

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved: 1.7.2021

Date of Decision: 5.7.2021

Appeal No.433 of 2021

Rajesh Shah

4-B, Pleasant Palace,

Friends Colony, N.S. Road No.5,

JVPD Scheme, Vile Parle (West),

Mumbai – 400 056.

...Appellant

Versus

The Securities and Exchange Board of India

SEBI Bhawan, Plot No.C-4A,

G Block, Bandra Kurla Complex,

Mumbai.

...Respondent

Mr. Gaurav Joshi, Senior Advocate with Mr. Piyush Raheja, Mr. Sahil Gandhi, Mr. Feroze Patel, Mr. Jigar Shah and Ms. Dimple Vora, Advocates i/b. Markand Gandhi & Co. for the Appellant.

Mr. Sumit Rai, Advocate with Mr. Abhiraj Arora, Ms. Rashmi Dalmia and Mr. Karthik Narayan, Advocates i/b. ELP for the Respondent.

With

Appeal No.434 of 2021

Rajesh Shah

4-B, Pleasant Palace,

Friends Colony, N.S. Road No.5,

JVPD Scheme, Vile Parle (West),

Mumbai – 400 056.

...Appellant

Versus

The Securities and Exchange Board of India
SEBI Bhawan, Plot No.C-4A,
G Block, Bandra Kurla Complex,
Mumbai.

...Respondent

Mr. Gaurav Joshi, Senior Advocate with Mr. Piyush Raheja, Mr. Sahil Gandhi, Mr. Feroze Patel, Mr. Jigar Shah and Ms. Dimple Vora, Advocates i/b Markand Gandhi & Co. for the Appellant.

Mr. Sumit Rai, Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia and Mr. Karthik Narayan, Advocates i/b. ELP for the Respondent.

With
Appeal No.435 of 2021

Upkar Singh Kohli
202, Chinar,
21st TPS Road,
Bandra (West),
Mumbai-400 050.

...Appellant

Versus

The Securities and Exchange Board of India
SEBI Bhawan, Plot No.C-4A,
G Block, Bandra Kurla Complex,
Mumbai.

...Respondent

Mr. Piyush Raheja, Advocate with Mr. Sahil Gandhi, Mr. Feroze Patel, Mr. Jigar Shah and Ms. Dimple Vora, Advocates i/b. Markand Gandhi & Co. for the Appellant.

Mr. Sumit Rai, Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia and Mr. Karthik Narayan, Advocates i/b. ELP for the Respondent.

**With
Appeal No.436 of 2021**

Upkar Singh Kohli
202, Chinar,
21st TPS Road,
Bandra (West),
Mumbai-400 050.

...Appellant

Versus

The Securities and Exchange Board of India
SEBI Bhawan, Plot No.C-4A,
G Block, Bandra Kurla Complex,
Mumbai-400051.

...Respondent

Mr. Piyush Raheja, Advocate with Mr. Sahil Gandhi, Mr. Feroze Patel, Mr. Jigar Shah and Ms. Dimple Vora, Advocates i/b. Markand Gandhi & Co. for the Appellant.

Mr. Sumit Rai, Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia and Mr. Karthik Narayan, Advocates i/b. ELP for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member

Per: Justice Tarun Agarwala, Presiding Officer

1. There are two sets of appeals against two different orders, one set of appeals have been filed against the order of the Adjudicating Officer ('AO' for short) dated 27th April, 2021 and the second set is against the order Whole Time Member ('WTM' for short) dated 23rd March, 2021. The AO in its order has imposed a penalty of Rs.20 lakhs on the appellants. On the other hand, the WTM in his order has debarred the appellants from accessing the securities market for a period of one year and further directed that during this period their securities including mutual funds shall remain frozen. Since the issue is common in all the appeals they are being taken up together.
2. The facts leading to the filing of the present appeal is, that the Board of Directors of the Company known as Birla Power Solutions Ltd. passed a resolution dated 29th October, 2009 for issuance of Global Depository Receipts ('GDRs' for short). The Board of Directors also resolved in this resolution to open an

account with the European American Investment Bank AG (hereinafter referred to as the 'Euram Bank') for the purpose of depositing the GDR proceeds and to use the proceeds as security in connection with the loan. The resolution also authorized Shri P.V.R. Murthy and Shri N. Nagesh as authorized signatory to sign relevant documents on behalf of the Company. Based on this resolution, the Company issued two GDR issues, the first one on 27th January, 2010 for 20.01 US million dollars and the second GDR issue was on 9th July, 2010 for 53.53 US million dollars.

3. Investigation in the issuance of the GDR revealed that the GDR was not issued with proper consideration and without making adequate disclosure under the listing agreement. Accordingly, a show cause notice was issued alleging that Vintage FZE (hereinafter referred to as 'Vintage') was the only entity who subscribed to the two GDR issues and that the

subscription amount was paid by EURAM bank under the loan agreement whereby the bank agreed to lend the subscription money to Vintage. It was also alleged that a pledge agreement was executed on the same day between the Company and the EURAM bank for providing securities towards loan obtained by Vintage. It was also alleged that the loan agreement as well as the pledge agreement was not disclosed to the stock exchange.

4. The only charge against the appellants was that they were Independent Non-Executive Directors and were part of the resolution dated 29th October, 2009 by which the first resolution was passed by the Board of Directors for issuance of the GDR and for opening an account with EURAM bank.
5. Before the WTM and the AO, the appellants contended that they were appointed as Non-Executive Directors and were not involved in day to day affairs of the Company nor were part of the decision making

process relating to the GDR issue. The appellants contended that they have not signed any agreement involved in the alleged fraud and that their role as Independent Non-Executive Director was very limited and restricted. The appellants contended that they have no specific role in the GDR issue other than attending the board meeting in which the resolution dated 29th October, 2009 was passed for the issuance of the GDR. The WTM and the AO in their orders have come to the conclusion that the issuance of GDR was a fraud played upon investors and the scheme was wrongly utilized in the securities market which was violative of Section 12A of the Securities and Exchange Board of India Act, 1992 and 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. The WTM and the AO found that Vintage was the sole subscriber and misleading information was given to

the shareholders and the investors that the GDRs were subscribed by many entities. It was also found that the loan obtained by Vintage through a pledge agreement given by the Company was a fraudulent act which was not disclosed to the stock exchange. Consequently, direction and penalties were issued by the WTM and the AO.

6. We have heard Mr. Gaurav Joshi, Senior Advocate assisted by Mr. Piyush Raheja, Mr. Sahil Gandhi, Mr. Feroze Patel, Mr. Jigar Shah and Ms. Dimple Vora, Advocates for the Appellants and Mr. Sumit Rai, Advocate assisted by Mr. Abhiraj Arora, Ms. Rashi Dalmia and Mr. Karthik Narayan, Advocates for the Respondent.
7. We find that the controversy involved in the present appeal is squarely covered by a recent decision of this Tribunal in ***Prafull Anubhai Shah vs. SEBI dated 28th June, 2021 in Appeal no.389 of 2021.***

For facility, the relevant paragraphs are extracted hereunder.

“9. In our opinion, the impugned order insofar as the appellant is concerned cannot be sustained in the light of the various decisions given by us relating to the GDR issue. In Adi Cooper vs. Securities and Exchange Board of India (Appeal No. 124 of 2019 decided on November 5, 2019) this Tribunal on an almost identical issue wherein the resolution of the Board of Directors for opening an account was verbatim to the present resolution. The modus operandi was also the same. The Tribunal after analyzing held that:-

“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. Similarly in *Adesh Jain vs Securities and Exchange Board of India* (Appeal No. 217 of 2020 decided on November 19, 2020) this Tribunal held:- “12. Having heard the learned counsel for the parties and having given our thoughtful consideration in the matter, we are of the opinion, that the controversy involved in the present appeal is squarely covered by a decision of this Tribunal in *Adi Cooper* (supra) matter. In *Adi Cooper* (supra) the Tribunal interpreted the relevant words of the resolution “to use the fund so deposited in the aforesaid bank account as security in connection with loans if any”. The Tribunal held that the loans could be taken by the Company and GDR subscription to be used as security. It was never fathomed that the subscription amount would be used for giving loans to a third party, namely, Clifford in the instant case. 13. In addition to the aforesaid, we find that at the time when the

resolution of October 19, 2007 was passed Clifford was nowhere in the picture and therefore the concept of fraud emerging through this resolution of October 19, 2007 does not arise. There is no finding of the WTM that the appellant was aware of this arrangement of giving a loan to Clifford was in existence or the fact that a Credit Agreement or an Account Charge Agreement would be executed in the future. In the absence of any finding, the charge of collusion and/or fraud has not been proved. Further, by a deeming fiction, liability and/or culpability cannot be fastened upon the appellant only on the basis of a resolution dated October 29, 2007.”

11. In *Chromatic India Limited vs. Securities and Exchange Board of India* (Appeal No. 393 of 2020 decided on May 12, 2021) this Tribunal held:-

“14. Having heard the learned counsel for the parties, we are of the opinion that the Resolution dated August 13, 2010 by itself does not create any suspicion nor creates any fraudulent act. Being a signatory to the said Resolution by itself does not violate any provision of the SEBI Act or the PFUTP Regulations.”

12. In the light of the aforesaid, we are of the opinion that merely because the appellant was present when the resolution dated July 27, 2006 was passed, no conclusion can be drawn that this was the starting point of the fraudulent arrangement for issuance of GDR and for opening a bank account. The resolution does not given any indication that the appellant had knowledge beforehand that the GDR issue was the purpose to manipulate the price or the market or that a fraud would be played upon the shareholders and the investors. We are further of the opinion that finding of the WTM that the resolution of the Board of Directors dated June 27, 2006 provides execution of a pledge or execution of a charge agreement is wholly erroneous, perverse and based on no evidence. The resolution also does not stipulate that the proceeds could be utilized by the bank as security in connection with a loan taken by another entity.

13. In the light of the aforesaid, we are of the view that the appellant cannot be debarred only on the basis of being present in the resolution of the Board of Directors dated July 27, 2006. In the absence of any evidence that the appellant had a role to play in the issuance of the GDR, the mere presence of the appellant in the resolution of the Board of Directors dated July 27, 2006 does not make him liable for the alleged fraud that had been committed by the Company.”

8. In so far as the appellants are concerned no finding has been given either by the WTM or by the AO that the appellants had any role to play in the issuance of the GDR. The only finding given is that by signing the resolution of the Board of Directors dated 29th October, 2009 the appellants were party to the fraudulent scheme and had not acted diligently which finding cannot be accepted in the light of the decision cited aforesaid.

9. In view of the aforesaid, the impugned order of the AO as well as the WTM in so far as it relates to the appellants cannot be sustained and is quashed. The appeals are allowed. In the circumstance of the case, there shall be no order as to costs.

10. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

05.7.2021
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