were authorized to be pledged as security for loan. According to the WTM, this resolution of the Board to use the GDR proceeds as security for loan was the starting point of the fraudulent arrangement through which the company facilitated the financing of the GDR subscription by Vintage which arrangement was not disclosed to the shareholders of the company or to the investors of the securities market through the platform of the stock exchange. The WTM consequently, found that the appellant Adi Cooper was liable to the fraudulent acts of the company, namely, pledging the GDR proceeds

as collateral for the loan taken by Vintage for making subscription to the GDR.

8. The finding of the WTM against the appellant Adi Cooper is wholly misconceived, farfetched and cannot be accepted to come to a conclusion that the said appellant was party to a resolution which had an intention to manipulate the market or defeat its mechanism. Admittedly, the appellant Adi Cooper was party to a resolution of the Board of Directors dated January 30, 2008 which only resolved the company to open an account with the EURAM bank for the purpose of deposit of the GDR proceeds. The resolution further authorized the bank to use the proceeds as security in connection with a loan. The resolution did not stipulate that the proceeds would be used as security in connection with a loan taken by another entity. The resolution could also mean that the proceeds would be utilized by the bank as security in connection with a loan taken by the company itself. Thus, from the resolution dated January 30, 2008 one cannot arrive at a conclusion that this was the first step or the starting point of a fraudulent arrangement through which the company could facilitate the financing of the GDR subscription by Vintage. It may be noted here that when the resolution of January 30, 2008 was passed Vintage was nowhere in the picture. The pledging of the shares on May 5, 2009 in favour of Vintage and the loan taken by

Vintage in order to subscribe to the GDR issues was done at a time when the appellant admittedly was not involved in the affairs of the company as he had ceased to be a director prior to that date. There is no evidence to establish that the appellant Adi Cooper remained associated with the company or with other directors even after he resigned on October 10, 2008.

9. We further find that the resolution of January 30, 2008 authorizing the bank to utilize the proceeds as security in connection with a loan cannot be inferred as loan given to Vintage. Such presumption is farfetched and cannot hold that the appellant had intention to manipulate the market or play a fraud. Therefore, the finding of the WTM that the appellant had violated Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations is misconceived and not acceptable. For facility, the said provision of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations are extracted hereunder :-

“ 12A. No person shall directly or indirectly—

(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;

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

“3. Prohibition of certain dealings in securities

No person shall directly or indirectly—

- (a) *buy, sell or otherwise deal in securities in a fraudulent manner;*
- (b) *use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made thereunder;*
- (c) *employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;*
- (d) *engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made thereunder.”*

“4. Prohibition of manipulative, fraudulent and unfair trade practices

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

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

(a)

(b)

.....

(f) *publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;*

(k) *an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;*

(r) *planting false or misleading news which may induce sale or purchase of securities”*

10. A perusal of the aforesaid provisions clearly indicates that the appellant Adi Cooper was neither directly or indirectly involved in any fraudulent activity nor employed any scheme to defraud any shareholder or investor. The WTM committed a manifest error in holding that the appellant Adi Cooper cannot be absolved of the consequences of the resolution of January 30, 2008 even though he was not present in the time when the issuance of GDR and execution

of the loan and pledge agreements. We are of the opinion that the resolution of January 30, 2008 does not indicate any resolution or execution of the loan or the pledge agreement and, thus, holding the appellant that he was actively involved in the manipulation of the market through this fraudulent scheme is patently erroneous and farfetched. In the light of the aforesaid, we are of the opinion that the order of the WTM debarring the appellant Adi Cooper from accessing the securities market for two years cannot be sustained.

11. In so far as the appellant Kishore Hegde is concerned, the appellant alleged that he was an independent director from 2008 to 2013. The record indicates that he had attended 11 meetings of the Board including the meeting of the Board of Directors dated January 30, 2008 and May 25, 2009 during which the company informed the Board about the successful placement of the GDR. According to the WTM, the said appellant was involved in the planning and execution of the GDR issue from start till end and was fully involved in the day to day affairs of the company.

12. According to the appellant Kishore Hegde, he was not a signatory to the resolution of January 30, 2008. According to this appellant he was not involved in the day to operations of the company and was not attending the board meetings of the company.

13. Having heard the learned counsel for the appellant and having perused the record, we find that the appellant has only disputed his presence in the resolution of the Board of Directors dated January 30, 2008 but has not disputed his presence in the other resolutions that were passed by the Board of Directors of the company. Thus, his involvement in day to day affairs of the company cannot be ruled out. The contention of this appellant that he was not involved in the day to day running of the company cannot be accepted as he was found to be part of the resolution process of the company and his involvement in the issuance of the GDR proceeds. Apart from the above, we also find that the appellant was also the Chairman of the audit committee of the company. The WTM found that being the Chairman of the audit committee, he did not place any objection as to why the GDR proceeds did not reach the company and how the proceeds were utilized. We are thus, of the opinion that in the light of the findings given by the WTM, the appellant Kishore Hegde was part of the scheme through which issue of GDR by the company was effected through a fraudulent arrangement of loan agreement and pledge agreement. We are also of the opinion that the conduct of the appellant Kishore Hegde was inimical to the interest of the company, to the investors, as well as to the shareholders and, the action of the appellant Kishore Hegde was in violation of Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations.

The order of the WTM debarring the appellant Kishore Hegde from accessing the securities market, etc. for a period of two years does not suffer from any error of law.

14. In the light of the aforesaid, Appeal No. 124 of 2019 Adi Cooper vs. SEBI is allowed. The order of debarment etc. passed by the WTM against the appellant Adi Cooper is set aside. Appeal No. 300 of 2019 Kishore Hegde vs. SEBI is dismissed.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M. T. Joshi
Judicial Member

05.11.2019
Prepared & Compared by
PTM