

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on : 12.08.2013

Date of Decision : 30.09.2013

Appeal No. 126 of 2013

1. Pan Asia Advisors
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.C4-A, G-Block,
Bandra Kurla Complex,
Mumbai – 400 051.

... Respondent

Mr. P. N. Modi, Senior Advocate with Mr. Neville P. Lashkari, Mr. Joby Mathew,
Advocates for the Appellants.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Pratham V.
Masurekar, Advocates for the Respondent.

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

Per : Jog Singh (for self and A. S. Lamba)

The present appeal raises an important issue as to whether Global Depositories Receipts, i.e. GDRs, created and issued by foreign banks, namely, Deutsche Bank and Bank of New York, and listed on foreign stock exchanges, namely, Luxemburg Stock Exchange and the New York Stock Exchange, albeit at the instance of Issuer Companies located in India, by a Lead Manager registered in the UK and governed by regulations framed and enforced by a foreign regulator, are

amenable to the jurisdiction of an Indian regulator namely, the Securities and Exchange Board of India (“SEBI”), in case any allegations of irregularity/illegality are leveled against the Lead Manager registered in the UK.

2. The appeal is preferred by two Appellants against the impugned order dated June 20, 2013 passed by the Respondent. Appellant no. 1, namely, Pan Asia Advisors Limited is a company registered under the laws of the UK having its registered office at 42, Mincing Lane, London. It is registered with the Financial Services Authority, the federal financial regulator in the UK and is mainly in the business of advising investors in relation to financial products outside India, including services offered in relation to issuance of GDRs abroad in the capacity of an International Corporate Advisor or a Lead Manager. Appellant no. 2, namely, Mr. Arun Panchariya, is a non-resident Indian residing in Dubai, UAE who was looking after the affairs of Appellant no. 1 till September 2011, when he is stated to have resigned in the wake of the ad interim order of SEBI dated September 21, 2011.

3. Impugned order dated June 20, 2013 restrains the Appellants from accessing the securities market for 10 years for the violation of Regulations 12A(a)-(c) of the SEBI Act, 1992 read with Regulations 3(c)-(d), and Regulations 4(1), 4(2)(c), 4(2)(e)-(f), 4(2)(k) and 4(2)(r) 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).

4. The basis of the impugned order seems to be that the Appellants, while assisting certain Issuer Companies in the matter of creation and issuance of GDRs abroad as a Lead Manager, adopted an objectionable and seemingly illegal modus-operandi from the point of view of certain regulations issued by SEBI. The dispute

revolves around the role played by Appellant no. 1 as Lead Manager to the GDR issues floated abroad at the desire of six Issuer Companies, namely, Asahi Infrastructure and Projects Ltd., Avon Corporation Ltd., Cat Technologies Ltd., IKF Technologies Ltd., K. Sera Sera Ltd. and Maars Software International Ltd. Appellant no. 2 held the entire share capital of Appellant no. 1 during the relevant period i.e. July 1, 2008 to July 20, 2012. The transactions which prompted the Respondent to take action against the Appellants seem to be that Vintage FZE (“Vintage”) sold these to FIIs such as India Focus Cardinal Fund (“IFCF”) and KII Limited (“KII”) among others, who then converted these GDRs into shares and sold them in the Indian capital market. According to the Respondent, prospective investors in the Issuer Companies were given the impression that substantial foreign capital was accruing to these companies through GDR subscriptions without their being any genuine raising of capital. Further, the Respondent also states that misleading particulars of initial investors were provided by Appellant no. 1 to Issuer Companies, which forwarded them to the stock exchanges which, in turn, published them on their websites.

5. The main portion of the impugned order, as contained in paras 16 to 23 thereof, is reproduced hereinbelow for the sake of convenience :-

*“16. While dealing with a matter of this nature, it would be worthwhile to refer to the following observations made by the Hon’ble SAT in matter of **V. Natarajan vs. SEBI (Order dated June 29, 2011 in Appeal no. 104 of 2011)** wherein it was held: “... we are satisfied that the provisions of 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 were violated. These regulations, among others, prohibit any person from employing 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 an exchange. They also prohibit persons from engaging 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 that are listed on stock exchanges. These regulations also prohibit persons from indulging in a fraudulent or unfair trade practice in securities which includes*

publishing any information which is not true or which he does not believe to be true. Any advertisement that is misleading or contains information in a distorted manner which may influence the decision of the investors is also an unfair trade practice in securities which is prohibited. The regulations also make it clear that planting false or misleading news which may induce the public for selling or purchasing securities would also come within the ambit of unfair trade practice in securities”

17. I note that the provisions of section 12A(a)-(c) of the SEBI Act read with regulations 3(c)-(d) of the PFUTP Regulations, inter alia prohibit buying, selling or dealing in securities in a fraudulent manner; employment of any manipulative/deceptive device, scheme or artifice to defraud in connection with dealing in securities; engaging in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with dealing in securities. Further, regulations 4(1) and 4(2)(c), 4(2)(e)-(f), 4(2)(k), 4(2)(r) of the PFUTP Regulations, inter alia prohibit indulgence in fraudulent and unfair trade practices in securities through various acts, omissions stated therein. In my view, any fraudulent or deceptive device, scheme, act, omission, etc. which has the potential to inter alia induce sale/purchase of securities of any company; influence investment decisions of investors in such company; or result in wrongful gain, etc. would be covered within the prohibition under the aforementioned provisions of law.

18. Given the vital functions of protecting investors and safeguarding the integrity of the securities market vested in SEBI and the commensurate powers given to it under the securities laws, it is necessary that SEBI exercise these powers firmly and effectively to insulate the market and its investors from the fraudulent actions of the participants in the securities market, thereby fulfilling its legal mandate. A basic premise that underlies the integrity of securities market is that persons connected with securities market conform to standards of transparency, good governance and ethical behavior prescribed in securities laws and do not resort to fraudulent activities. In this case, I find that Pan Asia and Panchariya by employing fraudulent arrangement with regard to the subscription of GDRs and thereafter monetizing those GDRs through the sale of underlying shares of the GDRs have violated the provisions of Section 12A(a) –(c) of the SEBI Act read with Regulations 3(c) – (d), Regulations 4(1) and 4(2)(c), 4(2)(e) - (f), 4(2)(k), 4(2)(r) of the PFUTP Regulations, and have acted in a manner which is fraudulent and deceptive and to the detriment of the interest of investors in the Indian securities market.

19. I note that this is not the first time Panchariya has been involved in violating securities laws. I observe that earlier, SEBI had passed an order dated November 13, 2009 imposing monetary penalty for creating false and misleading appearance of trading in Alka and his involvement in publication of premature/misleading positive announcements. In view of the repetitive acts of Panchariya and the gravity of the offence that has been perpetrated by him as brought in the foregoing paragraphs, I am of the opinion that stern measures need to be taken against Panchariya and Pan Asia.

20. *In view of the foregoing, I, therefore, in exercise of the powers conferred upon me by virtue of section 19 read with section 11(4) and 11B of the SEBI Act and regulation 11(1) of the PFUTP Regulations, hereby direct as follows –*

i. *Pan Asia and Panchariya as persons connected to the Indian Securities market are barred from rendering services in connection with instruments that are defined as securities (as in section 2(h) of SCRA, 1956) in the Indian market or in any way dealing with them, directly or indirectly, for a period of 10 years, from the date of this order.*

ii. *Pan Asia and Panchariya are prohibited from accessing the capital market directly or indirectly, for a period of 10 years, from the date of this order .*

21. *I note that vide the Interim Order dated September 21, 2011 (later confirmed through the Confirmatory Order on January 17, 2012), Pan Asia and Panchariya were inter alia barred from rendering services in connection with instruments that are defined as securities in the Indian market or in any way dealing with them, till further orders.*

22. *In this context, I note that Pan Asia and Panchariya have already undergone the debarment for a period of approximately one year and eight months. In view of this factual situation, it is clarified that the debarment already undergone by Pan Asia and Panchariya pursuant to the aforementioned SEBI Order shall be reduced while computing the period of debarment being imposed vide this order.*

23. *This Order shall come into force with immediate effect.”*

6. Vociferously denying any misdemeanors on their part, the Appellants have raised a preliminary objection as to the jurisdiction of SEBI to intervene in respect of acts done and modalities adopted by them in the matter of creation and issuance of GDRs abroad as the same are governed by the RBI and the Ministry of Corporate Affairs, Government of India. The Appellants submit that they have no role in the conversion of GDRs into shares and their trading on Indian Stock Exchanges. Similarly, the Appellants cannot be held responsible for any alleged act of the Issuer Companies in India. No show cause notices have been issued to the concerned Indian Issuer Companies.

7. The jurisdictional issue was taken up seriously by the Appellants before SEBI as well as this Tribunal and at the time of oral submissions, both the learned senior counsel argued for almost four days on this preliminary issue intermingled with the merits of the matter. So even for deciding the issue of jurisdiction, we have to delve into the submissions made by the parties on merit to some extent. Since the jurisdictional issue is at the core of the controversy in hand, we must necessarily deal with it at the very outset. It has been specifically held by the Hon'ble Supreme Court in the case of Carona Ltd. vs. Parvathy Swaminathan & Sons reported in (2007) 8 SCC 559 that *the fact(s) upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be "jurisdictional fact(s)". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. Also, a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess. The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a court or tribunal.* There is a plethora of rulings supporting this proposition of law but the same have not been dealt with for the sake of brevity.

8. It is the Appellants' case that the Respondent's jurisdiction is limited to the territory of India and acts or omission committed by a party therein. It does not extend to transactions executed by the Appellants in countries outside India with respect to the issuance of GDRs since the same are governed by **the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipts Mechanism) Scheme, 1993 ("the GDR Scheme")** issued by

the Ministry of Finance, Government of India and the Master Circular on Foreign Investment issued by the RBI periodically. On the contrary, the Respondent has not framed any regulation governing GDRs for the simple reason that it lacks jurisdiction to do so.

9. With respect to the transactions between Vintage Bank (“Vintage”) and Euram Bank, the necessary returns filed by Vintage have been scrutinized by the RBI which, as submitted by the Appellants, has jurisdiction instead of the Respondent. The transactions in question are said to be valid in Austria since the banking regulator in Austria, ie., the Central Bank of the Republic of Austria has not questioned any transaction. In this connection, the Appellants have produced the legal opinion of some leading law-firms of Austria and the UK which has not been denied by the Respondent. The Respondent is wrong in holding that there was no real movement of funds solely on the basis of the fact that the transactions were by way of book entries in Euram Bank’s records through which the account of Vintage was credited with the loan amounts which were then transferred to the GDR account of the Issuer Company. The Appellants, thus, vehemently refute the Respondent’s allegation that there was no actual inflow of funds to the Issuer Companies and that GDRs were issued without any costs or purchase transactions abroad.

10. The Appellants submit that even otherwise none of their actions with respect to GDRs can be construed as violating any law, rule or regulation framed by SEBI. It is pointed out that even in India, banks regularly finance applications in IPOs as well as share trading. In such transactions the shares end up getting pledged and then sold for repayment which is considered bonafide and legitimate. All loans to Euram Bank have since been repaid and pledges released. It is not uncommon in foreign countries for GDRs to be subscribed through Special Purpose Vehicles (SPVs) which in this case were the initial investors and not fictitious entities created

by the Appellants. Such SPVs are especially created for the limited purpose of subscribing to GDRs. It was Euram Bank which was “the Banker to the Issue” in respect of the GDR issues. Similarly, the Bank of New York and Deutsche Bank created and issued GDRs to the initial subscribers. These entities are also, undoubtedly, beyond the jurisdiction of the Respondent manifested in the fact that the Respondent has not taken up the matter with them even for the sake of clarification. If this has in fact been done by the Respondent, the outcome has not been brought on record.

11. The Appellants further submit that the GDRs were in reality legitimately sold and transferred to IFCF, KII and the rest. The loans availed from Euram Bank were repaid and the loan/pledge agreements were terminated. Vintage did not have a joint account with any Issuer Company. The Issuer Companies pledged their cash account in which the GDR subscription funds were deposited while Vintage pledged the account in which the GDRs were held. Moreover, no pledge agreement between Euram Bank and any Issuer Company was ever invoked. And the reliance placed by the Respondent on the agreement between Euram and Vintage is totally erroneous since the agreement itself is beyond its purview.

12. Regarding the Respondent’s allegation that Indian investors have ultimately paid for the GDRs, it is argued by the Appellants that large quantities of GDRs have not even been converted into shares, and a sizeable portion of those converted has not been traded in the Indian securities market. The Appellants submit that the allegation regarding the initial investors being fictitious contradicts the allegation that certain foreign subsidiaries of a few Issuer Companies had financial transactions with initial investors of GDR issues. As elsewhere noted, Vintage has not been called upon to answer for its alleged misdeeds, if any. The Respondent’s finding that it is “probable” that the transactions between the foreign subsidiaries and

Vintage “could possibly be a route for the issuer company to compensate Panchariya for the services rendered by him” is untenable since the Respondent does not seem to have conducted a full and proper investigation regarding the same by seeking clarifications from either the Bank of New York, the Deutsche Bank or the other FIIs. Similarly, no loss, whatsoever, is shown to have been caused to the Indian investors or to the Indian capital market.

13. The Appellants submit that during the course of the hearing of the Appeal, this Tribunal put a question to the Respondent seeking to know which of the steps of the flow-chart depicting the fraudulent scheme allegedly undertaken by the Appellants, is actually illegal as per Indian law. The Respondent’s reply to this was simply that nothing depicted in the flow chart could as such be said to be illegal. Moreover, the GDRs were created and issued to initial investors by Deutsche Bank and the Bank of New York. The Respondent does not seem to have checked with either of them regarding the identity of these initial investors. In the absence of any investigation conducted by the Respondent in this regard, the Respondent cannot allege that the list of initial investors provided is fictitious.

14. The Respondent’s accusation that Appellant no. 1 provided false information regarding initial investors contradicts the allegation that appellant no. 1 failed to provide information regarding the names of initial investors. It is further submitted that all Vintage did was to arrange the loan from Euram Bank. The GDRs were pledged by Vintage to Euram Bank as security after obtaining the consent of the initial investors as per law.

15. The allegation that the Appellants provided Indian stock exchanges with false information is baseless owing to the fact that no information was provided to any stock exchange by the Appellants since it is not their responsibility to do so. While

addressing the Respondent's contention that the GDR subscription funds received by the Issuer Companies could not be used by them since they were pledged to Euram Bank to secure the loan availed by Vintage, the Appellants state that pledging the funds would itself amount to usage of the funds. It was pointed out that only that could be pledged which belonged to oneself. The Respondent is, therefore, wrong in alleging that no foreign capital was raised by the Issuer Companies to be used for their benefit.

16. The Appellants forcefully submit that it is incorrect to state that the GDRs have been issued from the authorised capital of the company, when in actuality the shares underlying the GDRs held by the Domestic Custodian Bank form part of the authorised share capital of the Indian Companies. So long as the GDRs remain unconverted into shares, no trading can be said to have been done in the Indian market with respect to the underlying shares.

17. Per contra, the Respondent states that it noticed that several FIIs/Sub-accounts were converting GDRs held by them in certain companies into shares for sale in the Indian market. Appellant no. 2 can be said to be connected with a few of these entities, namely, Alkarni Holdings Ltd.; Alka India Ltd.; Vintage FZB; India Focus Cardinal Fund; KII Ltd.; Oudh Finance and Investment Pvt. Ltd.; Basmati Securities Pvt. Ltd. and S. V. Enterprises.

18. The Respondent explains the allegedly fraudulent scheme launched by the Appellants in the following manner. Vintage manages the availment of loans in order to subscribe to GDRs. After subscription these GDRs are sold to FIIs by Vintage which then go on to sell shares upon conversion of GDRs in the Indian capital market. The Respondent states that as per the agreement entered into between Vintage and Euram Bank, the amount received by the Issuer Company

from Vintage on subscribing to GDRs should be deposited in the account of the Issuer Company maintained with Euram. It is also pointed out that this account appears to be the same as the one in which the Issuer Company shows its GDR subscription proceeds to have been deposited. This GDR account is stated to have been pledged as security by the Issuer Companies to Euram Bank for loans availed of by Vintage. From all of the above, the Respondent has inferred that although the GDR account is held in the name of every Issuer Company, it is actually Vintage which has control over these accounts since they are kept as collateral for the loan availed by Vintage.

19. The Respondent states that once the loan is taken and the proceeds towards GDRs deposited with Euram, the Issuer Company issues GDRs to investors through the designated Overseas Depository Bank. The GDRs were transferred to the security account of Vintage maintained with Euram instead of the accounts of initial investors. It was also noted that this was done on the day of issuance of GDRs when a payment for the GDRs in question was made from Vintage's account with Euram to the GDR account of the Issuer Company. On the basis of this, the Respondent has concluded that the GDRs were issued to Vintage directly and that the list of initial investors allegedly provided by the Appellants is misleading. The Respondent submits that there is no effective movement of funds involved. Investigations seem to have revealed that the dealings of KII in the GDRs of the Issuer Companies were financed by Appellant no. 2. The explanation received by the Respondent from the Issuer Companies in this regard is stated to be inadequate.

20. It is also alleged that Appellant no. 2 through Vintage signed a loan agreement with Euram Bank which was collateralized by pledging the GDR proceeds received by the Issuer Companies which allegedly made Vintage the sole subscriber to GDRs. The Respondent's case, thus, appears to be that upon buying

shares from the afore-mentioned FIIs the Indian investors seem to have assisted the Issuer Companies in releasing the GDR subscription proceeds from all encumbrances.

21. Further, it is submitted that the loan agreement and the pledge agreement cannot exist exclusively of each other. Due to the pledge agreement entered into by Asahi, which is one of the Issuer Companies, it was not able to utilize the GDR proceeds till the loan taken by Vintage from Euram Bank was repaid, which took nearly eight months. Via the pledge agreement, the Issuer Companies pledge the GDR proceeds as collateral for the loan availed by Vintage. Such an arrangement is not allowed by law in India. Existing shareholders of the Issuer Companies, while appreciating the fact that foreign capital was being raised through issuance of GDRs, were not aware of this design of the Appellants.

22. We have heard the learned counsel for both parties at length and perused the appeal, documents attached therewith and the judgments cited before us. To begin with, we would like to deal with the contention of the Appellants that since no affidavit in reply has been filed to the Appeal, none of the submissions in the Memorandum of Appeal are denied/disputed by the Respondent, and hence, all the submissions in the Appeal are deemed to be admitted. In this connection, Mr. P. N. Modi, learned senior counsel for the Appellants has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **M. Venkatramana Hebbar (Dead) By Lrs. vs M. Rajagopal Hebbar and Others reported in (2007) 6 SCC 401**. We have minutely gone through the said judgment and we note that the respondents before the Hon'ble Supreme Court were the original plaintiffs who had filed a suit for partition of the property involved in that matter. Their suit was not decreed by the trial court on the ground that there was already a family settlement in place and the property had been partitioned by the co-owners. On appeal the Hon'ble High

Court observed that the trial court had not taken into consideration the plea of the plaintiffs that there was no partition of the family property by metes and bounds. This plea of the plaintiffs was not denied by the defendants (appellants before the Hon'ble Supreme Court) before the trial court. Therefore, on appeal, the Hon'ble High Court reversed the judgment of the trial court.

23. In this background, the matter reached the Hon'ble Supreme Court which held that the High Court rightly directed that the plaintiffs' suit be decreed. In this connection, relying upon Order 8 and Rules 3 and 5 of the Civil Procedure Code, the Hon'ble Supreme Court held as under :-

“12. The contract between the parties, moreover was a contingent contract. It was to have its effect only on payment of the said sum of Rs. 15,000 to the plaintiff and the order respondents by Defendants 1 to 3. It has been noticed hereinbefore by us that as of fact, it was found that no such payment had been made. Even there had been no denial of the assertions made by the appellant in their written statement in that behalf. The said averments would, therefore, be deemed to be admitted.

13. Thus, if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the court was entitled to draw an inference that the same had been admitted. A fact admitted in terms of Section 58 of the Evidence Act need not be proved.”

24. Facts of the above case are clearly distinguishable and do not help the Appellants since in the present matter we are dealing with a statutory Appeal. Moreover, the learned senior counsel for the Respondent, Shri Shyam Mehta, had argued the matter on the basis of the impugned order for almost two days in the presence of the learned senior counsel for the Appellants, who had even availed of an opportunity granted to him to meet out the contentions of the Respondent made during the oral arguments by way of rejoinder arguments. Therefore, it cannot be said that mere non-filing of reply in affidavit by the Respondent would amount to an admission of the submissions/contentions raised in the Appeal by the Appellants.

This plea of the Appellants, being misconceived, is hereby repelled in the facts and circumstances of the present case. However, we feel that had a reply been filed by the Respondent in the case in hand, it would have definitely helped the Tribunal as well as the Appellants to comprehend the whole matter in a shorter span of time and with better precision.

25. During the course of exhaustive arguments made before us on facts and on law, learned counsel for both parties have brought various rulings and other material on record in their tireless efforts to assist us in reaching a just and fair inference in the present matter. However, no pronouncement made by any Hon'ble superior court on the issue of GDRs has come to our notice. In such a situation, we have tried to restrict ourselves to purely statutory and regulatory provisions promulgated by the Government of India/ RBI, coupled with well settled legal principles enunciated mainly by the Hon'ble Supreme Court.

26. As stated earlier, this Appeal raises an issue regarding the jurisdiction to be exercised over the creation and issuance of GDRs. Specific guidelines regarding issuance of GDRs are in existence in the form of regulations and rules enunciated by individual stock exchanges like the Luxemburg Stock Exchange. The Financial Services Market Act, 2000 regulates financial services and markets in the UK. And as per Section 19 of the Act only an authorised person or an exempt person may carry on regulated financial activity in the UK. As already stated above, Appellant no. 1 (now called Global Finance and Capital Limited) is an authorised person bearing reference number 456779 on the website of the FSA. Appellant no. 1 clearly functions under the aegis of the FSA which supervises all its actions.

27. Turning to the Indian context, it may be noted that the expression 'Global Depository Receipts' has been defined in clear terms under the provisions of the

GDR Scheme of 1993 and not in the SEBI Act, 1992, or the Securities Contracts (Regulations) Act, 1956, or the Depositories Act (1996), or the existing Companies Act, 1956. Section 2(c) of the said Scheme reads as follows :-

“2(c) Global Depository Receipts” means any instrument in the form of a depository receipt or certificate (by whatever name it is called) created by the Overseas Depository Bank outside India and issued to non-resident investors against the issue of Ordinary shares or Foreign Currency Convertible Bonds of issuing company.”

An attempt has been made to solidify the law with respect to GDRs by introducing Section 2(44) in the new Companies Bill, which defines GDRs, and Section 41 which provides that a company may issue GDRs abroad after passing a special resolution as per law.

28. The conception of GDRs may be traced back to the early 1990's when various steps of economic liberalization relating to foreign investment and foreign trade were undertaken by the Government of India and drastic changes were made in the then existing law by bringing in new rules and regulations, including revisiting the entire Foreign Exchange Regulations Act, 1973 ("FERA"). A Task Force was constituted under the supervision of the RBI to undertake a fresh exercise and suggest a new law in this regard. Finally, it was suggested that the FERA should be repealed altogether. As such, new legislation called the Foreign Exchange Management Bill was introduced in the Parliament, which ultimately took the shape of the Foreign Exchange Management Act, 1999. Simultaneously, a detailed scheme for the issuance of GDRs as well as FCCBs i.e Foreign Currency Convertible Bonds was issued by the Ministry of Finance, Government of India in the year 1993, i.e., the GDR Scheme of 1993, with the object of facilitating the issue of FCCBs and GDRs abroad by companies registered in India. The Government of India's policy with regard to GDRs is primarily reflected in the following -

- I. Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipts Mechanism) Scheme, 1993.
- II. The Reserve of India Master Circular on Foreign Investment in India.
- III. The Foreign Exchange Management Act, 1999
- IV. The Foreign Exchange Management (Transfer or Issue of Security by a person resident Outside of India) Regulations, 2000.

29. A perusal of the **GDR Scheme of 1993** shows that GDRs are to be “created and issued” by an Overseas Depository Bank. No Merchant Banker (Lead Manager) registered with SEBI or any other authority in India is competent to handle GDRs to be issued abroad by an Issuer Company located in India. Reciprocally speaking, the Securities regulator in India, viz., SEBI, cannot conceivably extend its reach to a company which is not only incorporated in the UK, but by virtue of being registered with the financial regulator of the UK, i.e., FSA is also managed and supervised by the FSA itself.

30. **Clause (3)** of the scheme provides that an application for permission to issue GDRs is to be made by an Issuer Company to the Department of Economic Affairs, Ministry of Finance, Government of India. It further provides that an approved intermediary under the scheme, would be an Investment Banker registered with the Securities and Exchange Commission in the USA, or under the FSA in the U.K., or the appropriate regulatory authority in Germany, France, Singapore or in Japan. Such issues would need to conform to the Foreign Direct Investment Policy and other mandatory statutory requirements and detailed guidelines issued in this regard. The provisions of paragraph (4B) of Schedule I to **Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000** as notified by Reserve Bank of India vide Notification No. FEMA 41/2001-RB, dated March 2, 2001, would also need to be adhered to. **Clause 5(4)** specifically stipulates the manner in which the issue price or conversion price is to

be determined. Sub-clause (cc) specifically lays down that it is only where an Issuer Company makes an issue of GDRs and simultaneously offers shares to the Indian market by way of an Initial Public Offer (IPO) or otherwise that SEBI's approval is to be obtained and even that would be for the limited purpose of issuance of shares to Indian investors and no one else. GDRs have been consciously kept out of the purview of SEBI. **Clause (6)** mentions that GDRs can only be listed and freely traded on a foreign stock exchange. Similarly, **Clause 7** stipulates the mechanism for conversion of GDRs into shares. **Clause 8** further stipulates that even bonus and rights shares, if any, should be locked in with the Domestic Custodian Bank. The Overseas Depository Bank shall then issue corresponding GDRs to the GDR subscribers abroad. Further, **Clarification 22** for the first time introduced the concept of **two way fungibility of GDRs**. Clause (e) expressly provides that since conversion of shares into GDRs, in keeping with this principle of two way fungibility, would involve a secondary market transaction, the acquisition of such shares through an intermediary on behalf of the overseas investors would fall within the regulatory purview of SEBI. However, it is pertinent to note that here again the second tranche of the issuance of the GDRs is to be monitored by the RBI alone. It is, thus, evident that wherever the law makers wish to entrust SEBI with any kind of role in the matter of GDRs, the same is expressly provided for.

31. A perusal of the provisions dealt with above leaves no room for doubt regarding the jurisdiction pertaining to the creation and issuance of GDRs. To our minds, it is clear that the Government, as a policy matter, intended for GDRs to sail in a different boat entirely. As noted above, the Ministry of Finance/ RBI regulates the issuance of GDRs. The fact that even the issuance of GDRs, in accordance with the concept of two-way fungibility is to be managed by the RBI shows that even

after GDRs are converted into shares, if their reconversion is required, the relevant authority i.e. RBI steps into the picture.

32. Next, we analyze important provisions of the **RBI Master Circular on Foreign Investments in India**. This master Circular exhaustively deals with the regulatory framework governing foreign investment in India as per the requirements laid down in **Section 6(3)** of the FEMA, 1999. It provides for the application of SEBI's rules, regulations regarding various forms of foreign investments in India, but clearly excludes GDRs. It also deals with other connected issues such as that of NRI direct investment; transfer of shares from Resident to Non-Resident; Issue of Rights/Bonus Shares to the Non-Resident shareholders; Issue of Shares under ESOP's to Non-Resident; Investment in Shares by qualified Foreign Investors and Indian Depository Receipts (IDR) etc. In all these matters GDRs are not involved at all. **Clause 8(f)** specifically mentions that GDRs must be issued in accordance with the GDR Scheme of 1993 and provides for the reporting guidelines. Section V of the said master circular stipulates provisions for reporting to the RBI on the completion of the GDR issues, and quarterly reporting thereafter to the RBI by the Issuer Companies in the prescribed form to the RBI and not to SEBI.

33. Once again a perusal of the provisions of this Master Circular makes it abundantly clear that GDRs fall squarely within the RBI's domain as is evident from the fact that the only mention of GDRs has been made to clarify any doubt regarding control over GDRs by stating that they are to be managed in accordance with the GDR Scheme of 1993 issued by the RBI. It is categorically mentioned that once GDRs have been issued, a report on the completion of the process of issuance is to be sent to the RBI, as opposed to it being sent to SEBI.

34. Now we turn to the **Foreign Exchange Management Act, 1999** i.e. FEMA. The history behind the promulgation of FEMA has already been discussed hereinabove. **Section 1** of FEMA deals explicitly with extraterritorial jurisdiction, stating in no unclear terms that the act extends not only to India but also offices and agencies outside India which happen to be owned or controlled by an Indian resident. It also applies to contraventions committed outside India by any person to whom the act applies. **Section 6(3)** of the said Act, which stipulates that RBI would regulate the transfer or issue of security outside India, reads as under :-

“6(3) Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, be regulations, prohibit, restrict or regulate the following:-

- (a) transfer or issue of any foreign security by a person resident in India;*
- (b) transfer or issue of any security by a person outside India;*
- (c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;*
- (d) any borrowing or lending in foreign exchange in whatever form or by whatever name called;*
- (e) any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;*
- (f) deposits between persons resident in India and persons resident outside India,*
- (g) export, import or holding of currency or currency notes;*
- (h) transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;*
- (i) acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;*
- (j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred, --*
 - (i) by a person resident in India and owed to a person resident outside India; or*
 - (ii) by a person resident outside India*

35. **Chapter 6 of the FEMA** deals with penalties in respect of any violation of the provisions of the said Act and any, rules, regulations, notifications or directions issued thereunder by the RBI. In fact, **Chapter 5** also provides for the adjudication process to be undertaken by an “adjudicating authority”. It makes provisions for

appeals from the orders of an adjudicating authority to an “Appellate Tribunal”, and then to the Hon’ble High Court. **Chapter 6** lays down provisions for establishment of a separate Directorate of Enforcement which has been empowered to undertake investigation and search operations etc.

36. **Section 47** of the said Act empowers the RBI to make regulations under which “**Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside of India), Regulations, 2000** (“the regulations of 2000”) have been framed. **Regulation 3** of the regulations of 2000 provides that securities can be issued or transferred outside India only as per FEMA, 1999 and rules and regulations framed thereunder. **Regulation 4** specifically governs GDRs. It is stipulated that GDRs can only be issued with the approval of the Ministry of Finance as per the aforesaid Scheme. The reporting requirement to RBI with respect to GDRs has once again been reiterated. **Regulation 6** clearly stipulates that pricing of the GDRs would be determined strictly as per the aforesaid Scheme. **Schedule I** prescribes the format for the return to be filed by an Indian Issuer Company issues GDRs. The scheme of FEMA, thus, makes it abundantly clear that Government of India has, as a policy matter, kept each and every minute aspect of the GDR issue under the purview of the RBI and not SEBI. So much so that there is a separate, distinct and exhaustive regulatory system for controlling issues connected with GDRs in FEMA which belies the contention of the Respondent that it has jurisdiction in the matter.

37. Furthermore, Section 1 of the SEBI Act, 1992 itself makes it crystal clear that the SEBI Act extends solely to the whole of India. The natural interpretation of the provisions of Section 1 would be that it does not apply to activities pertaining to the capital market outside the country. As far as jurisdiction goes, it is a settled position that in the Indian politico-legal set up, jurisdiction on any entity, such as

the Respondent, maybe conferred only by the Parliament and no one else. It cannot be acquired, assumed or exercised in any other manner by any governmental agency.

38. In this connection, it is pertinent to note the observations of the Kania Committee which submitted its report in 2005. It was observed that the SEBI Act is bereft of any substantive provisions which, in the opinion of members of the Committee, ought to be given an overriding effect over other laws. Moreover, in places in the SEBI Act where certain substantive provisions deserve to be given an overriding effect, it has already been done through non-obstante clauses. The Committee, therefore, recommended that the SEBI Act not be amended to allow it to override all other statutes.

39. Our Constitution prides itself on being one which recognizes a system of governance wherein the three organs of the Government, viz., the legislature, the executive and the judiciary, each adopts a system of 'checks and balances' so as to keep the other organs in line. In **Ram Jawaya Kapur & Ors. vs. The State of Punjab, reported in AIR 1955 SC 549**, the Supreme Court proclaimed the following principle: *“The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”* This principle applies not only to the three arms of the Indian Government but also to all the statutorily created bodies to which the Government might choose to delegate certain tasks. But those tasks/ matters, which have not specifically been delegated, can under no circumstances be assumed to have been so delegated.

40. Learned counsel for the Appellant has placed before us the judgment passed in the case of **GVK Industries Ltd. and Anr. vs. Income Tax Officer and Anr., decided by the Hon'ble Supreme Court in 2011 reported in (2011) 4 SCC 36**, the issue which arose was related to extra-territorial application of laws passed by the Parliament. The facts of the case were such that the appellant filed a writ petition in the Hon'ble High Court of Andhra Pradesh challenging an order of the IT Officer which directed the Appellants to withhold certain amount of money being paid to a foreign company under one of Sections 9(1)(i) or 9(1)(vii)(b) of the Income Tax Act, 1961. The vires of Section 9(1)(vii)(b) was challenged for the alleged violation of Article 14 of the Constitution of India. The Hon'ble High Court, rejecting the petition, upheld the applicability of Section 9(1)(vii)(b) along with its constitutional validity. It, however, held that Section 9(1)(i) did not apply in the circumstances of the case. Allowing the appeal, the Hon'ble Supreme Court pertinently observed as under :-

“120. The courts should always be very careful when vast powers are being claimed, especially when those claims are cast in terms of enactment and implementation of laws that are completely beyond the pale of judicial scrutiny and which the constitutional text does not unambiguously support. To readily accede to demands for a reading of such powers in the constitutional matrix might inevitably lead to a destruction of the complex matrix that our Constitution is. Take the instant case itself.”

41. Keeping in view the spirit of GVK, it is evident that the Parliament has already stepped in and made law governing GDRs in the form of FEMA, 1999 and connected regulations. This has been done deliberately by the Parliament duly taking note of the nexus between creation and issuance of GDRs abroad and its conversion into underlying shares in India. Thus, the Parliament has, as a matter of policy, conferred majorly upon the RBI the jurisdiction pertaining to the creation and issuance of GDRs abroad because of foreign exchanges being involved in the

process. SEBI cannot assume jurisdiction vested with the RBI when its role as a regulator begins only after GDRs are converted into Indian listed Securities.

42. We, therefore, fail to see how and on what ground supervision over creation and issuance of GDRs can be given to the Respondents, particularly in the absence any law categorically empowering SEBI to deal with matters relating to creation and issuance of GDRs abroad. On the contrary, the Indian Parliament, in its wisdom, has conferred such power upon RBI and Ministry of Corporate Affairs under the FEMA, 1999 except when the GDRs are converted into shares in India and are traded on Indian Stock Exchanges. Thus, SEBI has been given a restricted and well defined role in this regard and all other regulatory aspects in respect of GDRs are within the domain of RBI or Ministry of Corporate Affairs.

43. We now discuss certain other judgments referred to by the Appellants during the course of the arguments advanced before us. In **General Manager, Telecom vs. Mr. Krishnan and Anr., decided by the Hon'ble Supreme Court on September 1, 2009 reported in (2009) 8 SCC 481**, the dispute related to non-payment of the telephone bill to the respondent, for which the connection was disconnected. The respondent filed a complaint before the District Consumer Disputes Redressal Forum. The complaint was allowed by the Forum vide order dated November 26, 2001 which directed that the connection be restored and that a compensation of Rs. 5000/- with interest at 12 percent per annum from the date of filing of the complaint be paid to the respondent. The appellant filed a writ petition before the Hon'ble High Court of Andhra Pradesh which was dismissed. The Hon'ble Supreme Court while allowing the appeal held that when there was a special remedy provided by way of Section 7-B of the Telegraph Act, the remedies under the Consumer Protection Act would be barred by implication. It was observed that special law overrides the general law. It is indeed a well established principle that in cases

where the law provides a specific course of action to the aggrieved, other remedies in law are unavailable.

44. We now deal with the judgment passed by the Hon'ble Supreme Court in the case of **State of Maharashtra vs. Public Concern for Governance Trust and Ors., alongwith Vinay Mohan Lal vs. State of Maharashtra and Ors. reported in (2007) 3 SCC 587**. Certain applications were made to the Chief Minister of Maharashtra, who also held the post of Minister for Urban Development, regarding allotment of land. Now, the Chief Minister noted the words “please put up” on five out of the six applications. The applications were forwarded to the relevant authority, i.e., the City and Industrial Development Corporation (CIDCO). The Chief Minister's role ended after the endorsement of the five applications. Allotments were made to six co-operative housing societies by CIDCO. These were challenged by way of a writ petition on the ground that the Chief Minister favored five of those applications by endorsing them. The Hon'ble High Court of Bombay set aside the allotments without calling for any explanation from the Chief Minister or making him a party to the case. Certain adverse remarks were made against the Chief Minister by the Hon'ble High Court. After hearing both parties, the Hon'ble Supreme Court came to the conclusion that the remarks/strictures passed against the Chief Minister were illegal, incorrect and unwarranted, being against the principles of natural justice, particularly “audi alteram partem” since the Chief Minister had not been given an opportunity to put forth his case before the Hon'ble High Court. In the case in hand as well, we note that the Respondent has sought to implicate Vintage, Euram Bank, Indian Issuer Companies alongwith certain other entities including FIIs by making certain observations against them without issuing any show cause notice or summons thereby denying any opportunity to them of being heard.

45. We now deal with the judgments cited by the Respondents. In the case of **V. Natarajan relied upon by the Respondent, and decided by this Tribunal on June 29, 2011 (Appeal No. 104 of 2011)**, the Appellant therein was the Chairman-cum-Whole Time Director of company in question i.e., Pyramid Saimira Theatre Ltd. During the financial year 2007-2008, the Board of Directors of Pyramid Saimira Theatre Ltd. inflated its revenues and profit by fictitious entries in its accounts and disclosed the same in quarterly and annual accounts of the stock exchanges where the shares of the said company were listed. This definitely misleads the investing public in their investment decision. This was rightly treated by the Tribunal as a fraudulent act on the part of Mr. V. Natarajan, the Appellant in the said case. The FUTP Regulations clearly prohibit planting false or misleading news which has the potential of influencing the gullible public in their decision making process for the investment purposes in shares of a particular company. Moreover, despite his resignation in April 2008, Mr. V. Natarajan continued as Chairman emeritus of the company. Therefore, the said case is distinguishable and does not advance the case of the respondents.

46. Similarly, in the case of **N. Narayanan vs Adjudication Officer, SEBI reported in (2013) 178 Comp. Case 390 (SC)**, Hon'ble Supreme Court was dealing with the case of a promoter and whole time director who was found guilty of intentionally giving false information by artificially inflating his companies' financial results, revenues and profits etc. Thereby, causing damage to the capital market as well as a common investors' interest. This led to erosion of the confidence of the public in the capital market. Moreover, this was done by the appellant therein for personal gains and attainment. In fact we find that both these are distinguishable on the ground that in those two cases irregularities of a grave nature had been committed by directors of the companies by providing false

information to the stock exchanges and Indian investors in the form of artificial inflated accounts. In this case, however, no information has been provided to the public or the stock exchanges, whatsoever by the Appellants as that particular job belonged to the Issuer Companies.

47. The case of **Alka India Ltd. decided by this Tribunal on May 6, 2010 in Appeal Nos. 44 of 2010 etc.** has been relied upon by the Respondent to impress upon the point that the Appellant no. 2 has adopted similar modalities in the case in hand. We have minutely read the judgment of Alka India Ltd. and we note that it pertains to certain reportings by the said company i.e., Alka India Ltd. of the financial results in the year 2003. The same were alleged to have been inflated by not making any provision of tax payment etc. There were certain misleading corporate announcements which also formed part of the allegations. This Tribunal, therefore, concluded that such an act on the part on the company disseminated certain non-accounting information to the shareholders and the public at large, which was price sensitive. The company was, therefore, debarred from accessing the Indian securities market for a period of 6 months. Certain monetary penalties were also imposed on the promoters/directors of the said company. Alka India Ltd. is, therefore, totally in the context of an Indian company making certain misleading corporate announcements which were considered harmful to the Indian market. It does not deal with the issue of Global Depository Receipts. The case of Alka India stands on a completely different footing with respect to the case present before us. Any irregularities, if at all committed by Appellant no. 2, with respect to Alka India cannot be a ground to condemn the Appellants in the case in hand, without any obvious correlation. The judgment, therefore, does not advance the case of Respondents.

48. In **Sahara India Real Estate Corporation Limited & Ors. vs. SEBI reported in (2013) 1 SCC 1**, the main issue was whether Optionally Fully Convertible Debentures (“OFCDs”) issued by the two Sahara companies were public issues and hence required to be listed on a stock exchange. Connected to this was the question of interpretation of the expression “securities”, as defined in the SCRA. In this context the broad issue was whether SEBI possessed jurisdiction to regulate such securities which were not listed on any of the stock exchanges in the light of certain provisions of the Companies Act, 1956. The Tribunal held that the OFCDs were securities within the meaning of the SEBI Act read with the provisions of the SCRA and S.2 (45 A) of the Companies Act. Therefore, the OFCDs were compulsorily required to be listed on a stock exchange as it was a public issue and not a private one which could be limited to 50. The OFCDs were subscribed to by almost 3 crore investors, as such, listing was necessary. On appeal before the Hon’ble Supreme Court, the order of the Tribunal was upheld with certain modifications regarding grant of extra time to the two Sahara Companies for complying with the orders in question. The facts of the present case are, therefore, entirely distinguishable in as much as in the case before the Hon’ble Supreme Court, admittedly, OFCDs were involved which are securities created, conceptualized and invested in by investors in India whereas in the present case GDRs have been created and issued in foreign domain and thus, fall within the purview of the RBI and not SEBI.

49. Further, in **Karnavati Fincap Limited. Vs. SEBI reported in 186 Comp. Cases (87)**, the issue which presented itself before the Gujarat High Court was whether investors who have purchased shares listed on a recognized stock exchange can be included within the meaning of the expression “other persons associated with the securities market” in Section 11(2) (i) of the SEBI Act and that the said

expression is not limited to persons listed in Section 11(2). The petitioners before the Hon'ble High Court had dealt in the scrip of Mr. Madanlal B. Purohit listed on the BSE. They argued that purely on the basis of the fact that they had executed transactions with respect to shares listed on the BSE, SEBI did not have the right to summon the petitioners or institute an enquiry against them or call for any information from them. It was also contended that an in-depth reading of Section 11(2) (i) read with Sections 11 B and 12 of the SEBI Act leads to the conclusion that SEBI could regulate only stock exchanges, mutual funds, other persons associated with the securities market and intermediaries and self- regulatory organizations in the securities market. However, the Hon'ble High Court held that the buyer of shares would fall within the purview of the class enumerated in clause (i) as a person associated with the securities market. It was also held that the PFUTP Regulations of 1995 categorically provided for an investigation to be conducted into the affairs of any person dealing in the securities market.

50. In the facts and circumstances of the present case, we note that the judgment in Karnavati Fincap Ltd. is distinguishable on account of the petitioners therein being Indian citizens, particularly investors in the capital market. In the present appeal, Appellant no. 1 is a company registered with the FCA, UK, whereas Appellant no. 2 is based in Dubai. Therefore, Karnavati Fincap Ltd. does not advance the Respondent's case in any manner. We find this case to be distinguishable purely on the basis of facts.

51. In **Price Waterhouse and Company vs. SEBI reported in (2010) 112 (8) Bom. L. R. 3871**, SEBI had received some information from B. Ramalinga Raju of Satyam Computer Services Limited disclosing that the information provided to stock exchanges in the form of the statement of accounts was false in that the balance sheet of Satyam showed inflated cash and bank balances amounting to

around an extra Rs. 321 Crore. SEBI, while investigating the matter, sent show cause notices to Price Waterhouse and Company, along with a few individual chartered accountants in relation to the audit performed by them of the accounts of Satyam.

52. The Hon'ble Bombay High Court held that SEBI did in fact have the right to inquire into the matter connected with the fabrication of books of accounts and balance sheets of Satyam since SEBI's powers stand independent of the Institute of Chartered Accountants. SEBI taking action with respect to **a statutory auditor** appointed for a listed company cannot be construed as SEBI encroaching upon the powers of the institute referred to above. This judgment too is distinguishable owing to the fact that the firm Price Waterhouse and Company is registered with the Institute of Chartered Accountants, and hence subject to Indian laws. Moreover, the acts complained of against them were committed within the territory of India.

53. Without prejudice to the contentions of both the parties, it is worthwhile to note that the Appellants submit that the impugned transactions are legal in Austria and that the Respondent is wrong in holding that the legality of the transactions in Austria is irrelevant. The Appellants point out that certain allegations, i.e., allegations relating to Section 77 of the Companies Act, 1956, allegations with respect to the judgment in the case of Gammon India Limited and allegations in respect of the FEMA Guarantees Regulations, made their first appearance in the impugned order and are conspicuously missing in the show cause notice. This itself vitiates the impugned order, being violative of natural justice. From a perusal of the second chart it is seen that the total value of GDRs sold by Vintage to IFCF and KII was US \$ 2,79,84,972 (Rs. 139.92 crores when \$1= Rs.50) and the total value of shares sold by IFCF and KII in the Indian market was Rs.120.17 crore, which shows actual loss to Vintage. From the two charts provided, it cannot be

conclusively proved that prices of scrips of some Issuer Companies involved, for which GDR's were issued by the Appellants went up, or that Indian investors were put to any loss. In fact, from sale values of GDRs in USD and sale realization of these GDRs in the Indian security market, it can be clearly seen that there was a financial loss to the Appellants.

54. Be that as it may, in our considered opinion, GDRs seem to be sown, nurtured and nourished in countries abroad and right from their conception to their fruition, GDRs exist overseas. By no stretch of the imagination, can it be accepted that GDRs which are issued abroad can come within the purview of the SEBI Act. It would be appropriate to state that the Respondent in this case has, in fact, indulged in hot pursuit of the Appellants to bring them within its clutches without any legal basis for the same. We fail to see how jurisdiction over something brought into existence under a scheme launched by the Ministry of Finance, Government of India and the RBI in the first place can be assumed by the Respondent. SEBI may have a role only when GDRs are converted into shares and traded on Indian Stock Exchanges, and that too when any loss or prejudice is caused to the Indian investors or to the Indian capital market. In the case in hand, on facts, SEBI has not proved any loss to Indian investors or damage to the Indian capital market by putting forth any cogent and convincing evidence.

55. The above discussion categorically leads to one conclusion, viz., it is the RBI and/or the Ministry of Finance, Government of India, which has exclusive jurisdiction in respect of the issuance, trading and conversion of GDRs into shares abroad. In fact, since the year 1993 all the rules, regulations, guidelines, circulars etc, governing GDRs have been promulgated by the RBI or the Ministry of Finance. Therefore, the RBI/Ministry of Finance would have jurisdiction to investigate and/or adjudicate upon any alleged wrong-doing in the issuance of GDRs abroad by an

Issuer Company through a lead manager overseas. In this connection, it may also be pertinently noted that the SEBI Act, 1992; the Securities Contracts (Regulations) Act, 1956; the Depositories Act (1996) and the Companies Act, 1956 give no power to SEBI to exercise any jurisdiction in respect of the issuance, trading or conversion of GDRs abroad. The Respondent would have jurisdiction, if at all, only once the GDRs are converted into shares and traded on Indian stock Exchanges in an objectionable manner or in violation of any norm, rule or regulation prescribed by SEBI.

56. There are, however, a couple of exceptions which are to be noted in the entire jurisprudence pertaining to GDRs where SEBI has been given a limited role. First, if the Issuer Company has been debarred by SEBI in respect of some violations of its regulations, the said Issuer Company cannot issue any GDRs. Therefore, the ban comes at the threshold itself. Secondly, if an issuer company intends to issue an IPO, i.e., Initial Public Offerings of its shares in the Indian capital market and simultaneously, intends to float GDRs abroad, SEBI is empowered to look into the aspect of the issue of IPOs only. Barring these couple of exceptions, there does not seem to be any other provision either made by the Parliament, Ministry of Finance, RBI or even by SEBI under which SEBI might have acted and looked into any alleged fraudulent or wrong methodology/modus operandi adopted by any party in the matter of creation and issuance of some GDRs abroad. Being the appellate authority over SEBI and also keeping in view its excellent performance so far, we would ourselves wish for SEBI to have vast and extensive powers to deal with issues pertaining to the capital market. However, we would hasten to add that looking at the changing economic scenario at the national and international levels, the concerned authority shall have to be a bit proactive in empowering SEBI with wider jurisdiction from time to time.

57. In light of the above legal and factual backdrop, the Impugned Order is hereby set aside on the ground of SEBI not having the jurisdiction over the creation and issuance of GDRs abroad. Having thus decided on the basis of the preliminary objection, we are not obligated by law to adjudicate upon the other issues raised in the appeal pertaining to the merits of the matter, which are kept open to be looked into by the relevant authority as per law, and if so advised, with a view to streamline the entire programming of the issuance of GDRs. The appeal is, accordingly, allowed. No costs.

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

30.09.2013
ptm

Per : Justice J.P. Devadhar

1. On perusal of order proposed by learned Member Shri Jog Singh, I find it difficult to agree with the views expressed therein. Hence, this separate order.
2. Basically two questions arise for our consideration in this appeal. They are:-
 - (i) whether Securities and Exchange Board of India ('SEBI' for short) has jurisdiction to initiate proceedings under the Securities and Exchange Board of India Act, 1992 ('SEBI Act 1992' for short) against lead

manager to the Global Depository Receipts (GDRs) issued outside India, if SEBI, on investigation concludes that in relation to transaction of sale/purchase of underlying shares released on redemption of GDRs in the securities market in India, the lead manager had committed fraud on the investors in India and that fraudulent intention existed at every stage of the GDR process till sale/purchase of underlying shares in the securities market in India;

- (ii) assuming SEBI has such jurisdiction, whether by impugned order dated June 20, 2013, SEBI is justified in debarring appellants 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 prohibiting appellants from accessing the capital market directly or indirectly under SEBI Act, 1992 and Regulations framed thereunder, for a period of 10 years.

3. Appellant no.1 is a company registered in United Kingdom (U.K.) and is, inter alia, engaged in the business of advising investors in relation to financial products outside India. Appellant no.2, a non-resident Indian, is the Promoter/Director of appellant no.1 holding 100% shares of appellant no.1. Appellant no.2 has stepped down as Managing Director of appellant no.1 with effect from 29/9/2011, after ad-interim ex-parte order was passed against him by SEBI on 21/9/2011.

4. Relevant facts are that, SEBI on receiving alerts from its regulatory system, conducted investigation in respect of trading in scrips of certain companies during

the period from January 1, 2009 to May 31, 2010 ('investigation period' for short). Preliminary investigation revealed that during the investigation period, average daily volume of trading in shares of certain companies had increased significantly. It was noticed that the shares of the companies under investigation were sold by a set of FIIs/sub-accounts and bought by a set of clients. Based on preliminary investigation, SEBI was prima facie of the opinion that Arun Panchariya (appellant no.2) the then Managing Director of appellant no.1 was the mastermind for issuance of structured Global Depository Receipts ('GDRs' for short) on behalf of companies under investigation. It was found that the GDRs of those companies were subscribed to by entities controlled by Arun Panchariya which were sold thereafter to entities controlled by Arun Panchariya which in turn converted the said GDRs into equity shares and sold those equity shares in Indian market to the entities with which Arun Panchariya was connected. Thus, according to SEBI, Arun Panchariya, through structured GDRs played major role in creating liquidity in the scrips of companies under investigation, which was detrimental to the interests of investors in India.

5. In view of above prima facie opinion, pending further investigation, SEBI passed ad-interim ex-parte order on September 21, 2011 whereby appellants were restrained from accessing the Indian securities market. On January 17, 2012, ad-interim ex-parte order dated September 21, 2011 was confirmed.

6. Preliminary investigation conducted by SEBI during the investigation period related to following six companies:-

- i) Asahi Infrastructure & Projects Ltd.
- ii) IKF Technologies Ltd.
- iii) Avon Corporation Ltd.

- iv) K Sera Sera Ltd.
- v) CAT Technologies Ltd.
- vi) Maars Software International Ltd.

Preliminary investigation revealed that the above six companies had issued GDRs and heavy trading in scrips of above six companies during the investigation period was on account of conversion of GDRs issued by above six companies ('issuer companies' for convenience) into equity shares, by certain Foreign Institutional Investors/sub-accounts, namely:-

- i) India Focus Cardinal Fund
- ii) KII Ltd.

Preliminary investigation further revealed that equity shares of issuer companies sold by above FIIs/sub-accounts were bought by set of clients ('Group' for convenience), namely:-

- i) Alka India Ltd.
- ii) Basmati Securities
- iii) S.V. Enterprises
- iv) JMP Securities
- v) Oudh Finance & Investments Ltd.

7. On completion of detailed investigation and after hearing appellants, SEBI by impugned order dated 20/6/2013 held that appellants, being persons associated with securities market, have acted detrimental to the interests of investors by entering into prohibited arrangement with the promoters of Issuer Companies. Therefore, with a view to protect interests of investors in securities, SEBI by impugned order dated June 20, 2013, has debarred appellants from rendering services in connection with instruments that are defined as 'securities' under Section 2(h) of SCRA in the Indian market or in any way dealing with them directly or indirectly for a period of 10 years and further prohibited appellants

from accessing the capital market directly or indirectly for a period of 10 years. Challenging the aforesaid order, present appeal is filed.

8. With this background, first question raised in this appeal may be considered viz., whether SEBI has jurisdiction to initiate proceedings under SEBI Act, 1992 against appellants on the ground that appellants had committed fraud on the investors in India in relation to sale/purchase of underlying shares released on redemption of GDRs in India.

9. Arguments advanced by Mr. Modi, learned Senior Advocate appearing on behalf of appellants, on the above question may be summarized as follows:-

- (a) Jurisdiction of SEBI as per Section 1 of SEBI Act, 1992 is limited to the territory of India. GDRs are issued outside India under “Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme 1993” (‘1993 Scheme’ for short) framed by the Central Government. Under the 1993 Scheme, Indian companies desirous of raising foreign funds through GDR mechanism are required to apply to the Department of Economic Affairs, Ministry of Finance, Government of India (‘DEA’ for short). Terms and conditions set out in the 1993 Scheme require that GDR issue must conform to the Foreign Direct Investment Policy of Central Government and other mandatory statutory requirements and detailed guidelines issued to that effect by Reserve Bank of India (‘RBI’ for short) from time to time including the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000

(‘2000 Regulations’ for short) notified by RBI. Under the 1993 Scheme, GDRs are created by Overseas Depository Bank, sold to non-resident investors outside India and traded on stock exchanges outside India. Therefore, issuance and trading in GDRs being outside India and jurisdiction of SEBI is limited to the territory of India, SEBI cannot initiate proceedings in the matter of issuance and trading in GDRs.

- (b) Under 1993 Scheme, it is only RBI/DEA have power to issue guidelines, circulars, etc. and therefore it is only the RBI/DEA that would have exclusive jurisdiction to investigate and/or adjudicate any alleged mischief or wrongdoings in relation to GDRs.
- (c) While framing operative guidelines for the limited two way fungibility under the 1993 Scheme, by Clarification No.22 it is clarified by Central Government that investments under the 1993 Scheme are treated as direct foreign investments. As per the said guidelines, reissuance of GDR is permitted to the extent of GDRs which have been redeemed into underlying shares and sold in the domestic market. Clause (e) of Clarification No.22 provides that such a secondary market transaction, where acquisition of shares through the intermediary on behalf of the overseas investors is permitted would fall within the regulatory purview of SEBI. Clause (e) of clarification No.22 further provides that custodian would monitor reissuance of shares under two way fungibility of GDRs and furnish a certificate to both RBI and SEBI to ensure that

the sectoral caps are not breached and that RBI would monitor the receipt of certificates from the custodian to that effect. Thus, jurisdiction of SEBI under the GDR mechanism is limited to the extent noted in Clarification No.22 dated 13/2/2002 and not beyond that.

- (d) Similarly, by Clarification No.29 dated 5/1/2009, Central Government has clarified that relevant contract notes under two way fungibility of GDRs need not be submitted to SEBI and as and when required, SEBI shall requisition the custodians to provide copies of the contract notes. This clarification further supports contention of appellants that regulating GDR mechanism is with DEA/RBI and the role of SEBI is limited to the extent noted earlier and therefore SEBI could not have investigated role of appellants as lead manager to GDR issue.
- (e) RBI, in exercise of powers conferred upon it under FEMA 1999, has issued 'Master Circular on Foreign Investments in India' which contains regulatory framework and instruction governing foreign investment in India. Under that Master Circular, an Indian company issuing GDRs is required to furnish to the Reserve Bank, full details of GDR issue in the prescribed form within 30 days from the date of closing of the issue. The Master Circular further requires the company to furnish a quarterly return in the prescribed form to the Reserve Bank within 15 days of the close of the calendar quarter and continue to submit such quarterly returns

till the entire amount raised through GDR mechanism is either repatriated to India or utilized abroad in accordance with RBI guidelines. Similarly, 2000 Regulations framed by RBI in exercise of powers conferred under FEMA, stipulate that GDRs can be issued only with the approval of Ministry of Finance and reiterates reporting requirements to RBI. Thus, it is evident that ensuring compliance of the terms and conditions under GDR mechanism is with DEA/RBI and not with SEBI.

- (f) There is no provision under SEBI Act, 1992 which empowers SEBI to regulate GDR mechanism. In fact, till date, SEBI has neither framed any regulation relating to GDRs nor has investigated into the alleged lapses under GDR mechanism. Therefore, SEBI could not have investigated into the role played by appellants as lead manager to the GDRs in question, as it lacked jurisdiction.
- (g) It is not in dispute that GDRs are created, sold and traded outside India and therefore, irregularity, if any, committed by the appellants in respect of those GDRs outside India could only be investigated by DEA/RBI and hence beyond the jurisdiction of SEBI.
- (h) Relying on decision of Apex Court reported in (2009) 8 SCC 481 (G.M. telecom vs. M. Krishnan), it is contended that 1993 Scheme is a special provision and GDRs issued thereunder are liable to be regulated by DEA/RBI and power of SEBI to regulate the same is

limited to the extent specified therein and therefore, in respect of violations of GDRs, if any, special provisions contained in 1993 Scheme would prevail over general provisions contained in SEBI Act, 1992.

10. It is difficult to accept above arguments advanced on behalf of appellants.

11. Preamble to the SEBI Act, 1992 provides that SEBI is established by Parliament with a view to protect interests of investors in securities and to promote development of, and to regulate, the securities market and for matters connected thereto or incidental thereto. Thus, preamble to SEBI Act, 1992 makes it clear that Parliament intended to establish SEBI with all powers necessary to protect interests of investors in securities and promoting/developing/regulating the securities market in India, and also confer powers in relation to matters connected therewith or incidental thereto.;

12. Section 11(1) of SEBI Act, 1992 provides that subject to the provisions of SEBI Act, 1992, it shall be the duty of SEBI to protect interests of investors in securities and to promote development of, and to regulate, the securities market by such measures as it thinks fit. Expression 'such measures as it thinks fit' in Section 11(1) of SEBI Act, 1992 clearly shows that Parliament has conferred upon SEBI absolute discretion in the matter of protecting interests of investors in securities and in the matter of promoting and regulating securities market.

13. Scope of the expression 'by such measures as it thinks fit' in Section 11(1) of SEBI Act, 1992, as pointed out by counsel for respondent, was considered by the

Apex Court in the case of Sahara India Real Estate Corporation Ltd. vs. SEBI wherein Apex Court has inter alia, held thus:

“303.1 Sub-section (1) of Section 11 of the SEBI Act casts an obligation on SEBI to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market, “by such measures as it thinks fit”. It is therefore apparent that the measures to be adopted by SEBI in carrying out its obligations are couched in open-ended terms having no prearranged limits. In other words, the extent of the nature and the manner of measures which can be adopted by SEBI for giving effect to the functions assigned to SEBI have been left to the discretion and wisdom of SEBI. It is necessary to record here that the aforesaid power to adopt “such measures as it thinks fit” to promote investors’ interest, to promote the development of the securities market and to regulate the securities market, has not been curtailed or whittled down in any manner by any other provisions under the SEBI Act, as no provision has been given overriding effect over sub-section (1) of Section 11 of the SEBI Act.” (emphasis supplied)

14. Section 11(4) of SEBI Act, 1992 further provides that without prejudice to the provision contained in sub-sections 1 to 3 of Section 11 and Section 11B, SEBI may, in the interests of investors or securities market, pending investigation or on completion of investigation, inter alia restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities. Thus, in order to protect interests of investors, under Section 11(1) SEBI is empowered to take such measures as it thinks fit and further under Section 11(4) SEBI is empowered to restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities for such period as it deems fit.

15. In the present case, SEBI has initiated proceedings against appellants in relation to sale/purchase of underlying shares of issuer companies released on

redemption of GDRs, in the Indian securities market. According to SEBI, these sale/purchase transactions carried out in India were detrimental to the investors in India because, these transactions were carried out by appellants fraudulently through the sellers/purchasers with whom appellants were connected and these transactions were part of the fraudulent transactions carried out by appellants at every stage of the GDR process. If SEBI during the course of investigation relating to sale/purchase of underlying shares in the Indian securities market arrives at a conclusion that the said transactions were carried out with a view to commit fraud on investors in India and that fraudulent intention existed at every stage of the GDR process up to the date of selling and purchasing underlying shares of issuer companies, then SEBI would be within its jurisdiction to initiate proceedings and take appropriate steps as it deems fit to protect interests of investors in India. In such a case, jurisdiction vested in SEBI to take action against those who have committed fraud on the investors in India, does not get divested merely because the fraudulent intention on their part existed at every stage of the GDR process.

16. Power of SEBI, under Section 11(1) and 11(4) of SEBI Act, 1992, is wide enough to take such measures as it deems fit and extends to restrain not only persons involved in the transaction from accessing the securities market, but also prohibit any person associated with securities market to buy, sell or deal in securities. Therefore, if SEBI on investigation arrives at a conclusion that appellants were persons associated with transaction of sale/purchase of underlying shares in India and those transactions were detrimental to interests of investors in India, then SEBI would be justified in invoking jurisdiction under Section 11(1) and 11(4) of SEBI Act, 1992.

17. Entire case of appellants is that no action could be taken against appellants who acted as lead managers to GDRs which were created and issued outside India, subscribed to by investors outside India and traded on stock exchanges outside India. There is no merit in the above contention, because, SEBI has not taken action against appellants for their role in relation to issuance/trading in GDRs, but in relation to their role in sale/purchase of underlying shares in India, which according to SEBI was with fraudulent intention. It is neither the case of SEBI that issuance/trading in GDRs outside India were contrary to 1993 Scheme, nor contrary to the guidelines framed by RBI. Entire case of SEBI is that sale/purchase of underlying shares in the securities market in India (after conversion of GDRs created/sold/traded outside India) were part of a sinister motive and that sinister motive existed right from the date of acquiring shares through GDR mechanism. In such a case, where fraud is alleged to have been committed by persons connected with transactions carried out in India, SEBI would be justified in invoking jurisdiction under SEBI Act, 1992 and take appropriate measures as it deems fit.

18. Once it is seen that in the present case, investigation initiated and the measures taken by SEBI related to transactions that took place in the securities market in India, then argument of appellants that SEBI has no jurisdiction to investigate into issuance/trading of GDRs outside India becomes wholly besides the point and not relevant to the facts of present case. Accordingly, argument based on decision of Apex Court in G.M. Telecom (supra) that GDRs are issued under special provisions contained in 1993 Scheme which are beyond the regulatory powers of SEBI becomes wholly irrelevant, because, in the present case, SEBI has neither found fault in issuance of GDRs nor found fault with trading in

GDRs outside India, nor SEBI has tried to regulate GDR mechanism. All that has been done by SEBI is to protect interests of investors in India by restraining appellants from entering capital market in India, on the ground that they were connected with transaction in securities market which were detrimental to the interests of investors in India, because, fact that appellants had subscribed to GDRs through entities controlled by appellant no.2, transferred GDRs to entities controlled by appellant no.2 and thereafter sold underlying shares released on cancellation of GDRs in the Indian securities market to entities controlled by appellant no.2 were suppressed from the public. There can be no dispute that in the matter of protecting interests of investors in India, SEBI has absolute powers under SEBI Act, 1992. Fact that not all GDRs but only part of GDRs held by entities controlled by appellants were in fact converted and underlying shares were sold in the Indian securities market makes no difference, because, for invoking jurisdiction under SEBI Act, 1992, it is not necessary that all GDRs must be converted and if the transactions carried out after conversion of GDRs were found to be detrimental to the interests of investors in India, SEBI would be within its powers to invoke jurisdiction under SEBI Act, 1992.

19. Specific finding recorded in the impugned order is that appellants caused false information to be published on the website of stock exchanges regarding subscription of GDRs by foreign investors, when in fact, appellants had entered into prohibitory arrangement with issuer companies in India, under which, ordinary shares raised through GDR mechanism were under the control of Arun Panchariya (appellant no.2) at all stages and ultimately some of those shares were sold/purchased in the securities market in India by entities controlled by Arun

Panchariya. Since these transactions were detrimental to the investors in India, action has been taken against appellants.

Thus, in the present case, investigation initiated and action taken is with reference to the transactions carried out in India, which is within the scope of powers, vested in SEBI under the SEBI Act, 1992 and the regulations made thereunder.

20. Accordingly, first question raised in this appeal is answered thus: where SEBI finds that the transactions relating to sale/purchase of underlying shares in the securities market in India (after conversion of GDRs created/sold/traded outside India) are fraudulent transactions and that fraudulent intention existed right from the date of issuance of shares through GDR mechanism, then, SEBI would be justified in invoking jurisdiction under SEBI Act, 1992 and debar persons connected with such transactions from rendering services in connection with instruments that are defined as securities (as in section 2(h) of SCRA, 1956) in the Indian market for such period as it deems fit and further prohibit persons involved in such fraudulent transactions from accessing the capital market directly or indirectly for such period as it deems fit.

21. Second question raised in this appeal is, assuming SEBI has jurisdiction, whether, on facts, SEBI is justified in debarring appellants from rendering services in connection with instruments that are defined as securities under Section 2(h) of SCRA for a period of 10 years and further prohibiting appellants from accessing the capital market directly or indirectly under the SEBI Act, 1992 and the regulations framed thereunder for a period of 10 years.

22. Finding of facts recorded in the impugned order at para 5.1 to para 5.3.3.8 read thus:-

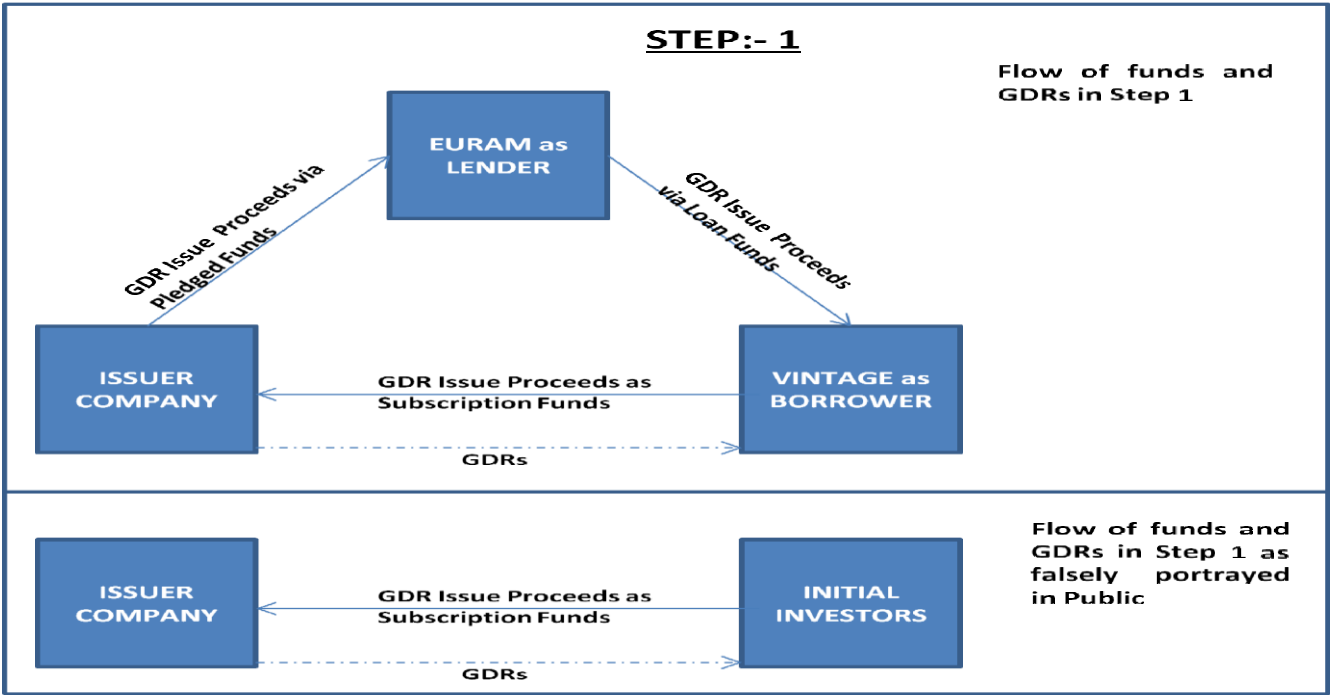
- “5.1 Panchariya is shown to be connected inter-alia with the following entities, viz. –
- a. Alkarni Holdings Ltd. (hereinafter referred to as “Alkarni”);
 - b. Alka India Limited (hereinafter referred to as “Alka”);
 - c. India Focus Cardinal Fund (hereinafter referred to as “IFCF”), a sub-account based in Mauritius;
 - d. Vintage FZE (hereinafter referred to as “Vintage”);
 - e. KII Limited (hereinafter referred to as “KII”);
 - f. Oudh Finance and Investment Private Limited (hereinafter referred to as “Oudh”);
 - g. Basmati Securities Private Limited (hereinafter referred to as “Basmati”);
 - h. SV Enterprises (hereinafter referred to as “SV”).
- 5.2 The basis for the abovementioned connection was on account of the following factors, viz.

Sr. No.	Name of Entity	Basis of Connection
1.	Alkarni	Panchariya alongwith his family members were shareholders.
2.	Alka	Panchariya along with his family members were Promoters.
3.	IFCF	Panchariya was a 100% shareholder in IFCF indirectly through Cardinal Capital Partners and was its Chief Investment Officer. Further, the major investor in Class A shares of IFCF was Vintage, whose owner was Alkarni. Alkarni has Panchariya and his family members as shareholders.
4.	Vintage	Panchariya controlled Vintage and was its authorised signatory.
5.	KII	Vintage signed a loan agreement with Credo, parent company of KII, wherein it provided loan to Credo to further lend it to KII so that KII can purchase GDRs of Issuer Companies and convert into shares to sell in Indian Markets. According to this agreement signed by Panchariya himself on behalf of Vintage, the market risk of these transactions in GDRs by KII was borne by Vintage.
6.	Oudh	Basmati holds approx. 27% of the capital of Oudh as per Oudh's Annual Return in 2009.
7.	Basmati	Oudh and Alka together hold approx. 29.9% of the capital as per Annual Return of Basmati in 2009.
8.	SV	Panchariya's brother, Ashok Panchariya is the nominee for the demat account of SV.

- 5.3 Pan Asia and Panchariya had acted fraudulently in scrips of the Issuer Companies. The manner in which the fraud was carried out is explained below –

5.3.1 According to the fraudulent scheme perpetrated, Panchariya arranges loans for the subscription to GDRs, subscribes to GDRs, and sells the GDRs to FIIs / Sub accounts (FIIs) who, in turn, sell shares received from conversion of GDRs in Indian securities market. The GDRs thus issued and sold to Indian investors through steps explained below are hereinafter referred to as “Structured GDRs” and the complete scheme is referred to as “AP GDR Scheme”.

5.3.2 Steps 1 – Issuance of GDRs



5.3.2.1 As the Issuer Company is ready to issue GDRs in the Luxembourg market, Vintage (controlled by Panchariya) signs a loan agreement with European American Investment Bank AG (hereinafter referred to as “Euram”) for issue of loan (Subscription Loan) for the purpose of subscription of GDRs. This loan agreement is signed by Panchariya on behalf of Vintage.

5.3.2.2 The nature and purpose of the agreement states clearly that the loan is being provided to enable Vintage to take down the specified GDR issue of the Issuer Company. Further, according to the Loan Agreement, the amount may only be transferred to the account of that Issuer Company maintained with Euram. The aforesaid account of the Issuer Company mentioned in the Loan Agreement of Vintage is the same account where Issuer Company shows its GDR subscription proceeds as deposited (GDR Account).

5.3.2.3 Simultaneously, the Issuer company also signs a Pledge Agreement with Euram wherein inter alia, following is pledged by the issuer company to Euram:

"...all of its right title and interest in and to, and the balance of funds existing from time to time at present or hereafter on the account no ...

(GDR Account) kept by Bank (Euram) and all amounts credited at any particular time therein."

- 5.3.2.4 Further, the Pledge Agreement is also part of the Loan Agreement and vice versa. The Pledge Agreement in its preamble states that – "...The Pledgor (Issuer Company) has received a copy of the Loan Agreement and acknowledges and agrees to its terms and conditions."
- 5.3.2.5 The following is also secured as per the Loan Agreement –
- "...In order to secure all and any of the Bank's claims and entitlements against the Borrower (Vintage)..... it is hereby irrevocably agreed that the following securities and any other securities which may be required by the Bank from time to time shall be given to the Bank as provided herein or in any other form or manner as may be demanded by the Bank.....
 - Pledge of certain securities held from time to time in the Borrower's account no ... at the Bank as set out in a separate pledge agreement which is attached hereto as Annex which forms an integral part of this Loan Agreement.
 - Pledge of the GDR Account of the Borrower held with the Bank as set out in a separate pledge agreement which is attached hereto as Annex and which forms an integral part of this Loan Agreement."
- 5.3.2.6 The GDR account referred above is the same account wherein the issuer company (Asahi), has deposited the subscription proceeds of the GDR issue. From the above, it is observed that the GDR Account is held in the name of each issuer company while, for all intents and purposes, the actual control of said account ultimately vests with Vintage (effectively Panchariya), as the account is kept as collateral for the loan availed by Vintage.
- 5.3.2.7 As a result of the Loan Agreement and the Pledge Agreement, the Subscription Loan provided to Vintage by Euram is used to acquire the GDRs of Issuer Company by Vintage. This Subscription Loan is thus deposited as Subscription fund in the GDR Account of Issuer Company which is pledged by the Issuer Company with Euram as security against the Loan provided to Vintage.
- 5.3.2.8 The Issuer Company then issues GDRs to Initial investors through Overseas Depository Bank. In the cases investigated by SEBI, it is observed that the GDRs were transferred not to the account of initial investors but to the security account of Vintage maintained with Euram. The issuer companies and Pan Asia have provided a list of initial investors to whom GDRs were issued. However, as per documents available with SEBI, it is observed that GDRs have been credited to the securities account of Vintage held with Euram on the day of GDR issuance and a payment for GDRs is made from the Euram Account of Vintage to the GDR Account of Issuer Company. From the foregoing it is clear that the GDRs were directly issued to Vintage. The list of initial investors of GDRs provided to SEBI by the issuer companies, therefore is a list designed to camouflage the name of the actual investor i.e. Vintage and mislead the shareholders of the company and the market.

- 5.3.2.9 There is no real or effective movement of funds involved (as observed from Paras 5.3.2.1 to Paras 5.3.2.8). By way of entries in the books of Euram, funds are released from loan account of Vintage to GDR account of issuer company and are kept as collateral with Euram. Thus, without any actual inflow of funds into the company, the issuer Company is successful in issuing large amount of GDRs which gives a respectable appearance to the financial statement of the company, which is misleading. In reality, few book entries result in large surge in the capital of the company. Thus, these GDRs are created without any purchase transactions or for any cost (apart from interest and commission earned by Euram).
- 5.3.2.10 The initial investors to the GDRs appear to be just fictitious/front entities created by Panchariya and Pan Asia. Efforts to contact these original investors were futile. Emails sent have bounced. Letters sent to these investors have also returned undelivered. SEBI also sought help of regulators of respective jurisdiction where these investors have been stated to be based. Foreign regulators have been unable to locate these investors.
- 5.3.2.11 Following are the details of the GDRs issued by the companies examined by SEBI.

Sr. No	Issuer	Date of GDR Issue	Pre GDR equity ('000)	Shares issued under GDR ('000)	% GDR to Pre GDR equity	Market Cap prior to GDR issue(Rs Crore)	Capital raised by GDR Issue(Rs. Crore)	% Capital raised to pre GDR Market Cap
1.	IKF	31-03-07	1,06,690	1,32,000	123	79.60	47.96	60.25
2.	CAT	27-07-07	5,750	25,286	440	3.00	26.13	871.20
3.	Maars	10-08-07	66,160	73,800	112	29.71	72.93	265.02
4.	K Sera	26-10-07	19,513	47,619	244	71.02	98.42	138.58
5.	Asahi	29-04-09	37,196	2,99,100	804	2.64	32.99	1137.94
6.	IKF	15-05-09	2,68,190	1,62,391	61	79.66	54.44	68.35
7.	Avon	19-06-09	16,580	48,000	289	14.71	48.13	327.19
8.	K Sera	16-10-09	67,131	1,34,257	200	137.95	138.73	100.57
9.	CAT	06-11-09	31,576	47,860	152	50.81	46.83	92.17

- 5.3.2.12 From the above table, it is clear that the amount of capital raised via issuing GDRs is significantly large when compared to existing capital of the companies.
- 5.3.2.13 For the purpose of subscription of the GDRs of the aforementioned Issuer Companies, loan agreements were signed by various entities with the banks. This loan was then utilised for subscribing to the GDRs of the Issuer Companies.

5.3.2.14 Following are the details of loan agreements signed for the purpose of subscription of GDRs of Issuer Companies.

Sr. No.	Issuer	Date of GDR Issue	GDR Issue Size (\$ '000)	Borrower	Loan Amount (\$ '000)	Date of Loan Agreement	Lender	Date of Pledge Agreement
1	IKF	31-03-07	11,000	Seazun	14,000	27-03-07	Banco	27-03-07
2	CAT	27-07-07	6,457	Vintage	6,457	23-07-07	Euram	20-07-07
3	Maars	10-08-07	17,933	Vintage	17,933	27-07-07	Euram	27-07-07
4	K Sera	26-10-07	25,000	Vintage	25,000	30-10-07	Euram	30-10-07
6	Asahi	29-04-09	5,982	Vintage	5,982	21-04-09	Euram	21-04-09
7	IKF	15-05-09	10,988	Vintage	10,988	28-04-09	Euram	28-04-09
8	Avon	19-06-09	10,000	Vintage	10,000	10-06-09	Euram	10-06-09
9	K Sera	16-10-09	29,984	Vintage	29,984	06-10-09	Euram	06-10-09
10	CAT	06-11-09	10,003	Vintage	10,003	27-10-09	Euram	27-10-09

5.3.3 Step 2 – Cancellation of GDRs and Sale of Resultant Shares by Sub-Accounts

5.3.3.1 The GDRs created at the end of Step 1 were transferred to the account of Vintage held with Euram. Subsequently, Vintage through over the counter transactions, sold the GDRs to FIIs such as IFCF and KII for the purpose of purchasing GDRs. The GDRs were then converted into underlying shares and these shares were sold in the Indian market.

5.3.3.2 Financial Market Authority (Austria) (hereinafter referred to as “FMA”), vide its letter dated March 27, 2012 informed SEBI that the major investor in Class A shares of IFCF was Vintage, whose owner was Alkarni Holdings Ltd. Alkarni Holding Ltd has Panchariya and his family members as shareholders.

5.3.3.3 Arrangements between Credo, KII and Vintage for dealing in GDRs of Issuer Companies have been observed. Vintage signed a loan agreement with Credo, wherein it provided loan to Credo to further lend it to KII so that KII can purchase GDRs of Issuer Companies and convert into shares to sell in Indian Markets. According to this agreement signed by Panchariya himself on behalf of Vintage, the market risk of these transactions in GDRs by KII was borne by Vintage. Thus, the dealings of KII in the GDRs of Issuer Companies were financed and controlled by Panchariya.

5.3.3.4 It is observed that IFCF and KII started dealing in the GDRs of Issuer Companies from June 2009 and after that no other FII/Sub-Account has cancelled GDRs of Issuer Companies except KII and IFCF. Following

table provides details of cancellation of GDRs of Issuer Companies done by KII and IFCF as on June 30, 2012.

GDR Issue	Date	Total GDRs Issued	Total GDRs Cancelled till June 30, 2012	GDRs cancelled between June 01, 2009 to June 30, 2012	GDRs cancelled by IFCF	GDRs cancelled by KII	% of GDRs cancelled by IFCF & KII to total GDRs cancelled	% of GDRs cancelled by IFCF & KII to total GDRs cancelled between June 01, 2009 to June 30, 2012
Asahi	29-04-09	29,91,000	15,14,450	15,14,450	13,81,000	1,00,000	97.8	97.8
Avon	19-06-09	16,00,000	16,00,000	16,00,000	14,44,000	1,56,000	100.0	100.0
CAT	27-07-07	43,04,348	25,80,000	1,95,000	1,20,000	75,000	7.6	100.0
CAT	06-11-09	15,95,333	13,685	13,685	13,685	0	100.0	100.0
IKF	31-03-07	1,10,00,000	1,10,00,000	0	0	0	0.0	0.0
IKF	15-05-09	54,13,048	10,34,000	10,34,000	9,89,000	45,000	100.0	100.0
K Sera	26-10-07	47,61,900	47,61,900	33,41,900	13,96,757	19,45,143	70.2	100.0
K Sera	16-10-09	44,75,238	12,35,500	12,35,500	7,58,500	4,77,000	100.0	100.0
Maars	10-08-07	73,80,000	57,92,800	15,77,800	11,27,800	4,50,000	27.2	100.0

- 5.3.3.5 From the above table, it is clear that from June 01, 2009, the activity of cancelling GDRs and converting to shares by IFCF and KII was done entirely under direct control of Panchariya.
- 5.3.3.6 To summarise, the funds for the purchase of GDRs are provided by Panchariya to FIIs, either by direct investment in the fund like IFCF or by entering into contractual agreement and providing loan to FIIs/Sub-Accounts (e.g. KII, etc). In reality, funds have only moved from one Panchariya controlled company (IFCF, KII) to another Panchariya controlled company (Vintage) and vice versa.
- 5.3.3.7 These Sub-Accounts then dump the shares of the Issuer companies received post cancellation in Indian Stock Markets and realize the proceeds. The sale of such shares by Sub-Accounts in Indian Markets is the only step where funds/proceeds have been provided by entities not under control of Panchariya i.e. Indian investors. Thus, it is the Indian Investors, and not the foreign investors, who have ultimately paid for the GDRs.
- 5.3.3.8 Investigations have revealed that all the Issuer Companies have utilised majority of the GDR issue proceeds through their foreign subsidiaries

in other countries. Majority of these foreign subsidiaries have following common aspects –

- a. Most of these are based in free zones of U.A.E.
- b. In almost all the case, the major portion of the GDR issue (100% in one of the case viz. CAT) is directly transferred to foreign subsidiary and is not repatriated to India.
- c. Mostly, these have been incorporated during or after the period of GDR issue.
- d. These are mostly trading companies generally dealing in commodities/ products unrelated to the business of parent company.
- e. They have financial transactions with Vintage, Initial investors of GDR issues of other companies and foreign subsidiaries of other companies which have issued GDRs managed by Panchariya and Pan Asia.

23. On the basis of aforesaid finding of facts set out in the impugned order, it is held that Arun Panchariya (appellant no.2), Managing Director of appellant no.1 had connived with issuer companies in India in raising shares of issuer companies through GDR mechanism and ultimately selling those shares in the Indian market to the detriment of the investors in India. According to SEBI, the modus operandi adopted by appellants was, (a) as lead manager take necessary steps under the 1993 Scheme for issuance of ordinary shares through GDR mechanism, (b) subscribe GDRs through Vintage FZE (Vintage) an entity controlled by Arun Panchariya outside India, (c) Vintage would then sell GDRs to FII/sub-accounts such as IFCF & KII which are controlled by Arun Panchariya, (d) IFCF & KII would then cancel the GDRs and get the underlying shares under the 1993 Scheme released from the domestic custodian bank in India, (e) IFCF & KII would then sell those underlying shares in the securities market in India (after the issuer companies inform concerned stock exchanges in India which in turn inform general public in India that GDRs issued have been fully subscribed by investors

outside India) to entities such as Alka, Oudh, Basmati & SV with which Arun Panchariya is connected.

24. On consideration of above facts, by the impugned order, SEBI has held that appellants have violated provisions of SEBI Act, 1992 and also violated provisions of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for short). The violations found by SEBI can be summarized thus:-

- (a) Transactions in question carried out during the investigation period were underlying shares released on cancellation of GDRs of issuer companies and those shares were sold/purchased by entities with which Arun Panchariya (appellant no.2) was connected. Thus, by transactions in question, investors in India were lured to invest in the shares of issuer companies.
- (b) Further investigation revealed that existing shareholders and prospective investors of the issuer companies were made to believe through advertisement on website of stock exchanges that issuer companies had raised foreign capital through GDRs which have been fully subscribed by foreign investors, when, in fact, there were no genuine subscribers to the GDRs nor there was genuine raising of capital and that the entire arrangement in relation to subscription of GDRs was fraudulent.
- (c) Further investigation revealed that underlying shares sold/purchased in the Indian securities market were originally issued under the 1993 Scheme involving issuance of ordinary shares through GDR

mechanism for which appellant no.1 was the lead manager. Investigation revealed that stock exchanges in India were informed that GDRs of issuer companies have been subscribed by various initial subscribers, when in fact, GDRs were subscribed by Vintage, a company controlled by Arun Panchariya. Further investigation revealed that the entities which were claimed to be initial investors were fictitious/non-existent entities, save and except Rexflec Ltd. (later on name changed to Pan Asia Management Ltd.) which was an entity controlled by Arun Panchariya. Though appellants had not furnished list of initial subscribers to the stock exchanges, in view of collusion between appellants and issuer companies in raising shares through GDR mechanism and appellants being in control of shares raised through GDR mechanism at all stages up to the stage of selling those shares in Indian market, appellants were liable as persons associated with the transaction in question in the security market in India.

- (d) Thus, appellants as lead manager were instrumental in raising ordinary shares of issuer companies under 1993 Scheme, get those shares deposited with the Domestic Custodian Bank and get GDRs issued outside India, then subscribe those GDRs through Vintage (controlled by Arun Panchariya), get GDRs transferred to IFCF and KII which were also controlled by Arun Panchariya. IFCF and KII would then convert GDRs into underlying shares and sell those shares in the Indian securities market to entities such as Alka, Oudh,

Basmati and SV with which Arun Panchariya was connected. Thus all the entities involved in the fraudulent scheme from the stage of subscribing to GDRs up to sale of underlying shares in the securities market in India were owned and/or controlled by Arun Panchariya.

- (e) Even before GDRs were issued, appellants caused issuer companies to execute pledge agreement with Euram Bank which records that Vintage has taken loan from Euram Bank for subscribing GDRs and that loan amount credited to a particular account shall be pledged by issuer companies in favour of Euram to secure loan taken by Vintage for subscribing GDRs. Suppressing these facts, investors in India were informed by advertisement on website of stock exchanges that GDRs have been fully subscribed by foreign investors.

25. On behalf of appellants, it is contended, by relying on a decision of Apex Court in case of N. Venkataramana Hebbar vs. M. Rajagopal Hebbar reported in (2007) 6 SCC 401, that since SEBI, in spite of repeated reminders, failed to file reply to the Appeal, submissions made in the memorandum of appeal must be deemed to be admitted. There is no merit in the above contention, because, question before the Apex Court in that case was, where there is no denial or assertion made in the written statement, whether allegations made in the plaint are deemed to be admitted. In that context, Apex Court referring to rule 3 and rule 5 of Order VIII of Code of Civil Procedure held that where a plea raised in the suit is not specifically traversed in the written statement, then the Court is entitled to draw an adverse inference that the same has been admitted. In the present case, based on the investigation report and after hearing appellants, impugned order has been

passed. Correctness of impugned order has to be judged on basis of reasons recorded therein and not on basis of reply to memorandum of appeal. Therefore, reliance placed on the decision of Apex Court in the case of N. Venkataramana Hebbar (supra) is misplaced.

26. On merits of the case, it is contended on behalf of appellants that neither the appellants have published/reported nor caused to be published/reported any advertisement or planted any news and hence appellants could not be said to have violated Regulation 4(2)(f), (k) and (4) of PFTUP Regulations. It is contended that BSE accepts only 'Corporate Announcements' that are made by listed companies and not by any third parties such as appellants. As regards discrepancy relating to list of initial subscribers to GDRs, it is contended that appellants have not furnished any list of initial subscribers to the stock exchanges. It could have been supplied to stock exchanges either by issuer companies or by Overseas Depository Banks. In the present case, Overseas Depository Banks were Deutsche Bank and Bank of New York who created and issued GDRs to whoever were the initial subscribers. Ex facie, they would be the only parties responsible for the same. Yet, respondent does not appear to have made any inquiry with them or taken any proceedings against them. It is further contended that it was not the duty of appellant no.1 to verify details of initial subscribers to GDRs and in fact regulators in U.K. and Austria have neither found any fault with the actions of appellants as lead managers nor found fault with the actions of respective Overseas Depository Banks. In any event, alleged discrepancy, if any, in the list of initial subscribers to GDRs do not amount to publishing or reporting or advertisement of false information or planting of any misleading news by appellants and therefore in the

absence of any law, rule or regulation by appellants, the impugned order is liable to be set aside.

27. It is difficult to accept above arguments advanced on behalf of appellants. Under 1993 Scheme, lead manager to GDR issue has major role to play right from seeking final approval from DEA to go ahead with GDR issue (see clause 3.3 of 1993 Scheme) up to taking necessary steps for issuance of GDRs (see clause 5.4 of 1993 Scheme). Every decision relating to structure of GDRs has to be finalized by issuer companies in consultation with lead manager to the issue. Lead manager is a person responsible for marketing the GDR issue. Therefore, ordinarily lead manager to GDRs would be aware of persons who are initial subscribers to GDRs.

28. Assuming that in a given case lead manager may not be aware of details of initial investors, in the present case, it is a matter of record that GDRs of issuer companies were held by Vintage, a company controlled by Arun Panchariya. In fact, Vintage through its authorized signatory Arun Panchariya had secured loans from Euram Bank for subscribing to GDRs of issuer companies. For example, loan agreement dated April 21, 2009 (page 199 of the paperbook) between Euram and Vintage specifically records that loan of US \$ 5,982,000.00 has been granted to Vintage with a view to provide funds to Vintage to take down GDR issue of Asahi (one of the companies investigated by SEBI). Clause 2 of the said loan agreement provides that funds advanced by Euram Bank may only be transferred to the account mentioned therein, viz. "Euram account No.:540030, Asahi Infrastructure & Projects Ltd." Clause 6 of the loan agreement provides that security for the loan would be Pledge Agreement attached as Annexure 2 to the loan agreement forming part of the loan agreement. It is not in dispute that Pledge Agreement

(page 215 of the paperbook) has been executed by and between Euram Bank and Asahi (issuer company) on April 21, 2009 itself as per Annexure 2, wherein it is recorded that all the amounts lying in Account No:540030 with Euram Bank would stand pledged. Clause 6.1 of Pledge Agreement provides that Euram Bank was entitled to apply funds lying in the Account pledged by issuer company, towards settlement of its dues in the event Vintage not repaying the loan amount to Euram Bank and redeem the pledge. Clause 1 of the Pledge Agreement dated April 21, 2009 between Euram and Asahi expressly records that Asahi acknowledges and agrees to the terms and conditions contained in the loan agreement between Euram and Vintage signed by Arun Panchariya as authorized signatory. Thus, Arun Panchariya as authorized signatory of Vintage having secured loans from Euram Bank for subscription of GDRs of issuer companies and getting Pledge Agreement executed between Euram and issuer companies for securing the loan obtained by Vintage, cannot now turn around and state that appellants are not initial subscribers to the GDRs of issuer companies, especially when GDRs were in fact held by Vintage. It is relevant to note that modus operandi adopted by appellants with Asahi was also adopted in all the remaining five issuer companies.

29. Although Vintage had taken loan from Euram Bank for subscribing GDRs and issuer companies had secured Euram Bank by pledging the very same loan amount, it appears that appellants got GDRs issued in the name of several entities and on the very same day on which GDRs were issued, got the GDRs transferred in the name of Vintage, a company of which Arun Panchariya was the authorized signatory. In view of finding that the alleged initial subscribers were non-existent/fictitious entities and in view of evidence on record that Vintage through

its authorized signatory Arun Panchariya had secured loan for subscribing to GDRs even before issuance of GDRs and in fact GDRs were transferred in the name of Vintage on the day on which GDRs were issued, inference drawn by SEBI that GDRs were in fact subscribed to by Vintage cannot be faulted. These facts, coupled with the fact that loan amount sanctioned by Euram Bank to Vintage were deposited in a particular account for subscribing to GDRs of issuer companies and amounts in that account were pledged by issuer companies were suppressed from investors in India, because of the collusion between appellants and issuer companies.

30. It is true that appellants themselves have not published any news in India regarding subscription of GDRs. However, from facts set out hereinabove, it is abundantly clear that the appellants were architects of a fraudulent scheme in connivance with issuer companies under which ordinary shares of issuer companies were to be raised through GDR mechanism under 1993 Scheme, Arun Panchariya was to subscribe GDRs through Vintage, transfer GDRs to entities controlled Arun Panchariya, who in turn would convert GDRs into underlying shares and sell those shares in the Indian securities market to entities controlled Arun Panchariya. Funds from subscription of GDRs were pledged by issuer companies to secure the loan taken by Vintage for subscribing GDRs, but investors in India were informed that GDRs have been subscribed by foreign investors. In these circumstances, collusion between appellants and issuer companies is apparent and therefore, inference drawn by SEBI that appellants were involved at every stage from raising ordinary shares through GDR mechanism up to the stage of sale/purchase of underlying shares in the Indian securities market were liable to

be treated as persons associated with the transaction in question in the securities market and accordingly liable for action under SEBI Act, 1992 and regulations made thereunder cannot be faulted.

31. Loan agreement/pledge agreement as also issuance of GDRs may not be per se illegal. But by informing investors in India that GDRs are fully subscribed by investors outside India and by selling/buying through the entities controlled by Arun Panchariya, investors are made to believe that with huge foreign funds the issuer companies have bright future, when actual facts are to the contrary. No doubt, Vintage is a foreign investor, but Vintage was admittedly controlled by Panchariya and even before GDRs were issued, Arun Panchariya got GDR subscription amount pledged by issuer companies in favour of Euram Bank from whom Vintage had obtained loan for subscribing the GDRs. Since these facts were not disclosed to the investors in India, appellants as persons associated with securities market have violated SEBI Act, 1992 and the Regulations made thereunder. Fact that no action has been taken against Overseas Depository Bank or Vintage or other entities involved in the transaction by regulators in U.K. and Austria, cannot be a ground for appellants to escape liability, as it is the appellants who have acted to the detriment of investors in India.

32. It was contended on behalf of appellants that without any basis, findings have been recorded in the impugned order that actual source of funding the GDRs were by selling shares of issuer companies in the Indian market. It is further contended that findings in the impugned order that SEBI has no material to show regarding end use of the GDR proceeds after release of funds by Euram Bank, amounts to admission on the part of SEBI that the issuer companies in fact,

received the GDR proceeds, which in turn belies the allegation that GDR proceeds were mere book entries and the issuer companies did not actually receive the same.

33. There is no merit in the above contentions. As noted earlier, to subscribe GDRs of issuer companies, Vintage had obtained loan from Euram Bank and loan amount was credited to “Euram account no:540030 Asahi Infrastructure & Projects Ltd.” and Asahi has pledged the amount in that account to Euram Bank for securing the loan obtained by Vintage from Euram Bank. Thus Vintage as also Asahi have considered aforesaid account as the account of Asahi and Vintage. Since GDR subscription amounts were pledged by issuer companies in favour of Euram Bank as security towards loan obtained by Vintage, it is evident that the said GDR subscription amount was available to the issuer companies only after loan amount was repaid by Vintage to Euram Bank. Since GDRs were cancelled immediately after issuance of GDRs and underlying shares were sold in the Indian market to the entities controlled by Panchariya, it could be said that funds for GDRs were from sale of underlying shares released on conversion of GDRs. Assuming that it was not so, even then fact remains that investors in India were kept in dark about the fraudulent manner in which ordinary shares were raised through GDR mechanism and thereafter sold in the securities market in India.

34. It is relevant to note that as per the pledge agreement between Euram and Asahi dated April 21, 2009, Euram Bank was entitled to apply the funds lying in the account pledged by Asahi, toward settlement of its dues in the event Vintage not repaying the loan amount due and payable by Vintage to Euram Bank and redeeming the pledge. Thus GDR subscription amount was not available to the

issuer companies till loan amount was repaid by Vintage to Euram Bank and the pledge was redeemed. It appears that in some cases Vintage has repaid the loan after considerably long period. Fact that SEBI could not find out as to how funds in “Euram Account No:540030 Asahi Infrastructure & Projects Ltd.” were utilized after the pledge under Pledge Agreement was redeemed, does not in any way support the case of appellants, because, action is taken against appellants for colluding with issuer companies and misrepresenting the investors in India that foreign funds are available to issuer companies on account of GDRs being fully subscribed by investors outside India, when in fact no such funds were available. It is difficult to accept the contention of appellants that pledging GDR subscription amount towards securing loan obtained by person subscribing GDRs, amounts to utilizing the subscription amounts for business of the issuer companies. Thus, it is beyond shadow of doubt that appellants in connivance with issuer companies have caused misleading statements published on the website of stock exchanges that the GDRs are fully subscribed by foreign investors, when in fact, GDRs were subscribed by Vintage, a company controlled by Arun Panchariya and GDR subscription amount was pledged by respective issuer companies in favour of Euram Bank to secure the loan taken by Vintage for subscribing GDRs.

35. Apart from causing misleading information being given to investors in India, appellants were instrumental in getting GDRs converted into underlying shares through the entities like IFCF and KII (controlled by Arun Panchariya) and sell those shares in the securities market in India to entities like Alka, Oudh, Basmati and SV with which Arun Panchariya was connected. Thus motive of appellant no.1 as lead manager to GDRs and appellant no.2 as its managing

director in connivance with issuer companies was to represent investors in India that foreign investors consider it prudent to invest in issuer companies and thus, GDRs have been fully subscribed by foreign investors. Moreover, by indulging in brisk trading in the underlying shares of issuer companies in the securities market in India by entities controlled by Arun Panchariya, investors were made to believe that there is considerable demand in the securities market in respect of shares of issuer companies. In these circumstances, decision of SEBI that appellants in connivance with issuer companies have committed fraud upon the investors in India and therefore, as persons associated with the transactions in the securities market in India, appellants are liable for action under SEBI Act, 1992 and the Regulations made thereunder cannot be faulted.

36. For all aforesaid reasons, both questions raised in the appeal are answered in the affirmative, i.e. in favour of SEBI and against appellants.

37. Accordingly, appeal is dismissed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

30/9/2013
ddg