BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. EAD-2/83/2012]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995

In Respect Of

M/s. Vakrangee Softwares Ltd.

[PAN AAACV9920D]

Background

1. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') has conducted investigation into the trading in the shares of Vakrangee Softwares Ltd. (hereinafter referred to as VSL') during the period from June 01, 2009 to July 13, 2009 (hereinafter referred to as 'investigation period') following an observation that Shri Prem Meiwal, Head of Finance had sold significant quantities of the shares of VSL prior to the announcement of results for the quarter ended March 2009. During the quarter ended March 31, 2009 VSL incurred a loss of ₹ 29.72 crore compared to a profit of ₹ 4.03 crore made by the company in the quarter ended December 31, 2008 due to write off of certain IT assets. The investigation could not conclusively establish that Shri Prem Meiwal has traded on the basis of and while in possession of Unpublished Price Sensitive Information (UPSI). However, the investigation revealed that VSL has wrongly disclosed Shri Prem Meiwal and Shri Nishikant Hayantnagarkar as Promoters of the Company during the quarters ended March 2008 to September 2008 and September 2008 to September 2009,

respectively. VSL has also failed to frame, adopt and enforce the code of internal procedures and conduct as near thereto the model code of conduct without diluting it in any manner and ensure the compliance of the same.

2. SEBI has therefore initiated adjudication proceedings under the SEBI Act against the Noticee to inquire into and adjudge the alleged violations of Clause 35 of the Equity Listing Agreement read with Section 21 of the Securities Contract (Regulation) Act, 1956 (SCRA) and Regulation 12 (1) read with Clause 4.2 in Schedule I, Part A of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (PIT Regulations).

Appointment of Adjudicating Officer

3. SEBI vide order dated May 10, 2012 appointed me as Adjudicating Officer under Section 15-I of the SEBI Act and Section 23 (1) of SCRA read with Rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the 'Adjudication Rules') and under Section 23(I) of the SCRA read with Rule 3 of the SC(R) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005 to inquire into and adjudge under Section 23 A (a) of the SCRA and Section 15 HB of the SEBI Act, the alleged violation of the Noticee.

Show Cause Notice, Reply and Personal Hearing

4. I issued a Show Cause Notice dated June 27, 2012 ('SCN') to VSL under Rule 4 of the Adjudication Rules to show cause as to why an inquiry should not be held against it and penalty be not imposed under Section 23A (a) of SCRA and Section 15 HB of the SEBI Act for its alleged violations as mentioned in Para 2 above. The Noticee submitted its reply vide letter dated August 23, 2012.

5. After considering the reply submitted by VSL, I decided to conduct an inquiry in the matter and accordingly granted an opportunity of personal hearing on September 14, 2012 vide letter dated September 04, 2012. VSL vide letter dated

September 13, 2012 sought for an adjournment. I granted another opportunity of personal hearing to VSL on September 21, 2012 vide letter dated September 13, 2012. The hearing was attended by the Chairman and Managing Director of the VSL, Shri Dinesh Nandwana who reiterated the written submissions made earlier.

6. VSL inter alia submitted that the definition of Promoter and Person Acting in Concert is subjective in nature, therefore the term Promoter was interpreted in different manner during the quarters referred to in the SCN. Shri Meiwal and Dr. Hayantnagarkar were Head of Finance and Whole Time Director, respectively with the company. Therefore as per the interpretation of the then Company Secretary their names were included under the Promoter category though their share holdings were a mere 0.42% and 0.02%, respectively.

7. VSL had already adopted the model code of conduct prescribed by SEBI under the PIT Regulations and there is no failure in implementing the code of conduct in order to prevent insider trading. The Clause 4.2 of the Schedule I read with Regulation 12 (1) of the Insider Trading Regulations has since been duly adopted and incorporated in the model code of conduct by the company. The company has continuously adhered to a good corporate governance policy and has been always one step ahead in implementing timely compliances and best corporate practices.

8. In view of the above, I am proceeding with the inquiry taking into account the submissions made by VSL, documents and material as available on record.

Issues, Evidence and Findings

9. I have carefully perused the charges against VSL mentioned in the SCN, the written and oral submissions of VSL and all the materials as available on record. The issues that arise for consideration in the present case are:

a. *Whether VSL has failed to comply with provisions of Clause 35 of the Equity Listing Agreement read with Section 21 of SCRA and Regulation 12 (1) read with Clause 4.2 in Schedule I, Part A of the PIT Regulations ?*
b. *Do the violations, if any, on the part of VSL attracts any penalty under Section Section 23 A (a) of SCRA and 15 HB of the SEBI Act?*
c. *If yes, what should be the quantum of monetary penalty?*

10. The provisions of Clause 35 of the Listing Agreement, Section 21 of the SCRA and Regulation 12(1) read with clause 4.2 in Schedule I, in Part A if the Insider Trading Regulations are as under:

Clause 35 of the Listing Agreement

"The issuer company agrees to file with the exchange the following details separately for each class of equity shares/security in the formats as specified in the clause, in compliance with the following timelines, namely:-
(a) One day prior to the listing of its securities on the stock exchanges.
(b) On a quarterly basis, within 21 days from the end of each quarter.
(c) Within 10 days of capital restructuring of the company resulting in a change exceeding +/-2% of the total paid up share capital".

Section 21 of SCRA

Conditions for listing

21. Where securities are listed on the application of any person in any recognised stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange.

Insider Trading Regulations

Code of internal procedures and conduct for listed companies and other entities.
12. *(1) All listed companies and organizations associated with securities markets including:*
(a) the intermediaries as mentioned in section 12 of the Act, asset management company and trustees of mutual funds ;
(b) the self-regulatory organizations recognized or authorised by the Board;
(c) the recognized stock exchanges and clearing house or corporations;
(d) the public financial institutions as defined in section 4A of the Companies Act, 1956; and
(e) the professional firms such as auditors, accountancy firms, law firms, analysts, consultants, etc., assisting or advising listed companies, shall frame a code of internal procedures and conduct as near thereto the Model Code specified in Schedule I of these Regulations without diluting it in any manner and ensure compliance of the same.

Schedule I

4.2 *All directors/ officers/ designated employees who buy or sell any number of shares of the company shall not enter into an opposite transaction i.e. sell or buy any number of shares during the next six months following the prior transaction. All directors/ officers/ designated employees shall also not take positions in derivative transactions in the shares of the company at any time.*

In the case of subscription in the primary market (initial public offers), the above mentioned entities shall hold their investments for a minimum period of 30 days. The holding period would commence when the securities are actually allotted.

Alleged violation of Clause 35 of the Listing Agreement read with Section 21 of the SCRA

11. It is alleged in the SCN that VSL has wrongly disclosed Shri Prem Meiwal and Shri Nishikant Hayantnagarkar as Promoters of the Company during the quarters ended March 2008 to September 2008 and September 2008 to September 2009, respectively for misleading the investors. In this context, VSL inter alia submitted that Shri Prem Meiwal, Vice President – Corporate Affairs has been associated with the company since 2004. Similarly Dr. Nishikant Hayantnagarkar, Whole time Director of the company is holding the directorship for the past 11 years. The definition of Promoter and Persons Acting in Concert is subjective in nature. The term Promoter was interpreted in different manner during the above referred quarters whereas the newly appointed Company Secretary interpreted the same differently. The quantum of shareholding by them which was shown under the category of promoters was minimal i.e. 0.49% of the total equity of the company and since there was no change in overall shareholding of the category, need was not felt to submit revised shareholding pattern. At the time when they were shown as the Promoters, Dr. Hayantnagarkar's holding was mere 0.02% of the share capital which is insignificant. Similarly Mr. Meiwal's holding was merely 0.42% in March 2008.

12. Due to such difference in interpretation of the definition of Promoter, no harm has occurred to the stake holders of the company or to the general public at large and such an interpretation was inadvertent and without any malafide intentions. As per the terms of the Listing Agreement the company has filed the shareholding pattern as per the prescribed format and within the prescribed time stipulated by the exchange. Hence there is no violation of Clause 35 of the Listing Agreement. More over NSE and BSE never took any objection on such disclosure of Clause 35 at any point of time. Further, during the period there was no public issue, nor any promoters of the company acquired shares through any means.

13. To examine the allegation leveled against VSL, I have carefully gone through the records of the case and I observe as under. The allegation is that VSL has wrongly included aforesaid two names under the category of Promoters in the quarterly shareholding pattern filed with the Stock Exchange pursuant to the listing agreement. It was also alleged that by doing so VSL has misled the public at large. I have perused the reply submitted by VSL and noted that the company has included the said two names under the category of Promoters in the year of 2008 and 2009 upon the advice of the then company secretary. However, the company has excluded the said two names from the Promoter category in their later filings as per the advice of the new company secretary. This fact remains undisputed on the record.

14. Now in this context it is pertinent to mention the meaning of promoters include as stated in Regulation 2 (1)(h)(b) of the SEBI (Acquisition of Shares and Takeovers) Regulation, 1997 (since repealed) which reads as under:

> "(b) *any person named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the Listing Agreements, whichever is later."*

After perusing the aforesaid clause, it is clear that a person can be called promoter if his name appears in the shareholding pattern filed with the stock exchange by the company. It appears that a company can include a person under the category of promoter after adopting the rational for that. Here in this case I observed that upon the advice of a professional company secretary, VSL has included the said names in the quarterly filings which were excluded later, again by virtue of professional advice by the new company secretary.

15. Here, for the charge of misleading the public, it is necessary to have on record sufficient evidence as to how the said inclusion or exclusion of the names has affected/misled the public at large, which is not available in this case. I note that the shareholdings of the said two persons were nominal and there was no change in the total promoter holding due to the inclusion/exclusion of the said names.

16. The corroborative evidences available on record are insufficient to prove the malafides of the company or any adverse outcome, it cannot be established beyond doubt that VSL has misled the public or included the names with any malafides. It will not be out of place to mention that a company generally acts upon professional advices, and in the present case it did so. By doing so and in the absence of any evidence of adverse effect to the public/market, it cannot be treated as a violation with malafide motives.

17. In view of the above findings and observations I am inclined to give VSL the benefit of doubt and conclude that the alleged violation, of wrong filing of quarterly shareholding pattern to mislead the investors, is not established beyond doubt.

Alleged Violation of Clause 4.2 of Schedule I, Part A of the PIT Regulations.

18. Further it was alleged in the SCN that VSL did not modify its internal code of conduct for prevention of insider trading with respect to Clause 4.2 of Schedule I, Part A of the PIT Regulations as amended by SEBI with effect from November 19, 2008. The amended Clause 4.2 read as under:

"4.2 All directors/officers/designated employees who buy or sell any number of shares of the company shall not enter into opposite transactions, i.e. sell or buy any number of shares during the next six months following the prior transaction. All directors/ officers/designated employees shall also not take positions in derivative transactions in the shares of the company at any time."

19. In this regard, VSL submitted that the non inclusion of Clause 4.2 in the Code of Conduct of the Company shall never mean that the same has not been followed inside the organization. The inclusion of Clause 4.2 is not necessary as the Schedule as contained in the PIT Regulations as much binds the world at large and in any case, there was no requirement to amend the codes of conduct as VSL already adopted the same before SEBI amended the schedule to introduce Clause 4.2.

20. The amended Regulation came into effect from the date of its notification, however the modification of the amended Regulation was not done as SEBI has not prescribed any time period within which the listed Companies are required to modify their company code; had it been the intension of SEBI, it should have specified the date. VSL drew a parallel to the listing agreement and stated that every amendment becomes automatically binding on the listed companies and it is not signed after every amendment. However, following the investigation by the SEBI officials VSL has inserted the same to the code of conduct of the Company.

21. The need to amend a company's code of conduct every time there is an amendment may prove to be counterproductive to the objective of the Regulation as the insiders who violate the PIT Regulations will take a stance that they cannot be acted against even in the absence of an amendment, despite the schedule to the PIT Regulations being amended. VSL submitted that in the case of Manmohan Shetty v. SEBI, Hon'ble Securities Appellate Tribunal (SAT) ruled that the schedule to the PIT Regulations is an integral and operative part of the PIT Regulations. VSL quoted Supreme's Court Judgment in Hindustan Steel's Case which was further appreciated by SAT in Cobot International Capital V SEBI.

22. VSL has a history of continuously adhering to good corporate governance policy and complying with all the clauses of the listing agreement and code of conduct and has never received any notice from NSE, BSE or SEBI. VSL has been vigilant and prompt in putting corporate Governance and Secretarial standard in place and has always won laurels from various credit rating agencies for achievement in different spheres.

23. I agree that no specific date has been mentioned in SEBI notification for incorporating the said amendment in the code of conduct of the listed companies. However it is implied that the listed companies shall incorporate the amendment in their internal code immediately or at the earliest possible time by virtue of Regulation 12 (1) of the PIT Regulations. I also concede that once the said amended Regulation came into force, i.e from the date of notification, it is applicable to all concerned and SEBI can enforce the same. However, a listed company gets empowered to exercise its regulatory and supervisory oversight with regard to the internal code of conduct for prevention of insider trading on its officers only to the extend adopted and incorporated in the internal code by it. In this context the parallel of the listing agreement drawn by VSL with the model code of conduct is not strictly

comparable. The application of the code of conduct of the company maybe compared with the application of the listing rules of the Stock Exchanges while the listing agreement may be compared with the contractual agreement the company has with the officers.

24. However I observe from the material available on record that initially VSL has incorporated the model code of conduct for prevention of insider trading as per PIT Regulations. In the instant case, the allegation is that the amended portion of clause 4.2 has not been incorporated by VSL in its internal code of conduct. In this context I cannot ignore the fact that the notification made by SEBI on November 19, 2008 and VSL in pursuance of the said notification has incorporated the same on April 26, 2012. In support of the same, VSL produced before me a copy of the code of conduct for prevention of insider trading incorporating clause 4.2 as amended by SEBI. Besides, there is no material available on record to show any instance of violation or non-compliance on the part of VSL of the clauses of the model code of conduct as prescribed by SEBI in Schedule I, Part A of the PIT Regulations. I also observe from the material available on record that there is no history of any irregularity/indulgence of any violation by VSL.

25. Therefore, in view of the above mitigating factors I am inclined to take a lenient view and conclude that this is not a fit case for imposition of monetary penalty under Section 23 A (a) of SCRA and Section 15 HB of the SEBI Act and VSL be exonerated from the charges leveled against it in the SCN.

Order

26. In view of the above, after considering all the facts and circumstances of the case and exercising the powers conferred upon me under Section 15-I (2) of the SEBI Act read with Rule 5 of the Adjudication Rules, I conclude that as the alleged violations of wrong filing of quarterly shareholding pattern to mislead

the investors is not established beyond doubt and taking into consideration the mitigating factors as mentioned in para 23 above in respect to the charge of non inclusion of the clause 4.2 as amended in the code of conduct, I hereby exonerate VSL. Accordingly the matter is disposed of.

27. In terms of the provisions of Rule 6 of the Adjudicating Rules the copies of this order is sent to VSL and also to Securities and Exchange Board of India.

Date: October 10, 2012 **P. K. KURIACHEN**

Place: Mumbai **ADJUDICATING OFFICER**