BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on : 16.11.2020

Date of Decision : 19.11.2020

Appeal No. 217 of 2020

Adesh Jain
61, Vaishali,
Pitampura,
New Delhi – 110 088. …Appellant

Versus

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

Mr. Ravichandra Hegde, Advocate with Mr. Robin Shah, Advocate i/b Parinam Law Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates i/b K Ashar & Co. for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member

Per: Justice Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated March 6, 2020 passed by the Whole Time Member ('WTM' for

short) of Securities and Exchange Board of India ('SEBI' for short) debarring the appellant from accessing the securities market for a period of 5 years. By the said order the appellant's securities in the form of shares, mutual funds etc. has also been frozen for the same period.

2. The facts leading to the filing of the present appeal is, that the MPS Infotecnics Ltd. ('MPS' for short) is a listed company and the shareholders in the extraordinary general meeting held on January 30, 2007 resolved and approved the issuance of Global Depository Receipts ('GDR' for short). Based on the aforesaid resolution, the process of issuance of GDR was initiated and, on October 19, 2007, a resolution of the board of directors was passed resolving to open a bank account with Lisbon Bank for the purpose of receiving the subscription money in respect of GDR. The resolution also authorized Mr. Rajinder Singh Negi, a director of the Company to sign all documents and process the necessary transactions in relation to the GDR issue. The resolution further authorized Banco Efisa, S.F.E., S.A. ('Banco' for short) a bank based in Lisbon "to use the subscription money as security in connection with loans if any". Since much depends on the interpretation of this resolution the same is extracted hereunder:-

"RESOLVED THAT the bank account be kept opened with Banco Efisa S.A. ("the Bank") or any branch of Banco Efisa S.A., including the Offshore Branch, for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company.

RESOLVED FURHTER THAT Mr. Rajinder Singh, Director of the company be and is hereby authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time as may be required by the Bank and to carry and affix common seal of the Company thereon, if and when so required.

RESOLVED FURTHER THAT Mr. Rajinder Singh, Director of the company, be and is hereby authorized to draw cheques and other documents, and to give instructions from time to time as may be necessary to the said Banco Efisa S.A. or any of branch of Banco Efisa S.A., including the Offshore Branch, for the purpose of operation of and dealing with the said bank account and carry out other relevant and necessary transactions and generally to take all such steps to do all such things as may be required from time to time on behalf of the Company.

Resolved further that the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow Agreement or similar agreements if and when so required."

3. It transpires that thereafter on October 29, 2007 the Credit Agreement was executed between Clifford Capital Partners A.G.S.A. ('Clifford' for short) with Banco wherein Banco

agreed to give a loan to Clifford. On October 30, 2007 Account Charge Agreement was executed by the director of the Company Mr. Rajinder Singh Negi with Banco on the basis of which it enabled Clifford to avail a loan from Banco for subscribing to the GDR. Based on the Credit Agreement and Account Charge Agreement, a loan was availed by Clifford from Banco which was used to subscribe to the GDR issue of the Company for which the circular was issued on December 4, 2007 and the public announcement was made on BSE Limited (‘BSE’ for short) on December 5, 2007. GDR of 4.65 million was issued amounting to US $ 9.99 million. Further, Clifford was the sole subscriber to the GDR issue on the basis of a loan taken under the Credit Agreement.

4. After 11 years, a show cause notice dated January 31, 2018 was issued to various noticees including the appellant alleging that Clifford was the sole subscriber to the GDR issued by the Company and that the subscription amount was paid by obtaining a loan under a Credit Agreement dated October 29, 2007 from Banco and that Mr. Rajinder Singh Negi signed Account Charge Agreement dated October 30, 2007 which was an integral part of the Credit Agreement and on the basis of this agreement Clifford availed loan from Banco for subscribing the

GDR issue. It was further alleged that the Company did not inform BSE about the execution of the Account Charge Agreement or the Credit Agreement and alleged that the GDR proceeds were diverted to the extent of US $ 8.90 million. This act of concealing and suppressing the material facts was in violation of the provisions of Section 12A of SEBI Act, 1992 and Regulation 3 and 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for short).

5. The WTM, after considering the matter, passed the impugned order directing the company to take steps for refund of the money from Banco and also debarred the appellant from accessing the securities market for a period of 5 years.

6. The WTM found that the act of the Company in the GDR issue resulted in the commission of a fraud under PFUTP Regulations. The WTM further found that the resolution dated October 19, 2007 allowed Banco to use the funds as security in connection with the loan on which basis the loan was given to Clifford and such transaction which was executed on the basis of the resolution dated October 19, 2007 amounted to a fraud under Regulation 3 and 4 of the PFUTP Regulations. The WTM

further held that since the appellant was a signatory to the resolution dated October 19, 2007 the appellant as a director was responsible and equally guilty of the violation of Section 12A of SEBI Act and Regulation 3 and 4 of the PFUTP Regulations.

7. In this regard we have heard Shri Ravichandra Hegde assisted by Shri Robin Shah, the learned counsel for the appellant and Shri Shyam Mehta, the learned senior counsel assisted by Shri Mihir Mody with Shri Shehaab Roshan, the learned counsel for the respondent through video conference.

8. Though a large number of grounds have been raised in the appeal, the appellant has only argued on one point, namely, that the appellant was a non-executive independent director in the Company and was not involved in the day-to-day affairs of the management of the Company and was only involved in policy decisions. It was urged that the appellant was a signatory to the resolution of October 19, 2007 which only allowed for opening of a bank account with Lisbon bank for the purpose of receiving subscription money in respect of the GDR. It also authorized “to use the subscription money as security in connection with loans if any”. It was urged that the word “in connection with loans”

only relates to loans taken by the Company and could not be stretched for the purpose of giving GDR proceeds as a loan to a third party who did not exist on the date when the resolution was passed. In this connection the learned counsel has relied upon a decision of this Tribunal in the matter of ***Adi Cooper vs Securities and Exchange Board of India (Appeal No. 124 of 2019 decided on November 5, 2019)***. The relevant portion of the judgment is extracted hereunder:-

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

on May 5, 2009 in favour of Vintage and the loan taken by Vintage in order to subscribe to the GDR issues was done at a time when the appellant admittedly was not involved in the affairs of the company as he had ceased to be a director prior to that date. There is no evidence to establish that the appellant Adi Cooper remained associated with the company or with other directors even after he resigned on October 10, 2008.

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

> *" 12A. No person shall directly or indirectly—*
>
> *(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;*
>
> *(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;*

(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder".

"3. Prohibition of certain dealings in securities

No person shall directly or indirectly—

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

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

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made thereunder."

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

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

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

(a) ……..
(b) ……..
……..

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

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

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

10. A perusal of the aforesaid provisions clearly indicates that the appellant Adi Cooper was neither directly or indirectly involved in any fraudulent activity nor employed any scheme to defraud any shareholder or investor. The WTM committed a manifest error in holding that the appellant Adi Cooper cannot be absolved of the consequences of the resolution of January 30,

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

9. In the light of the aforesaid decision, it was urged that the finding of the Tribunal in ***Adi Cooper's*** matter is squarely covered with the facts of the present appeal and, on that basis, the appeal should be allowed and the order should be quashed insofar as it relates to the appellant.

10. On the other hand, Shri Shyam Mehta, the learned senior counsel for the respondent submitted that the appellant was a director in the Company for more than 10 years i.e. February 20, 2004 to May 29, 2014 during the period when the GDR was issued. The appellant was also the signatory to the resolution of the board of directors dated October 19, 2007 which allowed the Company to open a bank account with Lisbon bank and further authorized Banco "to use the subscription money as security in connection with the loan if any". It was contended that the use

of the GDR proceeds as security for the loan by the resolution of October 29, 2017 was the starting point of the fraudulent arrangement through which the Company facilitated the financing of the GDR issue. It was urged that the appellant being a director in the Company for more than 10 years and was chairman of various committees such as remuneration committee, investors grievances committee, chairman of debt committee. He was, thus, deemed to be involved in the day-to-day affairs and management of the Company. It was also contended that the appellant was signatory to various resolution of the board of directors and therefore the contention that the appellant only participated in policy decision matters was not correct. The learned senior counsel for the respondent, thus, urged that the fact that the appellant was involved in the day-to-day affairs and being a director for more than 10 years was deemed to have knowledge of the GDR issue and therefore was rightly found guilty of violating the provisions of the SEBI Act and PFUTP Regulations. The learned senior counsel, thus, urged that the appellant being a director cannot escape his liability under the SEBI Act and PFUTP Regulations.

11. The learned senior counsel contended that the decision of this Tribunal in ***Adi Cooper (supra)*** matter is distinguishable

and, in any case, the respondent has filed an appeal in the Supreme Court which is pending consideration. The learned senior counsel also relied upon a decision of the Supreme Court in ***N. Narayanan vs Securities and Exchange Board of India, (2013) 12 SCC 152*** contending that the liability of a director is squarely covered and comes within the ambit of Section 27 of the SEBI Act.

12. Having heard the learned counsel for the parties and having given our thoughtful consideration in the matter, we are of the opinion, that the controversy involved in the present appeal is squarely covered by a decision of this Tribunal in ***Adi Cooper (supra)*** matter. In ***Adi Cooper (supra)*** the Tribunal interpreted the relevant words of the resolution "to use the fund so deposited in the aforesaid bank account as security in connection with loans if any". The Tribunal held that the loans could be taken by the Company and GDR subscription to be used as security. It was never fathomed that the subscription amount would be used for giving loans to a third party, namely, Clifford in the instant case.

13. In addition to the aforesaid, we find that at the time when the resolution of October 19, 2007 was passed Clifford was

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

14. We also find that there is no finding of the fact that the appellant was involved in the day-to-day affairs of the management of the Company. The submission of Shri Shyam Mehta, the learned senior counsel for the respondent that the appellant attended several board meetings and was chairman of various committees which can be find out from the annual reports are submissions which are not borne out from the records. The submissions so made are beyond the pleadings and cannot be taken into consideration. The respondent cannot be allowed to better their case and rely upon such documents which are not part of the record. There is no finding that the appellant, being a director for more than 10 years, was deemed to be

involved in the day-to-day affairs and management of the Company nor there is any finding that the appellant was chairman of various committees and therefore deemed to be involved in the day-to-day affairs of the Company. There is no finding that the credit agreement and the charge account agreement were in the knowledge of the appellant. On the other hand, it is the consistent case of the appellant that he was a practicing chartered accountant and a non-executive independent director and was only involved in policy decisions. These facts have not been disputed nor controvert by any documentary evidence before the WTM.

15. We also find that the reliance of Section 27 of the SEBI Act is patently erroneous. Section 27 is not applicable if the offence is committed without the knowledge of the incumbent. We have already held that there is no finding given by the WTM that the appellant was involved in the day-to-day affairs and management of the Company. On the other hand, a specific case was stated by the appellant that the fraud was committed by the mastermind, namelyly, the chairman, managing director and the authorized signatory / director Mr. Rajinder Singh Negi and that he had no knowledge of the violation committed by the masterminds of the PFUTP Regulations. This fact has not been

denied by the respondent. In our view Section 27 of the SEBI Act has no application. Consequently, the decision relied upon by the respondent in ***N. Narayanan (supra)*** is distinguishable and not applicable to the present facts and circumstances of the case.

16. In view of the aforesaid, the impugned order insofar as it relates to the appellant cannot be sustained and is quashed. The appeal is allowed with no order as to costs.

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

TARUN AGARWAL

Digitally signed by TARUN AGARWAL
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Date: 2020.11.19 11:05:13 +05'30'

Justice Tarun Agarwala
Presiding Officer

Dr. C.K.G. Nair
Member

19.11.2020
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