

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: DR. K. M. ABRAHAM, WHOLE TIME MEMBER

ORDER

UNDER SECTIONS 11 AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 AGAINST MR. KALPESH R. SHETH IN THE MATTER OF GENUS COMMUTRADE LIMITED

Date of Hearing: January 27, 2009

Appearance of parties:

For Mr. Kalpesh R. Sheth: Mr. Joby Mathew, Advocate

For Securities and Exchange Board of India: Mrs. Barnali Mukherjee, General Manager

Mr. Vijayakrishnan G, Deputy Legal Adviser

Mr. Naveen Sharma, Assistant General Manager

1. It was noticed by the Securities and Exchange Board of India (hereinafter referred to as SEBI) that Genus Commutrade Limited (hereinafter referred to as the company) had issued advertisements in leading newspapers in the month of July 2002, giving notice to the investors that the Board of Directors of the company would be meeting on July 18, 2002 to consider the possibilities of a buy back up to 18% of the equity of the company at a price of Rs.11/- per share and allotment up to 36% of equity shares to Foreign Financial Institutions. It was observed that after the issuance of the advertisements, there was a marked increase in the trading in the shares of the company at the Bombay Stock Exchange Limited (hereinafter referred to as BSE). The shares of the company were also listed at the Ahmedabad Stock Exchange Limited (hereinafter referred to as ASE). It was *prima facie* observed that such advertisements had been issued in the absence of any legal compulsion on the part of the company. It was

felt that such advertisements were published by the company/its directors *prima facie* to induce investors to trade in the shares of the company. In order to ascertain the veracity of such advertisements and to find out the possible violations, if any, of the provisions of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as SEBI Act) and the Rules and Regulations framed thereunder by the company/any person dealing in the shares of the company, SEBI conducted an investigation into the buying, selling and dealing in the shares of the company for the period between May 01, 2002 and September 30, 2002.

2. Investigations conducted by SEBI revealed that the company issued advertisements in prominent business newspapers between July 08, 2002 and July 10, 2002 about the proposed board meeting to be held on July 18, 2002, *inter alia*, to consider the buy back of equity shares up to 18,23,310 shares (18% of equity) at a price of Rs 11/- per share and to allot upto 36% of equity shares, as stated above in this order. It was noted that no shares were allotted to the entities as advertised by the company. It was further observed that Mr. Hitesh R. Bhatt, Mr. Pritesh B. Shah, Mr. Kalpesh R. Sheth and Ms. Rinku J Shah were the directors of the company during the relevant period. It was found that there was an increase in the trading volume in the shares of the company prior to the issuance of advertisements as well as subsequent to the issuance of the advertisements. Pursuant to the advertisement, the volume increased but the prices fell. Investigations further revealed that entities/individuals related to the company including Mr. Rajesh Kumar Vittalbhai Patel, Ms. Kirti R Patel etc. had transferred shares of the company off market to various persons. It was also noticed that some of the transferees had offloaded substantial shares in the market pursuant to the advertisements, thereby making unfair gains. It was found that the directors of the company mentioned above were responsible for such misleading advertisements issued on behalf of the company. The advertisements were published in the absence of any enabling provisions for 'buy back' in the Articles of Association of the company.

3. In view of the above, *inter alia* the company, its directors namely Mr. Hitesh R. Bhatt, Mr. Kalpesh R. Sheth, Mr. Pritesh Shah and Ms. Rinku J Shah and other entities were alleged to have contravened the relevant provisions of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995 (hereinafter referred to as PFUTP Regulations). Subsequently, SEBI vide order dated February 19, 2008, held that the company and its directors viz. Mr. Hitesh R. Bhatt, Mr. Kalpesh R. Sheth, Mr. Pritesh Shah and Ms. Rinku J Shah were guilty of violating the provisions of Regulation 5 (1) (a) & (b) and Regulation 6 (a) of the PFUTP Regulations. Further, Mr. Pritesh B Shah and the other entities were held to have violated the provisions of Regulations 3, 4 (a), (b), (c) and (d) and 6(a) of PFUTP Regulations. Further, the said order restrained the company and various other entities/person viz. Mr. Pritesh B Shah, Zenet Software Limited, Mr. Urvish Ramesh Vora, Mr. Rakesh Ramniklal Sheth, Mr. Tushar Jhaveri, Mr. Hitesh R. Bhatt, Mr. Kalpesh R. Sheth, Mr. Rinku J Shah, Galaxy Home Appliances, Mr. Mahendra K Sutaria and Mr. Piyush Jhaveri from accessing the securities market and also prohibited them from buying, selling or otherwise dealing or associating with the securities market in any manner whatsoever for a period of two years.

4. Aggrieved by the aforesaid order of the SEBI, Mr. Kalpesh R. Sheth (one of the directors of the company) filed an appeal before the Hon'ble Securities Appellate Tribunal (hereinafter referred to as the Hon'ble SAT) in Appeal No. 42 of 2008. Vide order dated March 14, 2008, the Hon'ble SAT allowed the appeal and set aside the impugned order in so far as Mr. Kalpesh R. Sheth was concerned on the ground that he was not served with the show cause notice. The Hon'ble SAT further granted liberty to SEBI to proceed afresh in accordance with law.

5. Subsequently, the show cause notice (along with the annexures) dated October 14, 2005 was served on Mr. Kalpesh R. Sheth (hereinafter referred to as

the noticee), vide SEBI letter dated April 04, 2008. The noticee was advised to submit his reply to the show cause notice within 15 days from the date of receipt of the same. The noticee, vide letter dated April 22, 2008 requested for an inspection of documents. After a request from the noticee for postponement of the inspection, the authorized representative of the noticee inspected the documents on June 27, 2008. During inspection, the authorized representative inspected the documents and informed that a list of documents to be further inspected would be sent to SEBI. However, no such list was received till date. As no reply was forthcoming, the noticee was advised to file his reply, vide SEBI letters dated September 26, 2008, November 19, 2008 and December 01, 2008. Pursuant to the reminders, the noticee submitted his reply dated December 07, 2008. The submissions of the noticee would be dealt with in the latter part of this order. Subsequently, an opportunity of personal hearing was also granted to the noticee on January 27, 2009. Mr. Joby Mathew, Advocate represented the noticee and made submissions before me.

6. I find that the role of the company and various other entities in the matter has been discussed at length in the SEBI order dated February 19, 2008 and therefore, I consider it not to reiterate the same in this order. This order would only determine the culpability of the noticee in the case.

7. I have perused the show cause notice dated October 14, 2005 issued to the noticee, his reply dated December 07, 2008 and other relevant material on record. On perusal of the said documents, I find that the following issues arise for my consideration:

- i. Whether advertisements were issued in leading newspapers with respect to the board meeting to be convened to consider the possibilities of a buy back?*
- ii. Whether the noticee was also responsible in publishing such advertisements for the company?*

- iii. Whether the advertisements so issued were misleading and false? Did they have the potential to attract investor interest in the scrip?
- iv. Whether the noticee is guilty of violating the provisions of Regulation 5 (1) (a) & (b) and Regulation 6 (a) of the PFUTP Regulations?
- v. What would be the nature of directions warranted to be issued against the noticee in the present case?

8. From the documents on record and the newspaper clippings, I find that the company had in fact issued advertisements on July 8, 2002 in 'Gujarat Samachar', 'Mumbai Samachar' and 'Sandesh', on July 9, 2002 in 'Business Standard', 'Financial Express' and 'Economic Times' and on July 10, 2002 in 'The Hindu Business Line' regarding the board meeting to be convened on July 18, 2002 to consider the possibilities of a buy back and allotment of shares to the foreign financial institutions. The text of one such advertisement is given below:

“Attention INVESTORS

Notice: Buy Back of Shares

Buy Back upto 18% of Equity

To allot upto 36% of Equity Shares to FFIs

NOTICE is hereby given that the Board of Directors of the Company will meet on 18th July, 2002 at registered office of the Company to consider possibilities of Buy Back upto 18,23,310 shares (18% of equity) at a price of Rs.11/- per share and allotment up to 36% of equity share to Foreign Financial Institutions.

***8th July 2002
Ahmedabad***

***For and on behalf of the
Board of Directors
Director”***

The decision of the company to make such advertisement and its subsequent issuance has been admitted by the noticee in his reply dated December 07, 2008. His only case is that the said advertisement issued by the company was not to misguide and not in violation of the provisions of PFUTP Regulations. Thus, it is an admitted fact that the company had published the advertisements. I

note that when the relevance of such advertisements was questioned, the company vide its letter dated October 21, 2002 informed SEBI that the said advertisements were made pursuant to the decisions taken in an informal meeting of the Board of Directors comprising Mr. Hitesh R Bhatt, Mr. Pritesh B Shah, Ms. Rinku J Shah, and the noticee held on July 01, 2002. I note that the company, vide its letter dated October 21, 2002 had stated that the advertisements were prepared by M/s. Garima Advertisements and the same was approved by the Board of Directors. As per the said letter, the total cost of the said advertisement was Rs.4,10,728/-. Thus, it is an undisputed fact that the company and its directors were responsible in issuing the said advertisements.

9. The next issue is to find out whether the noticee was also responsible for the issuance of such advertisements. The noticee was one of the directors of the company and continued as such till May 15, 2004 as seen from Form-32 submitted before the Registrar of Companies, Ahmedabad, Gujarat. I also take note of the fact that the noticee was a part of the Board of Directors of the company that met on July 01, 2002, when it was decided to examine the possibility of a buy back of its shares and allotment to Foreign Institutional Investors. Further, it is not the case of the noticee that he was not a part of the Board which met on July 18, 2002. In his reply dated December 07, 2008, the noticee has submitted that in the meeting held on July 18, 2002 (date in the reply is wrongly printed as July 8, 2002), the Board of Directors considered the proposal for buy back and that being aware that the Articles of Association of the company did not permit the same, had decided to amend the Articles of Association and to seek the approval of the shareholders of the company after completion of all necessary procedural formalities. The noticee also submitted that the Board of Directors decided to convene an extra ordinary general meeting or an annual general meeting of the shareholders to amend the Articles of Association. Thus, it becomes amply clear that the noticee was a director of the company during the relevant period and was also responsible in the issuance of the impugned advertisements.

10. Another important question to be determined is whether the advertisements placed by the company were misleading and whether they had the potential to induce sale/purchase of securities of the company or affect the price of the shares in any manner. It is to be noted that the advertisements were made without any legal compulsion on the part of the company or its directors. The aforesaid advertisements were merely a notice of the decisions taken by the Board of Directors of the company in their meeting on July 01, 2002 to convene a Board meeting on July 18, 2002 for the purposes of considering buy back and allotment of shares to Foreign Financial Institutions.

11. It is noted that the buyback of 18,23,310 (18% of equity of the company) shares were proposed to be bought back at Rs.11/- per share against the market price of Rs.2.40/- per share. Another fact that brings out the culpability of the company and its directors is that the company had spent Rs.4 lakh towards the cost of placing the impugned advertisements, when it (company) had made a profit of just Rs.16,000/- at the quarter ending June 30, 2002. The total expenditure incurred by the company during the said quarter was Rs.2.65 lakhs. With respect to the cost of placing the advertisements by the company, the learned counsel for the noticee had submitted (during the personal hearing) that the increased expenditure in advertisement is a commercial decision taken by the company and such a decision cannot be the basis for presuming that there was a manipulative intent on the part of the noticee. I find that it is highly improbable for a company making meager profits (of Rs.16,000/-) to spend Rs.4 lakh on advertisements which were not required to be made by any law in force at that time. Such a decision to publish advertisements would not be a prudent decision on the part of the Board of Directors. Considering the totality of the facts and circumstances of the case, such an advertisement would indicate the dubious intention of the company and its directors, especially as it was addressed to the investors in general and not to the shareholders of the company.

12. I note that the advertisement had mentioned the proposal to allot upto 36% of equity to Foreign Financial Institutions. It is observed that from February 2002 to May 2002, the number of trades and the number of shares of the company traded in the market were negligible. Besides, in the absence of any strong fundamentals, it is highly doubtful that in such a scenario, entities like foreign financial institutions or foreign institutional investors would show any interest in investing in the shares of the company. Given the weak underlying fundamentals of the company, no prudent investor would be interested in holding the shares of the company. The dissemination of news of the proposal to allot shares to foreign investors by the company was obviously misleading.

13. With regard to the price and traded volumes in the shares of the company, I find that prior to the advertisement, the number of shares traded and the number of trades was negligible during the period between February 2002 and May 2002. I note that, from 301 shares traded during May 2002, the numbers went upto 11.30 lakh shares in June 2002. During investigations, it was observed that this increase in the volumes of shares of the company was without any basis. During the days when the advertisements were published, I note the following:

- a. On July 08, 2002, the number of shares that were traded was 531800 shares in 674 trades. The price range during the said day was between Rs.2.30/- and Rs.3.40/-.
- b. On July 09, 2002, the number of shares traded was 721661 in 821 trades. The price range during the day was in between Rs.2.25/- and Rs.2.85/-.
- c. On July 10, 2002, the number of shares traded was 1178451 in 883 trades. The price range during the day was in between Rs.1.85/- and Rs.2.40/-.

It may be seen that on July 05, 2002 (the trade day prior to the advertisement on July 08, 2002), total shares that were traded was 161625 in 349 trades at BSE. It can be seen that number of shares that were traded in the market had increased from July 08, 2002. It is pertinent to note that after June 05, 2002, the trading volumes touched the highest of 1178451 shares during July 2002. The learned counsel representing the noticee submitted during the personal hearing that the advertisements came in July 2002 and that the spurt in price happened a month prior to that. He submitted that since price and volumes increased before the date of the advertisements, the same could not be attributed to the noticee. He further submitted that in the show cause notice, the noticee's role attributed was limited and did not include any role in the manipulation. In this regard, I find that the price of the shares of the company was fluctuating and going down during July and August of 2002. As already stated above, the volumes had increased substantially on the dates when the impugned advertisements were published by the company in newspapers. Further, it is noted that the buy back price of the shares as advertised was Rs.11/- when the share price of the company was hovering around Rs.3/- in the market. By placing such advertisements, the company had tried to impact the price of its shares. However, the same did not happen as is evident from the trade-volume data from the stock exchange for the relevant period.

14. Another point which goes against the company and its directors is that the advertisement has been given to the 'investors' and not 'shareholders'. The caption for the advertisements was "**ATTENTION INVESTORS**" as can be seen from the text of the impugned advertisements. Having displayed such caption, the noticee's submission that the advertisements were published out of abundant caution would not hold good. Thus, such advertisements were issued only with a malafide intention of attracting investors and inducing them into buying the shares of the company.

15. In view of the same, I hold that the advertisements were made to induce interest in the shares of the company. Giving notice of fixing the buy back price at Rs.11/- was only with a malafide intention of attracting investors giving them the offer of the buy-back as bait. The advertisements certainly did have the potential to impact the volumes that were traded in the market. As the noticee was a director and part of the Board of Directors of the company responsible for issuing the impugned advertisements, I hold the noticee responsible for the same.

16. Therefore, the act of the company and its directors in placing advertisements in leading newspapers, spending sizable amounts for such advertisements when the company's profits were low, considering a buy back price of Rs.11/- per share when the share price was around Rs.3/- per share, increase in the traded volumes during the days when the advertisements were published, create a very strong case against the company and its directors that they were culpable in disseminating misleading information to the potential investors.

17. Therefore, the noticee being responsible as a director of the company during the relevant period, in disseminating information in the form of advertisements which were misleading and which had the potential to induce purchase of the shares of the company by investors, had contravened the provisions of Regulation 5 (1) (a) and (b) and Regulation 6 (a) of the PFUTP Regulations. The relevant provisions have been reproduced herein below:

"Prohibition of misleading statements to induce sale or purchase of securities

5. (1) No person shall make any statement, or disseminate any information which -

(a) is misleading in a material particular; and

(b) is likely to induce the sale or purchase of securities by any other person or is likely to have the effect of increasing or depressing the market price of securities, if when he makes the statement or disseminates the information-

(i) he does not care whether the statement or information is true or false; or

(ii) he knows, or ought reasonably to have known that the statement or information is misleading in any material particular.

.....

Prohibition on unfair trade practice relating to securities

6. No person shall -

(a) in the course of his business, knowingly engage in any act, or practice which would operate as a fraud upon any person in connection with the purchase or sale of, or any other dealing in, any securities;

.....”

18. Before concluding, it is noted that the learned counsel for the noticee has submitted that the current proceedings are not fresh proceedings as the show cause notice issued to the noticee (subsequent to the order of Hon'ble SAT as cited above in this order) was part of the earlier proceedings. I find that though the show cause notice issued to the noticee was part of the earlier proceedings, the present proceedings cannot be vitiated because of the same. The case has been remanded by the Hon'ble SAT solely on the ground that the show cause notice was not properly served on the noticee. Accordingly, the show cause notice has been duly served on the noticee in the present proceedings and he has also put forth his submissions before me. Therefore, the said contention is without any merit.

19. On taking into consideration the case in its totality and the nature of the violations committed, I, in exercise of the powers conferred upon me under Section 19 read with Sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 hereby restrain Mr. Kalpesh R. Sheth [Permanent Account Number – AFGPS4061N] having his address at A - 202, Sarthak Tower, Near Ramdeo Nagar Cross Road, Satellite, Ahmedabad – 380015, from accessing the securities market and also prohibited from buying, selling or

otherwise dealing or associating with the securities market in any manner and in any capacity, for a period of two years.

20. This order shall come into force with immediate effect.

K. M. ABRAHAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

Place: Mumbai

Date: April 21,2009