Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.10560 of 2013

Securities and Exchange Board of India ...Appellant

VERSUS

Pan Asia Advisors Ltd. & Anr. ...Respondents

J U D G M E N T

Fakkir Mohamed Ibrahim Kalifulla, J.

1. This appeal at the instance of the Securities and Exchange Board of India (hereinafter called "SEBI") is directed against the majority judgment and final order dated 30.09.2013, passed by the Securities Appellate Tribunal, Mumbai, in Appeal No.126 of 2013.

2. The short question that arises in this appeal relates to the jurisdiction of SEBI under the Securities and Exchange Board of India Act, 1992, (in short "SEBI Act, 1992") to initiate proceedings against the respondents as Lead Managers to the Global Depository Receipts (in short "GDRs") issued outside India based on investigations held by it and on its conclusion that in relation to transaction of sale/purchase of underlying shares released on redemption of GDRs in the securities market in India, the Lead

Managers had committed fraud on the investors in India and that such fraudulent intention existed at every stage of the GDR process till sale/purchase of underlying shares in the securities market in India. The further question that arises for consideration is that if the said question is answered in the affirmative, whether the SEBI was justified in passing its impugned order dated 20.06.2013, debarring the respondents herein from rendering services in connection with instruments that are defined as securities under Section 2(h) of the Securities Contracts (Regulation) Act, 1956 (in short "SCR Act, 1956") and such debarment for a period of 10 years prohibiting the respondents from accessing the capital market directly or indirectly under SEBI Act, 1992 and the regulations framed there under was justified.

3. When the order of SEBI dated 20.06.2013 was challenged by the respondents before the Securities Appellate Tribunal, Mumbai in Appeal No.126 of 2013, the Chairman of the Tribunal in his minority view upheld the order of the SEBI while the members of the Tribunal by way of their majority view set aside the order of SEBI debarring the respondents. It was in the above stated background SEBI has come forward with this appeal before us.

4. Therefore, for us, the only question to be decided is as to whether SEBI had jurisdiction in passing the impugned order

dated 20.06.2013 debarring the respondents for a period of ten years in dealing with securities while considering the role played by the respondents as Lead Managers relating to the GDRs issued by six companies who issued such GDRs. In the counter affidavit filed on behalf of the first respondent, it is stated that the said respondent's name has been changed and is now known as Global Finance & Capital Limited, having its office International Corporate House, Monster House, 42 Mincing Lane, London and represented by its Executive Officer Ms. Neha Dua. Therefore, whatever stated with reference to first respondent and applicable to it in this order shall mutatis mutandis apply to the said entity namely Global Finance & Capital Limited in all respects.

5. In order to appreciate the issue raised, it will be necessary to explain the manner in which the respondents dealt with the GDRs issued by those six entities in the foreign market and the nature of allegation which according to SEBI was found true and which led SEBI to conclude that such manner of dealing of the GDRs of those companies by the respondents as Lead Managers did have a serious impact in the securities market of Indian origin and consequently it had jurisdiction to proceed against the respondents.

6. In the present appeal, according to SEBI the respondents as Lead Managers dealt with the GDRs issued by six entities viz., (1) Asahi Infrastructure & Projects Ltd (Asahi) (2) IKF Technologies Ltd. (IKF) (3) Avon Corporation Ltd (Avon) (4) K Sera Sera Ltd (K Sera) (5) CAT Technologies Ltd (Cat) and (6) Maars Software International Ltd (Maars).

7. Mr. C.U. Singh, learned senior counsel who appeared for SEBI submitted that since the nature and manner of handling of the GDRs by the respondents as Lead Managers were identical relating to all the six companies, for the purpose of noting the nature of such dealings we can restrict it to the first company viz., Asahi and that the same can be applied *mutatis mutandis* in respect of the six other companies. We are therefore referring to the details of the GDRs issued by Asahi and the manner in which such issuance of GDRs were disposed of and ultimately converted into shares and sold out in the Indian Market.

8. According to SEBI, Asahi issued equity shares of Rs.29,91,00,000/- of Rupee one each at the value of 2 USD on 29.04.2009. Such shares issued resulted in allotment of 29,91,000 GDRs containing 29,91,00,000 equity shares. The total value of the GDRs issued was 5.98 million USD. Such GDRs issued were fully subscribed and closed on 29.04.2009 itself.

9. Prior to the GDRs issue, Asahi had 3,71,96,000 fully paid equity shares and GDRs issued was about eight times of Asahi's outstanding share capital. The first respondent herein was appointed as the Lead Manager for the GDR issued and the entirety of the share capital of the first respondent was held by the second respondent. While referring to the GDR issued by Asahi and the appointment of the respondents as its Lead Managers, it will be necessary to refer to two other entities viz., Vintage and Euram. The second respondent is the Managing Director of Vintage and Euram is the foreign bank lender. It was mainly stressed at the instance of SEBI that there was a loan taken from Euram by Vintage for subscribing to the GDRs of Asahi and that the same was managed by a loan and pledge agreement signed not only by Vintage and Euram but by Asahi as well. According to SEBI, the second respondent herein structured the loan and pledge agreement to which Asahi, Vintage and Euram were signatories and the terms of the loan agreement as well as the pledge agreement were intertwined and they were the keys to the alleged fraudulent issuance and subscription of GDRs.

10. It was pointed out that the loan agreement was dated 21/22.04.2009 between Euram and Vintage bearing agreement No.K210409-003 i.e. eight days before the issuance of GDRs themselves. The second respondent signed the loan agreement as

Managing Director of Vintage under the loan agreement, Euram sanctioned a loan of 59,82,000 USD to Vintage, the borrower to enable Vintage to take Asahi's GDRs and thereafter to transfer to Euram A/c No.540030. However, as a matter of fact, it was found that A/c No.540030 in Euram was Asahi's account for depositing the proceeds of GDRs. Clause 6.1 of the loan agreement stipulated for creation of a pledge of (A) the securities held in the borrower's account No.540030 (in reality it was Asahi's account) at Euram (B) Pledge of that very account No.540030 (pledging of Asahi's account itself) for supporting the borrower under the loan agreement. The pledge agreement was dated 21.04.2009, between Asahi and Euram signed by Mr.Laxminarayan Rathi in his capacity as Managing Director of Asahi on 28.04.2009. It is relevant to note that family members of Mr.Rathi are the promoters of the Asahi. It was pointed out on behalf of SEBI that Mr.Rathi did not inform Bombay Stock Exchange (BSE) or the company or the shareholders about the signing of the pledge agreement in favour of Euram. Therefore, Asahi was the Pledgor with Euram Bank under the pledge agreement. The preamble of the pledge agreement after referring to the loan agreement between Euram and Vintage stated that the pledgor agreed to the terms of loan agreement and a copy of the loan agreement was also delivered to pledgor and in effect having regard to such nature

of agreement as between Asahi and Euram as pledgor and pledgee and the borrower made by Vintage from Euram for whom loan was advanced, Euram got it secured by the pledge of GDR themselves issued by Asahi.

11. Further Clause 2.1 of pledge agreement provided for pledging of the pledgor's assets as collateral security for due repayment of the loan under the loan agreement for the value of 59,82,000 USD. Clauses 6.1, 6.2 and 6.3 of the pledge agreement gave full rights to the bank Euram to realise its loan agreement by realisation of pledged securities. By virtue of the coalesce manner of the loan agreement and pledge agreement, the resultant position was found to be a common ownership of bank account by the borrower, subscriber and the issuing company added to a guarantee by the issuing company for the loan taken by the subscriber to its GDRs. According to SEBI such a nature of transactions as between Asahi, Vintage and Euram disclosed central and determining features of a scheme to fraudulently raise fake capital by the issuing company.

12. At this juncture, we want to make it very clear that we are not expressing any opinion as to the correctness or otherwise of the stand of SEBI at this moment. We are only concerned with the question as to the jurisdiction of SEBI to exercise its powers under

the provisions of the SEBI Act, 1992 and SCR Act, 1956 read along with the regulations framed under the provisions of SEBI Act, 1992 to proceed against the respondent(s) as the Lead Manager for the so called fraudulent transaction indulged in by the respondents.

13. As far as the nature of fraud alleged is concerned, according to SEBI the investors of GDR of Asahi were found to be Messers Greenwich Management Inc and Tradetec Corporation. Greenwich was stated to have paid 29,82,000 USD for the purchase of 14,91,000 GDRs and Tradetec Corporation paid 30,00,000 USD for 15,00,000 GDRs. It is further pointed out that while Greenwich claimed to have its office at Hong Kong and Tradetec at Singapore, inspite of its best efforts, SEBI could not contact both the addresses furnished by the above investors as it turned out ultimately that the addresses were non-existent or the said addresses do not belong to them. It also came to the knowledge of SEBI that the said investors had investments in several other GDRs of Indian Companies.

14. Apart from the above, it was pointed out on behalf of SEBI that on 01.06.2009, Asahi informed BSE about allotment and creation of 29,91,00,000 equity shares and 29,91,000 GDRs to foreign entities viz., Greenwich and Tradetec for conversion. Based on

such information, BSE made it public to retail investors. It was however found that in reality the GDRs were subscribed by Vintage in connivance with Asahi and the proceeds simultaneously pledged with Euram. On 15/16.07.2009, BSE stated to have authorised the trading of 29,91,000 GDRs in the Indian Market. After the issuance of GDRs, Vintage became the sole holder of the said GDRs and thereby it became majority share holder of Asahi i.e. 88.94 % shareholding. Vintage transferred the GDRs to two entities called IFCF (India Focus Cardinal Fund) and KII Limited between 17.08.2009 and 15.06.2011. Another entity called Credo an associate company of KII limited had an agreement with Vintage for dealing with the GDRs of Asahi. As per the said agreement Vintage gave a loan of 20,00,000 USD to Credo to further lend it to KII Limited to enable KII limited to purchase the securities of several Indian companies including Asahi. The agreement enabled KII limited to convert GDRs into underlying shares and in fact shares were sold in the Indian market. Such sale effected and the proceeds collected were used to purchase further securities and to repeat the said process until KII limited decided to terminate the agreement. Credo was paid commission by Vintage and the agreement ensured Vintage to take full liability of the dealings of KII limited in the GDRs of Indian Companies and

any loss by KII limited to be borne by Vintage. The said agreement was also signed by the second respondent on behalf of Vintage.

15. Cancellation of Asahi GDRs said to have started from 19.08.2009 and completed by 14.06.2011. The shares were released and credited to the Demat account of IFCF and KII limited. Between 20.08.2009 and 15.06.2011, 49.51 % of GDRs were cancelled by IFCF and KII limited. The underlying shares received by IFCF and KII limited were sold in the Indian Market.

16. On behalf of SEBI it was also submitted that when the utilization of GDR proceeds by Asahi was investigated, it was found that most of the documents submitted by Asahi to SEBI were inconsistent with the statements that were available in public domain. According to SEBI, it summoned Asahi to furnish details of the usage of proceeds of GDR issued by it, the bank statements, agreement copies etc., Based on the information furnished by Asahi, SEBI found that there were transfer of funds by Asahi to its subsidiary viz., Asahi FZE in Dubai, that Asahi transferred 26,73,000 USD to Asahi FZE by selling the GDRs, the total realisation came to 59,62,136 USD i.e. 99.66% of the total loan taken by Vintage from Euram. By making further reference to the transactions as between Asahi FZE and Vintage and another entity called Ababil which belonged to the respondent,

transfer of 44.68% of GDR issued in favour of the respondents which was suspected by SEBI as the modus operandi adopted by the respondents for repayment of loan taken by Vintage to Euram. It was further alleged that Asahi failed to provide vital information relating to Asahi FZE and other transaction details. It is claimed on behalf of SEBI that flow of funds post GDR revealed clandestine manner of GDR dealings by vintage and Asahi.

17. Reliance was also placed on false information about pledge and loan agreement and concealment of information regarding utilisation of funds by foreign subsidiary of Asahi which supported to great extent the suspicion of SEBI that part of proceedings of GDR issued were routed back to the entities belonging to the respondents.

18. It was also alleged on behalf of SEBI that Asahi did not disclose details of outstanding GDRs in its quarterly disclosure of share holding pattern to Exchanges and that as per BSE website the enquiry held with custodians shows that nil for Asahi even after issuance of GDR issue. It was therefore claimed that the falsification of information regarding pledge and loan agreement and concealment of information regarding utilisation of funds by foreign subsidiary fully supported the suspicion of SEBI that part

of the proceeds of GDR issue were routed back to the entities belonging to the respondents.

19. In conclusion, it was said that Asahi having executed fraudulent transaction of claiming subscription of GDRs by two foreign investors, while it was only purchased by the Lead Managers viz., the respondents and their related entities and finding the proceeds having been encumbered due to the underlying loan taken by the respondent(s) finally received in India not more than 30% of the money raised and the remaining funds were paid out to various parties without any clear purpose of such transfers mentioned in the books of the company apart from highly material events not explaining clearly in the financial statement of the company which were not even disclosed to the market and therefore the share holders of Asahi were adversely affected and without warning impacted seriously which resulted in slide in prices on account of large sale of shares upon cancellation of GDRs. It is on the above said basis, SEBI took the stand that it had every jurisdiction to proceed against the respondents for the alleged fraudulent manner of dealing with the GDRs issued by Asahi which had serious impact in the share holding pattern of Asahi in the Indian market which really hoodwinked the Indian investors.

20. Mr. C.U. Singh the learned senior counsel appearing for the SEBI after making reference to the above facts and also the statutory provisions submitted that the respondents as Lead Managers were involved in the above alleged fraudulent transactions of GDRs whereby without any actual inflow of funds into the issuing company, the said company was successful in issuing large amount of GDRs which gave a false respectable appearance to the financial statement of the company while in reality by making few book entries it was shown as though large surge in the capital of the company was made. It was contended that the so called initial investors to the GDRs were found to be fictitious which were created by respondent. It was contended that by making such fictitious book entries, the respondent(s) in reality ensured that the funds moved from one of its controlled company to another company also controlled by it and vice versa and ultimately the issuing company received post cancellation in Indian stock markets and the sale of such shares after its cancellation in the Indian market only resulted in reality the Indian investors and not the foreign investors who ultimately paid for the GDRs. It was pointed out that as a consequence of such a fraudulent arrangement perpetuated by the respondents the Indian investors upon buying shares converted from GDRs unknowingly assisted the issuing companies to release the GDR

subscription proceeds from encumbrance/pledge and thereby instead of capital being raised from foreign investors by way of issuance of GDRs, the Indian investors ultimately paid for part of the GDRs after the same were converted into underlying shares which were then sold in the Indian securities market to the investors.

21. According to SEBI, this kind of transaction would defeat the purpose of issuance of GDRs which is to raise finance from foreign investors. It was therefore contended that issuance of GDRs being sourced from authorised share capital of a company listed in the Indian Stock Exchanges, any structuring or manipulation related to GDRs will have a direct impact on the stocks of the company trading in Indian market, that the two way fungibility scheme for GDRs allow for conversion of GDRs in Indian market and vice versa and impact of such issuance, cancellation /conversion and sale/transfer of shares so converted will have a direct bearing on the securities market in India.

22. It was further contended that the material issue was whether the arrangement by which the respondents as Lead Managers indulged in the transaction of GDRs of the issuing company of the Indian origin by creating a pledge on the proceeds thereof to enable a foreign bank to lend to foreign investors will have to be

tested in the anvil of Indian law as the GDRs are always supported by the underlying Indian shares.

23. It was also pointed out that in the course of the hearing the respondents clarified that the disbursement of loan by the foreign financial institution actually occurred immediately subsequent to the execution of pledge agreement by Asahi and thereby made it clear that the loan agreement and pledge agreement drew strength from each other and were intricately connected to the transaction. It was also noted by SEBI based on the uncontroverted factual scenario that it took eight months for the issuing company viz., Asahi to utilise the GDR proceeds as till then the investor viz., Vintage could not repay the loan borrowed by it from Euram which borrowal was fully and mainly supported by the pledge agreement created by Asahi in favour of Euram. In this context, heavy reliance was placed upon Section 77(2) of the Companies Act which prohibited any public company or private company which is subsidiary to a public company to give directly or indirectly by means of a loan, guarantee etc., any financial assistance for the purpose or in connection with purchase or subscription made or to be made by any person for any share in the company or in its holding company. Reliance was also placed upon the provisions of SEBI (Prohibition of Fraudulent and Unfair

Trade Practice Relating to Securities Market) Regulations, 2003 (in short "2003 Regulations") which prohibited such transactions.

24. According to SEBI the existing share holders and prospective investors were projected of the positive dose that the issuing company had raised foreign capital through GDRs but were completely unaware of the activities of respondents as Lead Managers along with their connected entities in such GDR issues. It was the case of SEBI that the very fact that the GDRs were issued pursuant to the alleged fraudulent arrangement entered into by the respondents through Vintage that the initial investors as declared by the respondents largely did not exist, as a result of which, the investors in India were made to believe (falsely) that the stocks of issuing companies were highly valued by foreign investors.

25. Mr. C.U. Singh therefore contended that having regard to the nature of transaction of the GDRs of the issuing companies of Indian origin in the global market since had a direct bearing on the Indian investors and such transactions were found proved by SEBI had serious impact on the Indian market, SEBI was fully justified in assuming jurisdiction and thereby having passed the order of debarment in the order dated 20.06.2013.

26. To support his submissions, Mr. C.U. Singh learned senior counsel for SEBI also referred to various provisions of the SEBI Act, 1992, SCR Act, 1956 and the Regulations framed under the provisions of the SEBI Act, 1992. In particular he relied upon Section 2(i) of SEBI Act, 1992 read along with Section 2(h) of SCR Act, 1956 which defines "securities" and contended that GDRs are marketable securities as defined in Section 2(h)(i) and (iii) of SCR Act, 1956. By referring to Section 2(j), the definition of Stock Exchange in SCR Act, 1956 as well as Section 11(2) and (4) of SEBI Act, 1992, learned counsel contended that SEBI has been invested with enormous powers to check buying, selling or dealing in securities through stock exchanges which power having regard to the vide definition of securities under the SCR Act, 1956 would include any fraudulent transactions relating to GRDs which are always supported by the underlying shares. The learned senior counsel further pointed out that such powers of the Board have been clearly set out in Section 11B as well as 11C read along with Section 12 of the SEBI Act, 1992.

27. The learned senior counsel by making reference to Section 12A of SEBI Act, 1992 which prohibits manipulative and deceptive devices relating to insider trading etc either directly or indirectly, SEBI have every jurisdiction to proceed against the respondents when once it came to light that respondents indulged in

manipulative devices in dealing with the underlying shares of the GDRs by hoodwinking the investors and by making the issuing companies themselves to pledge their own investments for the purpose of advancing loan for the investment made by Vintage, which according to SEBI also belong to the respondents who are the Lead Managers who dealt with the GDRs of the issuing company Asahi.

28. According to the learned senior counsel by virtue of the alleged fraud played by the respondent(s) the Indian investors were the victims for whom SEBI is the custodian and the nature of transaction indulged in by the respondent resulted in more than 140 million USD of fraudulent transaction. The learned senior counsel, therefore, submitted that the action of the respondents was in total violation of stock market regulation, it was in violation of Section 77(2) of the Companies Act and was a rank fraud on the share holders apart from such violations attracting the provisions of the Foreign Exchange Management Act, 1999 (in short "FEMA") and Reserve Bank of India (in short "RBI") regulations.

29. In support of his submissions, the learned senior counsel relied upon **GVK Industries Limited and another** v. **Income Tax Officer and another** - (2011) 4 SCC 36 paras 3 to 6 and para 124, **Republic of Italy through Ambassador and Others Vs. Union of**

India and Others - (2013) 4 SCC 721, paras 14, 130 and 139, **Chairman, SEBI** v. **Shriram Mutual Fund and another** (2006) 5 SCC 361 paras 15, 17, 19, 33 to 36 and **Union of India and Others** v. **Dharamendra Textile Processors and Others** - (2008) 13 SCC 369 paras 2, 3, 13 and 20.

30. As against the above submissions Mr. Shyam Divan, learned senior counsel appearing for the respondents raised several points for consideration. The points raised by learned senior counsel for the respondents are:

> *a) SEBI is a creature of a Statute under Section 3 of SEBI Act, 1992 and its scope and powers are, therefore, defined by the Statute.*
>
> *b) SEBI Act, 1992 extends to the whole of India and extra jurisdictional matters are not covered by it and as a creature of a Statute SEBI cannot operate beyond India.*
>
> *c) PFUTP being delegated regulation/subordinate regulation under SEBI Act, 1992 cannot reach beyond its territorial jurisdiction.*
>
> *d) SEBI functions as defined under Section 11(1) and controlled by the words in that Section which specifically use the expression "subject to the provisions of the Act".*
>
> *e) Both the respondents are registered with the Financial Conduct Authority (UK) and therefore they are the authorities which can control the respondents and SEBI has no plenary jurisdiction over them.*
>
> *f) SEBI has no subject matter jurisdiction over GDR though the powers under FEMA regulations/schemes and RBI directions and the authorities specified may have jurisdiction to act and certainly not SEBI on the*

subject matter. Negatively the office manual of SEBI has nothing to do with the subject matter of GDR.

g) Material on records placed before the Tribunal disclosed that the activities of respondents were fully in compliance of local statutes of Austria and U.K.

h) The directions issued by SEBI to the respondents are extremely prejudicial.

31. Mr. Shyam Divan drew our attention to the stand of respondents 1 and 2 in their respective counter statements filed in this appeal and submitted that while the first respondent is the Lead Manager second respondent is not a Lead Manager and that both of them were not registered with SEBI or any other authority for the purpose of dealing with GDRs. The learned senior counsel contended that there is no obligation either on the first respondent or the second respondent under SEBI Act, 1992 or regulations or under any other Indian law including FEMA to make or disclose any information. It was contended that the first and second respondent have not filed any information in order to state that false information was furnished to the Indian authorities with an intention to mislead them. According to the learned senior counsel, the disclosure to be made were the obligations of the issuing company relating to GDRs including the details about the foreign bank, foreign exchange etc., under the statutes in India. It was further submitted that under no statutory prescription first and second respondent are obligated to inform about the fund flow

into India to SEBI. The fact that no such obligation exists even as Indian issuing company.

32. It was contended that as Lead Managers the role of respondents 1 and 2 end with the listing of GDRs. In so far as trading, conversion, redemption etc., they have no role to play. It was further contended that there is no lock in period for the GDR which is freely convertible, which may be converted and may not be converted which depends upon the decision of the investor. According to the respondents, they had no control over issuing companies which function independently in India and except commercial contractual relationship pertaining to GDR, the respondents had no relationship with the issuing company. The learned senior counsel submitted that it is not the case of SEBI that these companies were all bogus companies.

33. The learned senior counsel drew our attention to certain core features of the GDR issues dealt with by respondents as Lead Managers and listed them as under:

"Core features of the GDR issues

1) GDRs were issued and were subscribed in full.

2) GDRs were dollar denominated and the monies received at the time of subscription was in USD.

3) The dollars stood credited in the issuer company's bank account maintained with Euram Bank.

4) This account with Euram Bank was opened by the issuer company.

5) Dollars in the issuer company's account (GDR subscription proceeds) became available to the issuer companies, albeit according to SEBI after "repayment of loan". There was an 8 months delay in respect of Asahi with respect to free utilisation of the GDR proceeds.

6) The loans have been repaid.

7) As on 30.06.2012, though all loans were paid, all GDRs were not cancelled and certain GDRs remained intact.

8) The issuer companies received US Dollars and utilised the US Dollars by transferring them to their respective overseas subsidiaries or repatriating the funds to India."

34. The learned senior counsel further pointed out that there was no requirement to bring the GDR proceeds into India or there is no time frame for such repatriation which are supported by the RBI Master Circular apart from the fact that there was no allegation that the funds were used for prohibited activities, viz., stock exchange transactions or real estate transactions prescribed under the Issue of Foreign Currency Convertible Bonds and

Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 (in short "1993 Scheme").

35. Mr. Shyam Divan further contended that SEBI's own documents established that the GDR issues were subscribed in USD and the proceeds were available to the issuing companies and that in that process no violation of any Indian or overseas law was alleged against either the issuing company or the respondents.

36. Mr. Shyam Divan then referred to Section 2(o) the definition of "foreign security", Section 2(za) the definition of "security" and Section 3 and contended that the said provisions under the FEMA are relevant which control any transaction pertaining to foreign security which means shares, stocks, bonds, debentures etc., which are denominated expressed in foreign currency.

37. He also made reference to Section 6(3) wherein the RBI has been empowered to formulate regulations for prohibiting, restricting or regulating matters relating to transfer etc., of foreign security by a person who is resident in India as well as outside India. Further reference was made to Section 13 of the said Act which prescribed the penalties for contravention of the provision of the Act and Section 36 for the authorities who have been empowered under the said Act for the enforcement of the

provisions of the Act The learned senior counsel therefore contended that the GDRs will definitely fall within the definition of "foreign security" as defined in section 2(o) and "security" as defined in Section 2(za) and consequently with reference to any violation in dealing with the GDRs can be exclusively dealt with under the provision of FEMA and the SEBI or any of the provision of SEBI Act, 1992 will not have any application relating to GDRs.

38. The learned senior counsel referred to master circular on foreign investment in India dated 01.07.2011 of the RBI with particular reference to paragraph 8(F) of the said circular which deals with issues of shares by Indian companies under ADR/GDR as well as the form prescribed under Annexure 11 of the said circular by which the quarterly return are to be filed by the issuing company. The learned senior counsel pointed out that such procedure has been prescribed under the master circular under the provisions of the FEMA which takes care of the issuance of GDRs including two way fungibility provided under the said circular. The learned senior counsel submitted that even such prescriptions under the master circular issued by the Reserve Bank of India or with reference to the control which the Act prescribed on "foreign security" and "security" which includes GDRs as defined under FEMA as well as the manner in which such issuance of foreign security are to be controlled by the RBI.

In this context, Mr. Shyam Divan brought to our notice the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (in short "2000 Regulations") in particular Regulation 4, 5.1 along with Schedule I (4B), 5 and 6 and submitted that the scheme viz., 1993 Scheme got statutory flavour by virtue of the 2000 Regulations referred to above.

39. Learned senior counsel also referred to Clarification 23 in the RBI guidelines for the limited two way fungibility under the 1993 Scheme as well as the guidelines for ADR/GDR issues by the Indian companies under Euro issue and submitted that the issuance of GDR by the issuing company and dealt with by the respondent(s) as Lead Managers fulfil all the requirements under FEMA, RBI Guidelines, 2000 Regulations under FEMA as well as 1993 Scheme and, therefore, there was no scope for SEBI to proceed against the respondents under the provisions of the SEBI Act, 1992 or SCR Act, 1956.

40. The learned senior counsel also brought to our notice the Depositary Receipts Scheme 2014 (in short "2014 Scheme") notified by the Central Government which mandates the authorities under the RBI and SEBI as well as Ministry of Corporate Affairs in the Ministry of Finance to implement the

provisions of the said scheme. The learned senior counsel fairly pointed out paragraph 10 of the scheme which refers to market abuse, which states that "market abuse" means any activity prohibited under Chapter VA of the SEBI Act, 1992. By making reference to the said scheme learned senior counsel submitted that even the said scheme notified in the year 2014 cannot be invoked to rope in the respondents though it may empower SEBI to proceed against the issuing company.

41. The sum and substance of the submissions of the learned senior counsel for the respondents is that GDR is statutorily defined under Clause 2(c) of 1993 Scheme and 2000 Regulations which shows that cradle to grave GDR is outside India. The said submission was made on the footing that issuance of GDR is outside India, investor is outside India, market is outside India, investor bank is outside India, therefore, everything relating to GDR is outside India. The contention was that both as a matter of law and fact the GDR operates outside India and that the respondents are covered only till the GDR is listed in the overseas and therefore, GDR is not a security covered by SEBI Act, 1992 as well as SCR Act, 1956. Consequently, SEBI had no jurisdiction or role to protect the interest of GDR investors or to regulate the GDR market. It is also submitted that by virtue of Section 1(2) of the SEBI Act, 1992, the SEBI can have control over the operation in

the whole of India but not outside the country. It was contended that the various provisions referred to on behalf of the respondents under different statutes do not make express mention of GDR which was advisably so, because there was no impediment for including in the definition, because GDR was from cradle to grave outside India, whereas SEBI Act, 1992 is exclusively for transactions within Indian territory. By making specific reference to Section 12 of the SEBI Act, 1992, it was contended that while it refers to investment advisors, market bankers whose registration is statutorily required, respondents as Lead Managers are not required to be registered because they are not dealing with local Indian securities. It was also contended that even SEBI do not contend that the respondents are obliged to register with SEBI.

42. It was further contended that even under Section 12(1A), the respondents are not required to get registered with SEBI. The learned senior counsel relied upon the decision reported in **GVK Industries Limited (supra)** paragraphs 6, 108 and 124 to 126, and also relied on **Haridas Exports** v. **All India Float Glass Manufacturers' Assn. and Others -** (2002) 6 SCC 600 paragraphs 3, 18, 29, 33 to 39, 43, 46, 57 and 61. Reliance was also placed upon **Vodafone International Holdings BV** v. **Union of India and Another** - (2012) 6 SCC 613 paragraphs 83-93, 387 and 408.

43. To appreciate the submissions made by the respective counsel for the appellant as well as the respondents, in the forefront, we feel the following questions need our attention viz.,

I. What is GDR and whether it will fall under the definition of 'Securities' under Section 2(h) of SCR Act 1956 ?

II. How is it created ?

III. Why is it created ?

IV. After its creation, how is it dealt with ?

V. After the disposal of GDRs in the global market what are the rights of its investors ?

VI. What is the role played by a Lead Manager while dealing with GDRs in a foreign market ?

VII. Who are all the parties who are involved in the creation, ownership and the cancellation of GDR ?

VIII. Dealing with GDR, is it regulated by the statutory prescription of India or only by foreign laws ?

IX. Post cancellation of GDRs what impact it can create on the issuing company and the investors of the Indian market ?

X. In the event of any misfeasance or malfeasance in dealing with the GDRs whether SEBI can effectuate its control over those who are involved in such misfeasance or malfeasance?

44. To find an answer to the above questions we can make reference to Regulation 5 (1) and (2) as well as Schedule I of the 2000 Regulations which has been framed in exercise of the powers conferred by Clause (b) of sub-section 3 of Section 6 and Section 47 of the FEMA. Regulation 5 (1) and (2) and paragraph 4 (1), (2) & (3) and Paragraph 6 of Schedule I are relevant which are as under:--

> ***"Regulation 5. Permission for purchase of shares by certain persons resident outside India :-***
>
> *(1) A person resident outside India (other than a citizen of Bangladesh or Pakistan or Sri Lanka) or an entity outside India, whether incorporated or not, (other than an entity in Bangladesh or Pakistan), may purchase shares or convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions specified in Schedule 1.*
>
> *(2) A registered Foreign Institutional Investor (FII) may purchase shares or convertible debentures of an Indian company under the Portfolio Investment Scheme, subject to the terms and conditions specified in Schedule 2.*
>
> * * *
>
> ***Paragraph 4. Issue of Shares by International offering through ADR and/or GDR***

(1) An Indian company may issue its Rupee denominated shares to a person resident outside India being a depository for the purpose of issuing Global Depository Receipts (GDRs) and/ or American Depository Receipts (ADRs),

Provided the Indian company issuing such shares

(a) has an approval from the Ministry of Finance, Government of India to issue such ADRs and/or GDRs or is eligible to issue ADRs/ GDRs in terms of the relevant scheme in force or notification issued by the Ministry of Finance, and

(b) is not otherwise ineligible to issue shares to persons resident outside India in terms of these Regulations, and

(c) the ADRs/GDRs are issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and guidelines issued by the Central Government thereunder from time to time.

(2) The Indian company issuing shares under sub-paragraph (1), shall furnish to the Reserve Bank, full details of such issue in the form specified in Annexure 'C', within 30 days from the date of closing of the issue.

(3) The Indian company issuing shares against ADRs/GDRs shall furnish a quarterly return in the form specified in Annexure 'D' to Reserve Bank within fifteen days of the close of the calendar quarter.

* * *

Paragraph 6. Dividend Balancing

Where a company is engaged in any of the industries in the consumer goods sector, specified in Annexure E, or in any other activity where the condition of dividend balancing has been stipulated in terms of the provisions of Industrial Policy and Procedures notified by Secretariat for Industrial Assistance, the cumulative outflow of foreign exchange on account of payment of dividend over a period of seven years from the date of commencement of commercial production to investors outside India shall not exceed cumulative amount of export earning of the company during those years.

Provided that

(a) the restriction under this paragraph shall not apply

i) in respect of shares held in such a company by International Finance Corporation (IFC), the Deustche Entwicklungs Gescelschaft (DEG), the Commonwealth Development Corporation (CDC) and Asian Development Bank (ADB).

ii) to a company that has completed a period of seven years from the date of commencement of commercial production,

(b) in case of an existing company that has issued fresh equity to persons resident outside India under these Regulations, the restriction shall apply to the fresh shares from the date of their issue."

45. A reading of Regulation 5 read along with paragraphs (4) & (6) of Schedule I of 2000 Regulations, as rightly pointed out by Mr.Shyam Divan gives a statutory recognition to the 1993 Scheme

which came into force w.e.f 01.04.1992. It is needless to state that the said Scheme came to be issued by the Central Government in exercise of its executive powers under Article 73 of the Constitution of India. Paragraph 4 (1), (2) & (3) and paragraph 6 of Schedule I of the 2000 Regulations in effect authorises the issuance of GDRs and the Statutory requirements to be fulfilled for the issuance of such GDRs to have a valid sanction under law of the Indian origin.

46. Having noted such provisions framed under the 2000 Regulations, when we refer to paragraph 2(a), (c), (d) and (e) of 1993 Scheme, one will get a clear idea about how GDRs are issued. Paragraph 2(a) defines "Domestic Custodian Bank" to mean a banking company which acts as a custodian for the ordinary shares or foreign currency convertible bonds of an Indian company which are issued by it against Global Depository Receipt or certificates. Paragraph 2(c) defines Global Depository Receipts to mean any instrument in the form of a depository receipt or certificate (by whatever name it is called) created by an Overseas Depository Bank outside India and issued to non-resident investors against the issue of ordinary shares or foreign currency convertible bonds of the issuing company. Paragraph 2(d) defines an issuing company to mean an Indian company permitted to issue Foreign Currency Convertible Bond or ordinary shares of

that company for the purpose of creation of Global Depository Receipts. Paragraph 2(e) defines Overseas Depository Bank to mean a bank authorized by an issuing company to issue Global Depository Receipts against issue of ordinary shares of the issuing company.

47. It will be necessary to refer to paragraph 3(1) and 3(1)(iii) and (iv) and 3(2) and 3(3) of 1993 Scheme in order to get a clear picture as to what is Global Depository Receipt and how it is issued. Under paragraph 3(1) any issuing company desirous of raising foreign funds by issuing Foreign Currency Convertible Bonds or ordinary shares for equity issues through Global Depository Receipt is required to obtain prior permission of the Department of Economic Affairs, Ministry of Finance, Government of India.

48. Under paragraph 3(1)(iii) an approved intermediary under the scheme would be an Investment Banker registered with the Securities and Exchange Commission in USA or under Financial Services Authority in UK or appropriate regulatory authority in Germany, France, Singapore or in Japan. Under paragraph 3(1)(iv) such issues would need to confirm to the Foreign Direct Investment Policy and other mandatory statutory requirement and detailed guidelines issued in this regard. The provisions of

paragraph 4(B) of Schedule I of 2000 Regulations as notified by the RBI vide Notification No.FEMA 41/2001-RB dated 02.03.2001 should also be adhered. Under paragraph 3(2), an issuing company seeking permission under sub-paragraph I should have a consistent track record of good performance (financial or otherwise) for a minimum period of three years on the basis of which an approval of finalizing the issue structure would be issued to the company by the Department of Economic Affairs, Ministry of Finance. Under paragraph 3(3) on the completion of the finalization of the issue structure in consultation with the Lead Manager to the issue, the issuing company shall obtain the final approval for proceeding ahead with the issue from the Department of Economic Affairs. Under paragraph 3(4) the Foreign Currency Convertible Bonds shall be denominated in any convertible foreign currency and the ordinary shares of an issuing company to be denominated in Indian rupees. Under paragraph 3(5) when an issuing company issues ordinary shares or bonds under the 1993 Scheme, that company should deliver the ordinary shares or bonds to a Domestic Custodian Bank, who will in terms of the agreement instruct the Overseas Depository Bank to issue Global Depository Receipt or a certificate to non-resident investors against the shares or bonds held by the Domestic Custodian Bank. A Global Depository Receipt may be issued in the negotiable

form and may be listed on any international stock exchange enabling the investor for trading outside India under paragraph 3(6). Under paragraph 3(7) the provisions of any law relating to issue of capital by an Indian company would apply in relation to the issuance of Foreign currency convertible bonds or the ordinary shares of an issuing company and the issuing company should obtain necessary permission or exemption from the appropriate authority under the relevant law relating to the issue of capital. For this purpose, Sections 55A and 77(2) of the Companies Act are relevant which are to be followed. The issue structure of GDRs is governed by paragraph 5 of 1993 Scheme. A Global Depository Receipt can be issued for one or more underlying shares held with the Domestic Custodian Bank. The GDRs may be denominated in any freely convertible foreign currency. The ordinary shares under the GDRs will be denominated only in Indian currency. The issues viz., public or private placement, number of GDRs to be issued, the issue price, rate of interest payable on foreign currency convertible bonds, the conversion price, coupon and the pricing of the conversion options would be decided by the issuing company with the Lead Manager to the issue. There would be no lock-in period for the GDRs issued under this scheme.

49. Under paragraph 6, the GDRs issued under this Scheme may be listed on any one of the Overseas Stock Exchanges or over the

counter exchanges or through Book Entry Transfer System prevalent abroad and such receipts can be purchased, possessed and freely transferable by a person who is a non-resident within the meaning of Section 2(q) of the Foreign Exchange Regulation Act, 1973 and subject to the provisions of the said Act.

50. Paragraph 7 of the Scheme deals with the transfer and redemption. Under paragraph 7(1), a non-resident holder of GDR may transfer those receipts or may ask the overseas Depository Bank to redeem those receipts. In the case of redemption Overseas Depository Bank should request the Domestic Custodian Bank to get the corresponding underlying shares released in favour of the non-resident investor for being sold directly on behalf of the non-resident on being transferred in the books of account of the issuing company in the name of non-resident.

51. Under paragraph 7(3), on redemption, the cost of acquisition of shares under lying the Global Depository Receipts should be reckoned as the cost on the date on which the Overseas Depository Bank advises the Domestic Custodian Bank for redemption. The price of the ordinary shares of the issuing company prevailing in the Bombay Stock Exchange or the National Stock Exchange on the date of advice of redemption should be taken as the cost of acquisition of the underlying ordinary shares.

52. A combined reading of paragraphs 2(a), (c), (d) and (e) shows that the Global Depository Receipts are issued by a company in India based on the ordinary shares deposited with the domestic custodian bank and issued by the corresponding overseas depository bank depending upon the extent of ordinary shares held by the Domestic Custodian Bank. Once such Global Depository Receipts are issued by the Overseas Depositary Bank, which has the approval of the appropriate authorities of the Indian origin as well as appropriate regulatory authority of registered agencies at the global level, the GDR becomes an approved registered authenticated instrument over which any non-resident can make an investment for possessing it as a valid holder of GDR.

53. Under paragraph 3(1) it gives an indication as to why such Global Depository Receipts are sought to be created. The said paragraph states that an issuing company desirous of raising foreign funds can by way of GDRs based on ordinary shares for equity issues can create such receipts. In other words, the issuance of GDRs based on ordinary shares deposited with the Domestic Custodian Bank depends upon the issuing companies desire for raising of foreign funds. In order to fulfill its desire, while issuing the GDRs based upon the underlying shares deposited with the Domestic Custodian Bank through the overseas

Depository Bank, the prior permission of the Department of Economic Affairs, Ministry of Finance, Government of India has to be obtained. In that process, the Lead Manager plays a pivotal role as in consultation with the Lead Manager, the completion of finalization of issue structure by the issuing company is made subject however to the final approval for proceeding ahead with the issue from the Department of Economic Affairs.

54. After such creation, GDR which is governed by the agreement as between the Domestic Custodian Bank and the issuing company, instructions are given to the overseas Depository Bank to issue the GDRs to the extent of underlying ordinary shares held by the Domestic Custodian Bank. GDR is issued in the negotiable form and listed on any international stock exchange for trading outside India. On such listing, they are always issued for exchange of freely convertible foreign currency. It is significant to note that the ordinary shares underlying the GDRs are always denominated only in Indian currency. Again the Lead Manager plays a key role in relation to the issues viz., public or private placement, number of GDR to be issued, the issue price etc., in consultation with the issuing company. This is how GDRs are dealt with after creation.

55. Once the GDRs are listed on any of the overseas Stock Exchanges, the same can be purchased, possessed and freely

transferred by a person who is a non-resident within the meaning of Section 2(q) of the Foreign Exchange Regulation Act, 1973. A holder of Global Depository Receipts viz., a non-resident can transfer those receipts or may ask the Overseas Depository Bank to redeem those receipts. In the case of redemption, Overseas Depository Bank makes a request to the Domestic Custodian Bank to get the corresponding underlying shares released in favour of the non-resident investor for being sold directly on behalf of the non-resident or being transferred in the books of account of the issuing bank in the name of the non-resident. That is the manner in which GDR is dealt with after its creation and that is how the rights in favour of the holder of GDR is created after its transfer in his favour. The role of Lead Manager is thus prescribed under the scheme at the time of its creation as well as its disposal.

56. As far as applicable law is concerned, it must be stated that the underlying ordinary shares of a GDR which is held by the Domestic Custodian Bank prior to such shares being created in the form of GDR have to necessarily undergo a procedure to be followed by the issuing company and for certain purposes in consultation with the Lead Manager and before the GDRs are actually created by the corresponding Overseas Depository Bank, necessary prior permission of the Department of Economic Affairs, Ministry of Finance, Government of India have to be obtained. It

is based on such statutory sanction granted by the statutory authorities of Indian origin, a legally enforceable right for the purpose of creation of GDR comes into existence and based on such validity for issuance of GDRs, the Overseas Depository Bank will have the power to issue such GDR by way of negotiable form for the value to be determined by prescribing number of underlying shares that would be covered by each of the GDR. Once the GDR is thus created and issued by the overseas depository bank, again in consultation with the Lead Manager arrangements are made for being listed in the public or private listing of overseas Stock Exchanges. Thereafter the creation, existence and subsequent dealing with the GDRs outside the country of India would be governed by the relevant laws applicable to such Receipts.

57. Though it may appear that on the one hand underlying ordinary shares would be governed by the laws prevailing in India and the GDRs would be governed by the laws of the country in which such receipts are issued, the most relevant fact which is to be borne in mind is that the existence of GDRs is always dependent upon the extent of underlying ordinary shares lying with the Domestic Custodian Bank.

58. In this context, it will also be worthwhile to refer to Master Circular on Foreign Investment in India issued by the RBI, which gives detailed description about creation of GDRs which are negotiable securities issued outside India by a depository bank on behalf of an Indian company which represent the local rupee denominated equity shares of the company held as deposit by a Custodian Bank in India. The Master circular reiterates that GDRs are issued on the basis of the ratio worked out by the Indian company in consultation with the Lead Manager to the issuing company. It also highlights as to how such of those Indian listed companies which have been restrained from accessing the securities market by SEBI will be ineligible to issue GDRs.

59. The Master Circular also explains as to how under the two way fungibility scheme which was put in place by the Government of India for GDRs under which a stock broker in India registered with the SEBI can purchase shares of an Indian company from the market for conversion into GDRs based on instructions issued from overseas investors and also re-issuance of GDRs to be permitted to the extent of GDRs which are redeemed into underlying shares and sold in the Indian market.

60. On a consideration of the 2000 Regulations, the 1993 Scheme and the Master Circular issued by RBI periodically one can

discern that for creation of GDRs which can be traded only at the global level, the issuing company should have developed a reputation at a level where the marketability of its investment creation potential will have a demand at the hands of the foreign investors. Simultaneously, having regard to the development of the issuing company in the market and the confidence built up with the investors both internally as well as at global level, the issuing company's desire to raise foreign funds by creating GDRs should have the appreciation of investors for them to develop a keen interest to invest in such GDRs. Mere desire to raise foreign investments without any scope for the issuing company to develop a market demand for its GDRs by increasing the share capital for that purpose is not the underlying basis for creation of GDRs. In fact for creating of GDRs apart from the desire of the issuing company to raise foreign funds, the marketability of such shares in the form of GDRs should have an applicable potential at the global level. To put it differently, by artificial creation of global level investment operation, either the issuing company on its own or with the aid of its Lead Manager cannot attempt to make it appear as though there is scope for trading GDRs at the global level while in reality there is none. The above fact has to be kept in mind when dealing with an issue relating to creation of GDRs, in as much as, when the GDRs gets fully subscribed at the global

level providing scope for huge foreign investment, the same will have a serious impact at the internal investment market in the form of high appreciation of share value whereby the issuing company and the investor will be greatly benefited mutually. Such a real growth structurally and financially is the underlying principle in the creation and trading of GDRs at the global level.

61. In order to further appreciate the status of a GDR of an issuing company, it will be necessary to consider the definition of 'securities' as defined under Section 2(1)(i) of SEBI Act, 1992 read along with Section 2(h) of SCR Act 1956. In fact Section 2(1)(i) of the SEBI Act, 1992 simply defines 'securities' to mean the definition assigned to it in Section 2(h) of the SCR Act, 1956. Under Section 2(h) 'security' has been defined to mean as under in sub-clauses (i), (iia) and (iii):

> *"2 (h) "securities" include—*
>
> *(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;*
>
> *xxx xxx*
>
> *(iia) such other instruments as may be declared by the Central Government to be securities; and*
>
> *(iii) rights or interest in securities;*"

62. The above definition is exhaustive and includes not only shares, scripts, stocks, bonds, debentures, debenture stocks or other marketable securities of a like nature in or any incorporated company. The further definition under sub-clause (iia) covers such other instruments as may be declared by the Central Government as Securities and under sub-clause (iii) rights or interest in securities are also to be construed as securities.

63. Going by the definition under Section 2(h)(i) 'security' would include other marketable securities of a like nature of any incorporated company. Therefore reading Section 2(h)(i) and 2(h)(iii) together and apply the same to GDRs, having regard to the fact that the issuance of GDRs are always based on the underlying Indian shares deposited with the Domestic Custodian Bank and thereby the GDRs possess in it right, as well as, interest in the shares, scripts etc., it will have to be straight away held that all GDRs would fall within the definition of 'securities' as defined under Section 2(h) of the 1956 Act.

64. Further, under Section 2(2) of the SEBI Act, 1992, words and expressions used and not defined but defined under the SCR Act, 1956, the said meaning would respectively assign wherever used in the SEBI Act, 1992. Therefore for the expression 'stock

exchange' one will have to fall back upon Section 2(j) of the SCR Act, 1956 which definition is as under:

> *"2(j) "stock exchange" means—*
>
> *(a) any body of individuals, whether incorporated or not, constituted before corporatisation and demutualisation under sections 4A and 4B, or*
>
> *(b) a body corporate incorporated under the Companies Act, 1956 (1 of 1956) whether under a scheme of corporatisation and demutualisation or otherwise, for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities."*

65. The above definition makes it clear that a 'stock exchange' as formed under Section (2)(j)(a) & (b) are for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities. It is true that GDRs have no time limit and can be possessed as GDRs for any number of years. However, when the holder of the GDR apart from trading with the same as GDR in the global market at any point of time wish to redeem the same or go in for fungibility of the redeemed shares back into GDRs, necessarily the holder of a GDR will have to fall back upon the stock exchanges as per the definition under Section 2(j) of the SCR Act, 1956, who alone can assist, regulate or control the business of buying, selling or dealing with securities.

66. Having examined the above statutory provisions, we find that a GDR is one form of 'security' as defined under Section 2(h) of SCR Act, 1956, which is created by the issuing company of Indian origin based on underlying shares deposited with the Domestic Custodian Bank and created by the Overseas Depository Bank. Such creation is at the instance of the issuing company in India with a desire to earn foreign investments. Such investments made by the investors in the GDRs is facilitated by the Lead Manager at the time of its creation as well as its investment. Thereafter, the investors hold the GDRs either for further trading on it in the global market through the stock exchanges at global level and in the event of such investors interested in liquidating the GDR are entitled to liquidate the same through the Overseas Depository Bank, in which event the extent of underlying shares of the GDRs get transferred in the name of the investors themselves and thereby enabling such investors to trade on underlying shares in the Indian stock market or if so wish under the fungibility scheme once again get it redeemed in the form of GDR themselves.

67. Therefore, the creation of the GDR by the issuing company and after its creation in the fixation of price, value, marketing in the global market, the support of Lead Manager is involved and while dealing with such GDRs, the same is regulated in so far as it related to underlying shares deposited with the Domestic

Custodian Bank by the laws regulating the same and prevalent in India and so far as the corresponding GDRs created based on such underlying shares are concerned, the same are governed by the laws prevailing in the respective market where such GDRs are being traded. Post cancellation of GDRs, the underlying shares deposited with the Domestic Custodian Bank is made available for trading in India depending upon the wish of the holder of GDR in the local market or for holding it as such i.e as mere shares of the issuing company or by virtue of the fungibility scheme can once again be converted as GDRs for being traded in the global market.

68. In order to find out as to what would happen in the event of any misfeasance or malfeasance in dealing with the GDRs, whether SEBI can effectuate its control over those who are involved in such misfeasance or malfeasance, it will be appropriate to further examine the provision available under the SEBI Act, 1992 and SCR Act, 1956.

69. In order to assimilate the statutory functions of the Board its functions and the area of its operation, it will be necessary to make a detailed reference to Sections 11, 11B, 11C, 12 and 12(A) of SEBI Act, 1992. As we have to make a detailed reference to those provisions, the same are required to be extracted which are as under:

"*11. Functions of Board:*

(1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for -

(a) regulating the business in stock exchanges and any other securities markets;

(b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner;

(ba) registering and regulating the working of the depositories, participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification, specify in this behalf;]

(c) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds;

(e) prohibiting fraudulent and unfair trade

practices relating to securities markets;

(g) prohibiting insider trading in securities;

(4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:-

(a) suspend the trading of any security in a recognised stock exchange;

(b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;

11B. Power to issue directions: Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,-

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or

(iii) to secure the proper management of any such intermediary or person, it may issue such directions,-

(a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market]

11C. Investigation: (1) Where the Board has reasonable ground to believe that –

(a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or

(b) any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by the Board thereunder,

It may, at any time by order in writing, direct any person (hereafter in this section referred to as the Investigating Authority) specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board.

12. Registration of Stock-brokers, sub-brokers, share transfer agents etc.,

(1) No stock-broker, sub- broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary who may be associated with securities

market shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act:

Provided that a person buying or selling securities or otherwise dealing with the securities market as a stock- broker, sub-broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary who may be associated with securities market immediately before the establishment of the Board for which no registration certificate was necessary prior to such establishment, may continue to do so for a period of three months from such establishment or, if he has made an application for such registration within the said period of three months, till the disposal of such application.

Provider further that any certificate of registration, obtained immediately before the commencement of the Securities Laws (Amendment) Act, 1995, shall be deemed to have been obtained from the Board in accordance with the regulations providing for such registration.

(1A) No depository, participant, custodian of securities, foreign institutional investor, credit rating agency or any other intermediary associated with the securities market as the Board may by notification in this behalf specify, shall buy or sell or deal in

securities except under and in accordance with the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act:

Provided that a person buying or selling securities or otherwise dealing with the securities market as a depository, [participant,] custodian of securities, foreign institutional investor or credit rating agency immediately before the commencement of the Securities Laws (Amendment) Act, 1995, for which no certificate of registration was required prior to such commencement, may continue to buy or sell securities or otherwise deal with the securities market until such time regulations are made under clause (d) of sub-section (2) of section 30.

12A. Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control. 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 recognised 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"

70. In this respect it will be necessary to refer to some of the regulations of 2003 Regulations. We are concerned with Regulation 2(1)(b) & (c), Regulation 3(a)(b)(c)(d), Regulation 4(1) and (2) (a), (b), (c), (d), (e) (f), (k) and (r) and Regulation 5(a)(b). The said provisions are as under:

*"**Regulation 2**. (1) In these regulations, unless the context otherwise requires,—*

(b) "dealing in securities" includes an act of buying, selling or subscribing pursuant to any issue of any security or agreeing to buy, sell or subscribe to any issue of any security or otherwise transacting in any way in any security by any person as principal, agent or intermediary referred to in section 12 of the Act.

(c) "fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any

wrongful gain or avoidance of any loss, and shall also include—

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

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

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

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

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

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

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

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

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

And "fraudulent" shall be construed accordingly; Nothing contained in this clause shall apply to any general comments made in good faith in regard to—

(a) the economic policy of the government

(b) the economic situation of the country

(c) trends in the securities market;

(d) any other matter of a like nature whether such comments are made in public or in private;

***Regulation 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.

Regulation 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) indulging in an act which creates false or misleading appearance of trading in the securities market;

(b) dealing in a security not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or Page 4 of 11 cause fluctuations in the price of such security for wrongful gain or avoidance of loss;

(c) advancing or agreeing to advance any money to any person thereby inducing any other person to offer to buy any security in any issue only with the intention of securing the minimum subscription to such issue;

(d) paying, offering or agreeing to pay or offer, directly or indirectly, to any person any money or money's worth for inducing such person for dealing in any security with the object of inflating, depressing, maintaining or causing fluctuation in the price of such security;

(e) any act or omission amounting to manipulation of the price of a security;

(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.

***Regulation 5**. Where the Board, the Chairman, the member or the Executive Director (hereinafter referred to as "appointing authority") has reasonable ground to believe that—*

(a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market in violation of these regulations;

(b) any intermediary or any person associated with the securities market has violated any of the provisions of the Act or the rules or the regulations, it may, at any time by order in writing, direct any officer not below the rank of Division Chief (hereinafter referred to as the "Investigating Authority") specified in the order to investigate the affairs of such intermediary or persons associated with the securities market or any other person and to report thereon to

the Board in the manner provided in section 11C of the Act."

71. On a reading of the above statutory provisions, we find under Section 11(1) of the SEBI Act, 1992, a duty has been cast on the SEBI to protect the interest of investors in securities and also to promote the development of the securities market as well as for regulating the same by taking such measures as it thinks fit. The paramount purpose has been shown as protection of interest of investors on the one hand and also simultaneously for promoting the development as well as orderly regulation of the security market. By way of elaboration under Section 11(2)(a) to (e) it is stipulated that the duty of SEBI would include regulating the business in the stock exchanges and any other securities market which would include the working of stock brokers, share transfer agents and similarly placed other functionaries associated with securities market in any manner, registering and regulating the working of the depositories, participants of securities including foreign institutional investors in particular to ensure that fraudulent and unfair trade practices relating to securities markets are prohibited and also prohibiting insider trading in securities.

72. Under Section 11(4)(a) and (b) apart from and without prejudice to the provisions contained in sub-section (1), (2) (2A) and (3) as

well as Section 11B, SEBI can by an order, for reasons to be recorded in writing, in the interest of investors of securities market either by way of interim measure or by way of a final order after an enquiry, suspend the trading of any security in any recognized stock exchange, restrain persons from accessing the securities market and prohibiting any person associated with securities market to buy, sell or deal in securities. On a careful reading of Section 11(4)(b), we find that the power invested with SEBI for passing such orders of restraint, the same can even be exercised against "any person". Under Section 11B, SEBI has been invested with powers in the interest of investors or orderly development of the securities market or to prevent the affairs of any intermediary or other persons referred to in Section 11 in themselves conducting in a manner detrimental to the interest of investors of securities market and also to secure proper management of any such intermediary or person. It can issue directions to any person or class of persons referred to in Section 11 or associated with securities market or to any company in respect of matters specified in Section 11B in the interest of investors in the securities and the securities market. The paramount duty cast upon the Board, as stated earlier, is protection of interests of investors in securities and securities market. In exercise of its powers, it can pass orders of restraint to carry out the said

purpose by restraining any person. Section 12A of the SEBI Act, 1992 creates a clear prohibition of manipulating and deceptive devices, insider trading and acquisition of securities. Section 12A(a), (b) and (c) are relevant, wherein, it is stipulated that no person should directly or indirectly indulge in such manipulative and deceptive devices either directly or indirectly in connection with the issue, purchase or sale of any securities, listed or proposed to be listed wherein manipulative or deceptive device or contravention of the Act, Rules or Regulations are made or employ any device or scheme or artifice to defraud in connection with any issue or dealing in securities or engage in any act, practice or course of business which would operate as fraud or deceit on any person in connection with any issue dealing with security which are prohibited. By virtue of such clear cut prohibition set out in Section 12A of the Act, in exercise of powers under Section 11 referred to above, as well as 11B of the SEBI Act, it must be stated that the Board is fully empowered to pass appropriate orders to protect the interest of investors in securities and securities market and such orders can be passed by means of interim measure or final order as against all those specified in the above referred to provisions, as well as against any person. The purport of the statuary provision is protection of interests of investors in securities and the securities market.

73. Along with the Section 12A, when we read Regulation 2(1)(c) of 2003 Regulations, the act of fraud has been elaborately defined to include any kind of activity which would work against the interest of the investors in securities. Further, such interest of investors can be better ascertained by making reference to Section 2(h)(iii) of the SCR Act, 1956 which defines the 'security' to mean the right or interest in securities. A conspectus reference to Section 12A(a) (b) and (c) read along with Regulation 2(1)(b) and (c), as well as Section 2(h)(iii) of the SCR Act, 1956 sufficiently disclose that it would cover any act which will have relevance in protecting the interest of the investors in securities and security market with any person however remotely the same are connected with such securities, in the event of such an act working against the interest of investors in securities and securities market by way of fraud which has been elaborately defined under Regulation 2(i)(c) of 2003 Regulations.

74. Having thus noted the statutory prescription relating to the issuance of GDR based on the underlying shares of the issuing company, the manner in which such GDRs were being traded in the global market with the support and assistance of Lead Manager, the scope of construing GDRs as 'securities' falling under the definition of 'securities' as defined under Section 2(h) of the SCR Act, 1956 requires to be noted. The extent of duties and

powers vested with SEBI, namely, the protection of the interest of investors in securities and securities market and also the prohibitive measures as well as penal action that can be taken by SEBI whenever it comes across any fraud committed by any person relating to the interest of the investors in securities and securities market are very wide. When we examine the nature of acts alleged against the respondents, the following instances which according to SEBI empowers it to exercise jurisdiction over the respondents under SEBI Act, 1992 can be listed viz.,

I. Loan or Pledge agreement between Euram, Vintage and Asahi were structured by respondents and were keys to fraudulent issuance and subscription of GDRs.

II. Loan agreement was dated 21/22-4-2009 between Euram and Vintage, while GDRs were issued eight days later i.e. on 29.04.2009.

III. The second respondent signed the loan agreement as the Managing Director of Vintage.

IV. Euram sanctioned a loan of 59,82,000 USD to purchase GDRs of Asahi.

V. Account No.540030 in Euram was Asahi's account for depositing the proceeds of GDRs.

VI. Clause 6.1 of loan agreement referred to the said account as Borrower's account i.e., Vintage.

VII. That very account was again pledged to support the borrowings of Vintage.

VIII. Pledge agreement dated 21.04.2009 was signed by Mr.M.Laxminarayan Rathi, Managing Director of Asahi on 28.04.2009.

IX. Family members of Mr.Rathi are the promoters of Asahi.

X. Mr.Rathi did not inform BSE or the company or the shareholders about the signing of the pledge agreement.

XI. As pledgor, Asahi agreed to the terms of the loan agreement between Euram and Vintage.

XII. Pledgor agreed to pledge its assets as collateral security for due repayment of the loan of 59,82,000 USD. Clause 6.1, 6.2 and 6.3 gave full right to Euram to realise its loan by realising the pledged securities.

XIII. According to SEBI, the original investors of GDRs of Asahi were Greenwich and Tradetec whose addresses were found to be fake and non-existent.

XIV. On 01.06.2009 Asahi informed BSE about allotment and creation of GDR shares to Greenwich and Tradetec.

XV. In turn BSE published the information to retail investors.

XVI. That in reality the entire GDRs were invested by Vintage.

XVII. On 15/16-07-2009, BSE authorised the trading of 29,91,000 GDRs in Indian market.

XVIII. Vintage by virtue of the entire holding of GDRs became 88.94% shareholder of Asahi.

XIX. Vintage transferred the GDRs to IFCF and KII for which Vintage granted a loan of 20,00,000 USD to CREDO, associate company of KII for lending to KII. It enabled KII to sell the underlying shares of GDRs in Indian market.

XX. Agreement between Vintage and CREDO was also signed by the second respondent on behalf of Vintage.

XXI. GDRs of CREDO received by IFCF and KII were cancelled and then the underlying shares were sold in Indian market.

XXII. Most of the documents submitted by Asahi to SEBI were inconsistent with the statements available in public domain.

XXIII. There was transfer of funds by Asahi to its subsidiary Asahi FZE, Dubai to the extent of 26,73,000 USD by selling the GDRs.

XXIV. Asahi failed to furnish vital information about Asahi FZE.

XXV. All the above factors led SEBI to greatly suspect that part of the proceeds of GDR issued were routed back to the entities belonging to the respondents.

XXVI. Annexure B to the first respondent's reply dated 29.05.2013 to SEBI, which is a statement disclosing that the loan availed by Vintage from Euram in April 2009 and the time taken to repay the loan i.e. till December, 2009 during which period the pledge agreement between Asahi and Euram in support of the loan submitted and thereby Asahi's right as issuing company of GDRs was locked up.

XXVII. Indian investors upon buying shares converted from GDRs, unknowingly assisted the issuer company to realise the GDR subscription proceeds from encumbrance / pledge.

XXVIII. Instead of capital being raised from foreign investors through issuance of GDRs, the Indian investors unknowingly paid for part of GDRs after the said GDRs were converted into underlying shares which were sold in the Indian securities market to the investors.

XXIX. The highest and lowest price of Asahi for the period of three months from January, 29, 2009 to April, 29, 2009 was Rs.0.89 and Rs.0.53 respectively. Subsequent to the issuance of GDR, the price paid for each share underlying GDRs was Rs.1.04 which was 140.54% of the price of the script on the same day.

XXX. The information provided by Asahi to BSE about the allotment of 29,91,000 GDRs to foreign (fake) entities, namely Greenwich and Tradetec was made public to retail investors on BSE website which misled the investors in believing that the GDRs were subscribed by genuine foreign investors, whereas in reality, GDRs were subscribed by Vintage in connivance with Asahi and the proceeds simultaneously pledged in Euram."

75. In the light of the above features noted and alleged by SEBI as against the respondents, relating to GDRs issued by the six entities for whom the respondents acted as Lead Manager, with particular reference to the extent of the involvement of the respondents even while acting as Lead Managers, while facilitating the issuing companies in the fixation of price of the GDRs and its trading in the global market, according to SEBI, by virtue of such fraudulent nature of involvement of the respondents along with the issuing company, SEBI is entitled to invoke its jurisdiction under Section 11, 11B, 11C, 12 and 12A of the SEBI Act, 1992 read along with its 2003 Regulations and consequently its order dated 20th June 2013 debarring the respondents from rendering services in connection with the instruments which are defined as 'securities' under Section

2(h) of the SCR Act, 1956 in the Indian market or dealing with them either directly or indirectly for a period of ten years from the date of its orders and also prohibiting them from getting access to the capital market directly or indirectly for the said period of ten years was justified. It was, therefore, contended that the majority view of the impugned order in holding that SEBI lacked jurisdiction to proceed against the respondents is liable to be set aside.

76. On the other hand according to the respondents, since cradle to grave GDRs are dealt with outside the country in the global market, SEBI lacks jurisdiction in proceeding against the respondents. When we consider the above respective submissions, we are convinced that the stand of the appellant that having regard to the statutory prescription under the SEBI Act, 1992, SCR Act, 1956, 2000 Regulations, 1993 Scheme as well as 2003 Regulations is well justified. Having regard to the nature of the allegations against the respondents, it possess every jurisdiction to proceed against the respondents. At the risk of repetition we wish to make it very clear that whatever factual matters we have noted, as well as those allegations levelled against the respondents by SEBI we have not expressed any opinion as to the correctness or otherwise of those factors or allegations. Those factors and allegations have been taken note of only for the purpose of deciding the question as to the jurisdiction claimed by SEBI for proceeding against the

respondents. In fact, by the majority view of the impugned order, the order dated 20.06.2013 of SEBI in having debarred the respondents for a period of ten years came to be set aside on the sole ground that SEBI lacked jurisdiction. The Tribunal has not gone into the merits of the allegations levelled against the respondents. Therefore, in the event of the impugned order being set aside and thereby providing scope for the Tribunal to consider the correctness of the order dated 20.06.2013 of SEBI on merits, it will be open for the respondents to take the stand as Lead Managers that they have not committed anything wrong in order to justify the appellant to pass its order dated 20.06.2013.

77. When we consider the stand of the respondents, by the learned senior counsel Mr. Shyam Divan his contention was two fold. According to the learned senior counsel, GDRs are created by the Overseas Depository Bank in the stock market outside the country and, therefore, dealing with those GDRs and its trading by the Lead Manager while assisting the issuing company are governed by the statutory prescriptions prevailing in the respective trading points in the foreign countries and, therefore, SEBI has no power to deal with the same as its jurisdiction was limited to the securities which are being dealt with within the Indian territory and not outside. It was then contended that as Lead Managers the respondents only facilitate the issuing company of India for creation, pricing and

trading of their GDRs in the foreign market and so long as such trading of the GDRs by the respondents as Lead Managers work within the framework of the law applicable in the respective foreign countries, SEBI has no power to proceed against the respondents and pass the order of debarment. The contention is that as Lead Managers, the respondents have never dealt with the securities issued by the Indian company within the territory of India and therefore neither the provision of SCR Act, 1956 and the SEBI Act, 1992 nor any of the regulations or the scheme provisions of 1993 can have any application as against the respondents. The further submission is that if at all any violation complained of as against the issuing company can only be relating to the provisions of FEMA which has recognized the 1993 Scheme and therefore that cannot give scope for SEBI to proceed against the respondents who acted as Lead Managers for the issuing companies.

78. When we examine the said submissions of the learned senior counsel for the respondents, we find that the said submissions raised the following issues viz., that issuance of GDRs requires as many as 14 steps such as authorization by the Board of Directors, Notification to the Stock Exchange, Issuer share holders approval, appointment of a Lead Manager and other intermediaries viz., the custodian who physically hold the shares of the issuer on behalf of the depository and the overseas bankers, receiving all information,

certification for due diligence and other documents, commencement and completion of due diligence for GDR issue, opening of bank account outside India, appointment of intermediaries, offer document and prospectus, decision to open the issue and price fixation, opening and closing of the issue, allotment of underlying equity shares, listing of GDRs with foreign stock exchanges and application to Indian stock exchanges for listing of underling equity shares. While referring to the above steps, it was fairly submitted by the learned senior counsel for the respondents that the role of the respondents as Lead Manager ends with the 13th step viz., listing of GDRs with foreign stock exchange and that it is not concerned with the application to Indian stock exchanges for listing of underlying equity shares. By stating so, it was contended that when such steps are taken for the ultimate listing of GDRs with foreign stock exchanges as Lead Manager the key role played is on the price fixing, opening of the issue and enabling the issuing company to market the GDRs at the global level, there is no scope to hold that SEBI can proceed against the respondents on the ground of any misfeasance or malfeasance in issuance of GDRs, having regard to the territorial jurisdiction within which SEBI can operate. Though technically such a submission made on behalf the respondents appears to be forceful, we are not able to countenance such a submission on a detailed consideration of the various

provisions of the SEBI Act, 1992 read along with the definition of 'securities' under Section 2(h) of the SCR Act, 1956 in the manner in which GDRs are to be dealt with under the 2000 Regulations read along with the 1993 Scheme provisions.

79. The definition of 'securities' under Section 2(h) in particular sub-clause (iii) of Section 2(h)(a) of SCR Act, 1956 makes it clear that rights and interests in securities are also to be construed as securities as defined in Section 2(h). Therefore even if GDR as such is not specifically referred to under the definition of 'securities' under Section 2(h) by virtue of sub-clause (iii) of the said section, any rights or interests in securities would also fall within the definition of securities. Viewed in that respect, every issue of GDR is based on the underlying shares of the issuing company deposited with the Domestic Custodian Bank which clearly falls under the definition of securities of Section 2(h), the Global Deposit Receipts which create rights and interests in those securities, the Global Deposit Receipts would automatically fall and come within the definition of Section 2(h) viz., 'securities'. Once when the said legal position is insurmountable, any argument based on the said submission should be rejected.

80. Therefore when GDRs create rights and interests in the securities viz., the underlying shares deposited with the Domestic

Custodian Bank, the next question to be examined is as to how far any alleged misdeeds involved in the creation of GDR and its dealing by the issuing company with the support of the Lead Manager can be dealt with by SEBI. It is true that the creation of GDR and its trading in the global market are governed by the respective laws of the country in which they are dealt with. But one special feature to be borne in mind is that in the case on hand, the allegations levelled against the issuing company in connivance with the respondents are that a make believe affair was created, as though there was genuine creation of GDRs and its investments by the foreign investors on the very date when the GDRs were issued and thereby the global performance of the issuing company in the local market of the issuing company had a boost in the commercial sector, which lured the local investors to develop their keen interest to make the investments on a higher share value by virtue of the investment made by the foreign investors and in that process it is alleged that the issuing company itself provided every scope for the foreign investments to be financed and in reality the ultimate investment was made by Indian investors viz., the ordinary share holders. The said fact would certainly call for a probe at the hands of SEBI on whom a duty is cast under Section 11(1) to protect the interest of investors in securities and the security market. In this context, it will be necessary to make specific reference to the

relevant provisions of SEBI Act, 1992, 2003 Regulations and 1993 Scheme. Under Section 11(2)(b) while regulating working of stock brokers, etc., it is also provided that SEBI can regulate "such other intermediaries who may be associated with security markets in any manner". The said set of expressions would cover anyone who are directly or indirectly or in a subterfuge manner dealt with the securities to deceive the real investors in Indian stock market. Section 11(2)(e) also empowers SEBI to intervene to prohibit fraudulent and unfair trade practices relating to securities markets. Section 11(2)(g) prohibits insider trading in securities. If the allegation that the respondents facilitated issuing company (viz,) Asahi aided the foreign investor company to invest in its GDRs by supporting the loan it borrowed from Euram and thereby the said allegation can be brought within the expression 'insider trading' that would also empower SEBI to intervene. Under Section 11B while empowering SEBI to issue directions in the interest of investors, it is provided that such directions can be against any person or class of persons associated with securities market. Under Section 11C(b) it is provided that where SEBI has reasonable ground to believe that any person associated with securities market violated any of the provisions of the Act or Rules or Regulations or directions issued, it can order for an investigation and take action. Under Section 12A, it is specifically provided to prohibit any

manipulative and deceptive devices, insider trading and substantial acquisition of securities or control by ANY PERSON either directly or indirectly. If SEBI's allegation listed out earlier as well as all the other allegations fall under Section 12A(a), (b) and (c), there will be no escape for the respondents from satisfactorily explaining before the Tribunal as to how these allegations would not result in fully establishing the guilt as prescribed under sub-clause (a)(b)(c) of Section 12A. Similar will be the situation for answering the definition under Regulation 2(1)(b)(c), (3), (4)(1)(2)(a)(b)(c)(d)(e)(f)(k)(r) of 2003 Regulations, apart from taking required penal action against those who are involved in any fraud being played in the creation of securities.

81. Therefore, it is for the respondents as well as the Indian issuing company to demonstrate that any of the allegations made by the appellant in relation to the so called fraud or fictitious creation of GDRs at the global level to mislead the local investors was totally baseless and that therefore no action was called for. It will be appropriate at this stage to note that under the 2000 Regulations as well as the 1993 Scheme, one of the main reasons for creating GDRs by the issuing company is in fulfilment of its desire to gain foreign investments. It is common knowledge that in the commercial sector, companies which are in the field of manufacturing or any other business activity are able to gain the

confidence of the investors by virtue of their appreciable performance in the respective manufacturing or other business activities and while controlling and developing the growth in their respective field of business, aspire to make further excellence by drawing the attention of foreign investors to make investments and thereby broad base their business venture also endeavour to sustain their development in the concerned business in which they are involved. Any such initiative taken by any entrepreneur would develop an appreciable trend in the share market which would draw the attention of the local investors to stake their claim in such well established, well grown business ventures with a view to earn better profits on whatever investments they wish to make. Therefore, if there is going to be a false pretext or misleading information circulated with a view to lure both the foreign investors as well as Indian investors and in that process the very purpose of creation and trading in GDRs are found to be not true or *bona fide*, it cannot be said that simply because creation of such GDRs and its trading is in global market, SEBI should keep its mouth shut on the ground that it cannot extend its long statutory arm beyond Indian territory to control any such misdeeds deliberately committed with a view to defraud the Indian investors and thereby their interest in the investment of securities and its protection is at great stake.

82. We are therefore convinced that having regard to the nature of allegations in the interests of investors in securities as well as the statutory obligation/duty cast upon SEBI to protect their interests, SEBI has got every jurisdiction to proceed against the respondents as well as the issuing company. The contention made on behalf of the respondents that the only authority which can proceed against the issuing company can be only for violation of the FEMA Act or the RBI Act is therefore not appealing to us. It may be that the 1993 Scheme was acknowledged under the 2000 Regulations, but on that score it cannot be held that the said Scheme or Regulations will have no application when it comes to the question of any action being initiated under the provisions of SEBI Act, 1992 read along with SCR Act, 1956. There is no statutory prohibition either under FEMA or RBI Act preventing SEBI from taking action in exercise of its powers under Section 11, 11B and 12A of the SEBI Act, 1992. That apart under Section 11(3) it is provided that SEBI can exercise its powers under sub-section 2(i) or (ia) or sub-section 2A notwithstanding anything contained in any other law for the time being in force, meaning thereby, the action that can be taken for any of the violation under FEMA or RBI Act, SEBI can validly exercise its powers under SEBI Act, 1992. Even under the 1993 Scheme as well as the 2000 Regulations, there are provisions which make specific reference to the role of SEBI in dealing with the

securities. Therefore it is too late in the day for the respondents to contend that action can only be taken for any violation under the FEMA and there is no scope for invoking the provision of SEBI Act, 1992. The said submission therefore is also liable to be rejected.

83. In support of the contention based on applicable jurisdiction of SEBI, reliance was placed upon the opinion rendered by a law firm of United Kingdom, dated 25.07.2013. In the first place, the Courts in India cannot even be persuaded to rely upon any such opinion as opinion may differ from person to person depending upon the law which one may feel validly applies. In any event, the opinion rendered in the said document only pertains to the transactions contemplated by the documents placed before the said firm which related to the loan agreement and other connected documents. The opinion was that the documents and the performance of the transactions contemplated by the said documents were in accordance with the applicable Austrian laws and do not constitute any violation of any law or regulations of general application in Austria. There can be no conflict with the said opinion if in the consideration of the said law firm, the documents were in conformity with the laws of Austria within whose jurisdiction, the documents came to be executed and to be operated upon. In fact the action of SEBI initiated against the respondents are not on the footing that any of the documents are contrary to the laws of

Austria. The initiation of proceedings by SEBI as against the respondents are entirely on a different footing which was solely based on the alleged violation of the Indian laws vis., the SEBI Act read along with the SCR Act, 1956 the provisions of 2000 Regulations and the 1993 Scheme as well as 2003 Regulations. In fact in that opinion itself it is stated that the said opinion was not to be taken to imply that any provision of the document would necessarily be capable of enforcement or be enforced in all circumstances in accordance with its terms and that it should be understood that the law firm which gave the opinion should be understood to have not been responsible for investigating or confirming the accuracy of the facts including statements of foreign law or the reasonableness of any statements or opinion contained in any of the documents. Therefore, the said document is of no use to support the stand of the respondents.

84. As far as the opinion rendered by solicitors firm called Singhania and Co having its office at London, dated 17.07.2013, it only states that the second respondent was the sole shareholder of Pan Asia which is now known as M/s. Global Finance Capital Limited. It only stated that in its opinion from the aspect of laws applicable and enforceable in UK, the documents and transactions pertaining to those documents relating to the respondents were in the normal course of business under the applicable laws in UK and

they do not, in any manner, constitute any violation of any applicable laws of UK. It is stated that the documents and transactions were standard documents and transactions commonly executed by entities as part of mode of the lawful business activities. Here again we do not find any need to be guided by such an opinion of a law firm which only refer to the documents placed before it, which according to the said firm is in conformity with the laws of UK. Our notice was also drawn to the 2014 Scheme and in particular paragraph 10 of the said scheme under the caption "market abuse". The said clause reads as under:

> "*10. Market Abuse*
>
> *(1) It is clarified that any use, intended or otherwise, of depository receipts or market of depository receipts in a manner, which has potential to cause or has caused abuse of the securities market in India, is market abuse and shall be dealt with accordingly."*

85. It is clarified that any use, intended or otherwise, of depository receipts or market of depository receipt in a manner, which has potential to cause or has caused abuse of securities market in India, is "market abuse" and shall be dealt with accordingly. According to Clause 10(2) for the purpose of this paragraph, "market abuse" means any activity prohibited under Chapter V-A of the SEBI Act, 1992. Under paragraph 11 of the 2014 Scheme, the 1993 Scheme stood repealed except to the extent relating to foreign currency convertible bonds and sub-para (2) of Section 11 contains

a *non-obstante* clause that notwithstanding such repeal, anything done or any action taken under the 1993 Scheme shall be deemed to have been done or taken under the corresponding provision of the present scheme. Under Schedule-I, the permissible jurisdiction have been listed out as on the date of the notification in which Austria is also included apart from United Kingdom and United States. The 2014 Scheme having thus explained what is "market abuse", it must be stated that now after the 2014 Scheme any act done under the 1993 Scheme has also been validated. The definition of "market abuse" would squarely cover the allegation presently made by the appellant as against the respondents. Simply because "market abuse" has been now codified under the 2014 Scheme, it cannot be held that there is no scope for proceeding against any person for indulgence in such a "market abuse" prior to the introduction of the 2014 Scheme. As the nature of allegation which has now been explained under the caption "market abuse" in the 2014 Scheme and having regard to the violation complained of by the appellant as against the respondents with particular reference to the substantive provision of the SEBI Act, 1992 and SCR Act, 1956, read along with the 2000 Regulations and the 1993 Scheme, the power of the appellant to proceed against the respondents based on such allegations cannot be deprived.

86. To support the contention that the SEBI Act, 1992 operates only within Indian territory, reference was made to the provisions contained in other Acts viz., IPC, FERA, FEMA, Companies Act, the Information Technology Act and the Income Tax Act. In the first place, the said reliance placed on the provisions of those enactments providing for extra territorial jurisdiction can have no impact on the action initiated by the appellant, for the simple reason that the violation complained of by the appellant is with reference to such of those provisions contained in SEBI Act, 1992 vis-à-vis the underlying shares of GDRs. Therefore, we are unable to see any violation of exercise of its jurisdiction since the underlying shares of GDR were created and dealt with as well as traded in the stock market of Indian Territory. Any act which caused any infringement in such trading of those underlying shares by virtue of any malfeasance or misfeasance or misdeeds committed by any person under the Act which worked against the interests of the investors in securities and the securities market, the SEBI was entitled to proceed against such persons who are involved in any of those allegations. Therefore, the reference to those provisions contained in other enactments in our considered opinion does not cause any impediment for SEBI to proceed against the respondents in exercise of its jurisdiction under the SEBI Act, 1992.

87. In this context, it is also necessary to refer to certain compliance to be reported by the issuing company of GDR/ADR. As per paragraph 4(2) and (3) of Schedule I of 2000 Regulations, the Indian company issuing shares for the purpose of issuing GDRs should furnish to the Reserve Bank the full details of such issue in the prescribed form DR within 30 days from the date of closing of the issue. Similarly under paragraph 4(3) issuing company against GDR should furnish a quarterly return in the prescribed form DR-Quarterly to RBI within 15 days of the close of the calendar quarter. When we refer to Form DR and Form DR-quarterly, some of the details which are to be furnished are name and address of the depository abroad, name and address of the Lead Manager, name and address of the Indian custodians, details of the equity capital before issue after issue, number of GDRs issued, ratio of GDRs vis-à-vis the underlying shares, whether funds are kept abroad, if yes, name and address of the bank, amount raised in USD, amount repatriated in USD, the date of launching of GDR, total number of GDRs, total interest earned till the end of the quarter, the amount repatriated, number of GDRs still outstanding, company share price at the end of the quarter, the GDR price quoted on overseas stock exchange as at the end of the quarter and in the quarterly return, it should be certified by the authorized signatory of the company that

the funds raised through GDRs/ADRs were not invested in stock market or real estate.

88. A perusal of the above details which are required to be furnished statutorily, shows that in the event of any wrong statement furnished in the above referred to forms, it provides scope for proceeding against the issuing company as well as any person connected with such violation and it would certainly empower the authority viz., SEBI to initiate action under the SEBI Act, 1992 in order to protect the interests of Indian investors in securities and the security market.

89. For the purpose of ascertaining the role played by the respondents as Lead Managers, it will be worthwhile to refer to statement contained in the counter affidavit filed on behalf of the first respondent, wherein in paragraph E(ii) the functions of the first respondent in relation to any GDR has been mentioned as under:

> *"The Functions of the first respondent in relation to any GDRs include:*
>
> *(a) conducting due diligence in collecting and evaluating all possible information which may have a bearing on the issue for the purpose of the listing of GDR issue abroad "outside of territory and jurisdiction of India";*
>
> (b) *assessing the market for the purpose of the issue and marketing the issue;*

(c) *obtaining confirmation of acceptance of subscription acceptance from the initial investors to the GDR issues;*

(d) *assisting the Issuer Company at all stages from preparing the documentation, making investor presentation, selection of other manager(s) etc.,;*

(e) receipt of confirmation of subscription monies received in the requisite company's escrow account opened / maintained by the company with the escrow account holding bank;

(f) *receipt of Depository's (Depository's Banks) confirmation of issue of instructions to the clearing systems of the GDR subscribers and confirmation from the requisite foreign stock exchange of the listing of the GDRs issue;*

(g) *ensuring that the Issuer Company complies with applicable non-Indian legal formalities in respect of the same."*

90. It is true that if in the discharge of its functions as Lead Managers, the respondents had confined to their activities to any of the procedures set out in the said paragraph, it will be for the respondents to demonstrate before the appellant and come out unscathed. However, if under the guise of performing those functions as Lead Managers, if as pointed out by the appellant, the respondents had indulged in any activities which were contrary to

the provisions of SEBI Act, 1992 read along with SCR Act, 1956, which provided scope for proceeding against them for having acted against the interests of the Indian investors in securities and the security market or were involved in collusion with any alleged act of the issuing company in violation of the statutory prescriptions of SEBI Act, 1992, SCR Act, 1956, 2000 Regulations read along with 1993 Scheme, it is the bounden duty of the respondents to demonstrate before the appellant and now before the Tribunal that no such involvement by the respondents is made out in order to proceed against them as has been decided and orders passed by the appellant in its order dated 20.06.2013.

91. As far as the stand of the second respondent that he is a non-resident Indian residing in Dubai till September, 2011 and was the Managing Director of the first respondent and that the first respondent is a distinct and separate legal entity from the second respondent and therefore the first respondent cannot be made liable or responsible for the action of the second respondent, it must be stated that even as per the legal opinion of M/s. Singhania and Co the Solicitors and Indian Advocates based at London who have stated apparently on the instructions of the second respondent, that he was the sole shareholder of the first respondent who is a non-resident Indian residing at Dubai. Therefore, it is too late in the day for the respondents in attempting to get themselves

excluded from the alleged violations as against the issuing companies along with the respondents, which resulted in the passing of the order of debarment dated 20.06.2013.

92. For the very same reasons, the stand of the second respondent that he is not an intermediary and his role in relation to GDR was limited to advising for the listing of GDRs etc., would not absolve the second respondent from facing the action initiated by the appellant.

93. As far as the contention raised by the second respondent in paragraph M, N etc., we do not wish to go into the said stand so made by the second respondent, as it is for the second respondent to convince the appellant and now before the Tribunal that he cannot be proceeded against for any of the alleged violations. Similarly, the stand of the respondents by making reference to the core features of the GDR issues, to contend that there was no requirement to bring GDR proceeds into India and that there was no allegation that its funds were used for prohibited activities i.e. stock exchange transaction or real estate transaction as prescribed in 1993 Scheme and that the subscription of the GDR issued in USD become available to the issuing company were all matters the respondents can validly explain and substantiate the same before

the Tribunal while challenging the merits of the order passed by the appellant in the order dated 20.06.2013.

94. In support of his submissions Mr.C.U.Singh learned senior counsel for the appellant relied upon the Constitutional Bench decision of this Court reported **GVK Industries Limited and another Vs. Income Tax Officer and another** - (2011) 4 SCC 36. In paragraph 6 of the said judgment two questions were framed for consideration which are as under:

> *"6. Juxtaposing the two divergent views outlined above, we have framed the following questions:*
>
> *(1) Is Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for:*
>
> *(a) the territory of India, or any part of India; or*
>
> *(b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?*
>
> *(2) Does Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?"*

95. The said questions were ultimately answered in paragraph 124 to 127 which are as under:

"124. We now turn to answering the two questions that we set out with:

(1) Is Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for:

(a) the territory of India, or any part of India; or

(b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?

The answer to the above would be yes. However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, - events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like -- that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians.

125. It is important for us to state and hold here that the powers of legislation of the Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a-priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a pre-determined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful.

126. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

127. (2) Does Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

The answer to the above would be no. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question 1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to Parliament to make laws "for the whole or any part of the territory of India", and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by Parliament with respect to extra- territorial aspects or causes that have no impact on or nexus with India would be ultra-vires, as answered in response to Question 1 above, and would be laws made "for" a foreign territory."

(Emphasis added)

96. A reading of the above judgment makes it clear that a law enacted by Parliament if shows that for proceeding against in exercise of any extra territorial aspect, which has got a cause and something in India or related to India and Indians in terms of impact, effect or consequence would be a mixed matter of facts and of law, then the Courts have to enforce such a requirement in the operation of law as a matter of law itself. The Constitution Bench, however, held that Parliament has no power to legislate for any

territory other than the territory of India or other part of India with respect to aspects or causes which have no impact or nexus with India as was explained in question No.1. Keeping the said principle thus pronounced by this Court in mind, when we examine the SEBI Act, 1992 read along with SCR Act, 1956 as well as the 1993 Scheme, we find that the Act itself provides for proceeding against any person in order to protect the interests of investors and the stock market in India with reference to any fraud played against such interest of the investors in India. Therefore, the answer to the first question as pronounced by the Constitution Bench applies in all force to the case on hand.

97. The learned senior counsel then relied upon the judgment of this Court reported in **Republic of Italy through Ambassador (supra)** in particular paragraph 14, 130 and 139. In paragraph 14 the question posed for consideration is noted. In the concurring view of Mr. Justice Chelameswar in paragraphs 130 and 139 it is recorded as under:

> *"130. Though Article 245 speaks of the authority of Parliament to make laws for the territory of India, Article 245(2) expressly declares - "No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation". In my view the declaration is a fetter on the jurisdiction of the Municipal Courts including Constitutional Courts to either declare a law to be*

unconstitutional or decline to give effect to such a law on the ground of extra territoriality. The first submission of Shri Salve must, therefore, fail.

139. Thus, it is amply clear that Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether are not they are citizens) when such persons commit acts which affect the legitimate interests of this country."

98. We fully concur with the said view expressed by the learned Judge and applying the said principle, even if the law applies to persons who are not corporally present within the territory of India, even if they are citizens abroad when such persons commit acts which affects the legitimate interest of this country which would include such legitimate interest in the case on hand of the investors in India at the stock market, it must be held that the appellant would be fully empowered to proceed against such persons as provided under the provisions of SEBI Act, 1992.

99. The learned senior counsel then relied upon the decision reported in **Chairman, SEBI** v. **Shriram Mutual Fund and another - (2006) 5 SCC 361**. In particular, reliance was placed upon paragraphs 15, 17, 19 and 33 to 36. Paragraph 19 is relevant for our purpose which explains the scheme of SEBI Act in imposing penalty which reads as under:

> *"19. The Scheme of the SEBI Act of imposing penalty is very clear. Chapter VI-A nowhere deals with criminal offences. These defaults for failures are nothing, but failure or default of statutory civil obligations provided under the Act and the Regulations made thereunder. It is pertinent to note that Section 24 of the SEBI Act deals with the criminal offences under the Act and its punishment. Therefore, the proceedings under Chapter VI A are neither criminal nor quasi-criminal. The penalty leviable under this Chapter or under these Sections, is penalty in cases of default or failure of statutory obligation or in other words breach of civil obligation. In the provisions and scheme of penalty under Chapter VI A of the SEBI Act, there is no element of any criminal offence or punishment as contemplated under criminal proceedings. Therefore, there is no question of proof of intention or any mens rea by the appellants and it is not essential element for imposing penalty under SEBI Act and the Regulations."*

In paragraph 36, this Court has highlighted the purported powers of SEBI to impose penalty under Chapter VI-A, while commenting upon the judgment of the Securities Appellate Tribunal which by its order curtailed the powers of SEBI to impose such penalty. Paragraph 36 reads as under:

> *"36. In our view, the impugned judgment of the Securities appellate Tribunal has set a serious wrong precedent and the powers of the SEBI to impose penalty under Chapter VIA are severely curtailed*

against the plain language of the statute which mandatorily imposes penalties on the contravention of the Act/Regulations without any requirement of the contravention having been deliberated or contumacious. The impugned order sets the stage for various market players to violate statutory regulations with impunity and subsequently plead ignorance of law or lack of mens rea to escape the imposition of penalty. The imputing mens rea into the provisions of Chapter VI A is against the plain language of the statute and frustrates entire purpose and object of introducing Chapter VIA to give teeth to the SEBI to secure strict compliance of the Act and the Regulations."

100. The said decision was subsequently approved by a three Judge Bench of this Court reported **Union of India and Others** v. **Dharamendra Textile Processors and Others -** (2008) 13 SCC 369**.** The said decision also fully supports the stand of the appellant/SEBI.

101. On behalf of the respondents reliance was placed upon the decision reported in **Haridas Exports (supra).** That case arose under the Monopolies and Restrictive Trade Practices Act, 1969 (in short "MRTP Act, 1969). The appellant in that case was aggrieved by the orders passed by the Monopolies and Restrictive Trade Practices Commission, whereby Indonesian manufacturers of float glass had been restrained from exporting the same to India at

allegedly predatory prices. While considering the correctness of the order impugned in that case, the question relating to extra territorial jurisdiction came up for consideration. In paragraph 29, the question was noted as to whether MRTP Act, 1969 has extra-territorial jurisdiction and as to whether it can pass orders against parties who are not in India and who do not carry business here and where agreements were entered into outside India with no Indian being a party to it. In paragraph 31 this Court noted that under Section 1(2), the Act applied to whole of India except the State of Jammu and Kashmir as in the case of SEBI Act, 1992. Factually this Court while applying Sections 1, 2, 2(a) and 14 of the MRTP Act, 1969 found that for the Commission to exercise any jurisdiction, goods should be imported into India and so long as the import had not taken place and the goods were merely intended for exports to India the same would not fall within the definition of the word "goods" in Section 2(e). Paragraph 43 and part of paragraph 46 are relevant for our purpose where the concept of "effects doctrine" has been considered and explained. The said paragraph 43 and the relevant part of paragraph 46 are as under:

> *"43. Under Section 33(1)(j) of the Act, any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor is regarded as an agreement relating to restrictive trade practice and shall be subject to registration. The Act*

nowhere states that this agreement should be only in India or between Indian parties. In effect, this Section recognizes the 'effects doctrine', namely, where an agreement results in sale of goods at such prices which would have the effect of eliminating competition or a competitor. In the very nature of things, the sale of goods keeping in mind the definition of the word "goods" in Section 2(e) must be of goods imported into India, in the case like the present. But if we replace the word "goods" in Section 33(1)(j) with the definition of "goods" in Section 2(e)(iii), then the Section 33(1)(j) would read as follows:

"Any agreement to sell goods imported into India at such prices as would have the effect of eliminating competition or a competitor."

Thus, the agreement requiring registration must be in respect of goods after their import into India."

46. It is possible that persons outside India indulge in such trade practices, not necessarily restricted to the effectuation of prices within India, which have the effect of preventing, distorting or restricting competition in India or gives rise to a restrictive trade practice within India then in respect of that restrictive trade practice, the MRTP Commission will have jurisdiction. <u>The counsel for the respondents is right in submitting that if the effect of restrictive trade practices came to be felt in India because of a part of the trade practice being implemented here the MRTP Commission would have jurisdiction. This "effects</u>

doctrine" will clothe the MRTP Commission with jurisdiction to pass an appropriate order even though a transaction, for example, which results in exporting goods to India at predatory price, which was in effect a restrictive trade practice, had been carried out outside the territory of India if the effect of that had resulted in a restrictive trade practice in India. If power is not given to the MRTP Commission to have jurisdiction with regard to that part of trade practice in India which is restrictive in nature then it will mean that persons outside India can continue to indulge in such practices whose adverse effect is felt in India with impugnity. A competition law like the MRTP Act is a mechanism to counter cross border economic terrorism. Therefore, even though such an agreement may enter into outside the territorial jurisdiction of the Commission but if it results in a restrictive trade practice in India then the Commission will have jurisdiction under Section 37 to pass appropriate orders in respect of such restrictive trade practice." (Emphasis added)

102. Therefore, when we apply the above principles set down in the said judgment to the case on hand, we are convinced that the principle of "effects doctrine" will apply to the case on hand since we have found that in the event of the allegations noted in paragraph 74 of this judgment levelled against the respondents by the appellant being established, it will have a far reaching consequence on the Indian investors on securities as well as the stock market

and consequently the duty of the SEBI to protect their interests would automatically come into play as stipulated under Sections 11B, 11C, 12 and 12(A) of the SEBI Act, 1992. Therefore, the said judgment when applied carefully we find that the same supports the case of the appellant rather than the respondents.

103. In the decision reported in **Vodafone International Holdings (supra),** three Judge Bench considered the question whether Section 9(1)(i) of the Income Tax Act can be said to be a provision enabling the Income Tax Department to apply the principle of look through. The real issue which was considered by this Court on that aspect was based on the contention raised by the revenue that under Section 9(1)(i), "it can look through" the transfer of shares of a foreign company, holding shares in Indian company and treat the transfer of shares in the foreign company as equivalent to the transfer of shares to Indian companies on the premise that Section 9(1)(i) covers direct and indirect transfers of capital assets. The said contention raised on behalf of the revenue was rejected by holding as under in paragraph 93:

> *"93. The question of providing "look through" in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, limitation of benefits has to be expressly provided for in the treaty. Such clauses cannot be read into the Section by interpretation. For*

the foregoing reasons, we hold that Section 9(1)(i) is not a "look through" provision."

104. We do not find any scope for applying the said decision to the facts of this case as we have found that the specific provisions of SEBI Act, 1992 provided for necessary powers with the SEBI casting a duty on it to protect the interests of the Indian investors as well as the stock market in India whenever it finds any fraud or other such misdeeds committed by any person which worked against the interests of Indian investors in securities. What is fraud has been sufficiently defined under Regulation 2(1)(c) of the 2003 Regulations as well as under Section 12(A) of the SEBI Act, 1992. Therefore, when such express provisions are contained in the SEBI Act and its regulations apart from specific provisions relating to issuance of GDR based on the underlying shares deposited with the Domestic Custodian Bank under the 1993 Scheme which got a statutory backing under the 2000 Regulations, we are convinced that the exercise of jurisdiction by SEBI against the respondents, having regard to the nature of allegations, listed out in paragraph 74 is well founded.

105. Having regard to our above conclusions, we answer the questions posed by us and hold that SEBI had jurisdiction in passing the impugned order dated 20.06.2013 debarring the respondents for a period of 10 years in dealing with the securities

while considering the role played by the respondents as Lead Managers relating to the GDRs issued by six companies which issued such GDRs. We, therefore, hold that the Tribunal is bound to examine the correctness or otherwise of the order of SEBI dated 20.06.2013 in the appeal preferred by the respondents in Appeal No.126 of 2013. We, therefore, set aside the impugned order by the majority and hold that the minority view of the Chairman of the Tribunal is perfectly in order. The appeal stands allowed and the impugned order of the majority is set aside. The appeal No.126 of 2013 before the Securities Appellate Tribunal at Mumbai shall stand restored and the same shall be disposed of on merits and in accordance with law expeditiously preferably within three months from the date of production of a copy of this order.

.....J.
[Fakkir Mohamed Ibrahim Kalifulla]

.....J.
[Shiva Kirti Singh]

New Delhi;
July 06, 2015