

BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO.ISD/FDIL/AO/DRK/AKS/EAD-3/288/54 -11]

**UNDER SECTION 15 I OF SECURITIES AND EXCHANGE BOARD OF INDIA
ACT, 1992 READ WITH RULE 5(1) OF SECURITIES AND EXCHANGE
BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING
PENALTIES BY ADJUDICATING OFFICER) RULES, 1995**

Against:

Shri Abhishek Jain
51, Kalpavraksh
27, Ridge Road
Walkeshwar
Mumbai- 400006
PAN NO. ACZPJ7120M

FACTS IN BRIEF

1. An alert was generated at IMSS regarding huge off-market transfer at National Securities Depository Ltd. (hereinafter referred to as '**NSDL**') and Central Depository Services (India) Ltd. (hereinafter referred to as '**CDSL**') wherein it was observed that significant quantity of shares of Flawless Diamond (India) Ltd. (hereinafter referred to as '**FDIL / Company**') has been transferred through off-market transfer from Promoter / Non-Promoter related entities to Rotomac Global Private Ltd (hereinafter referred to as '**RGPL**') on 30/10/2009 and 31/10/2009.

2. Based on the alert, information was collected from Bombay Stock Exchange Ltd. (hereinafter referred to as '**BSE**'), NSDL and CDSL and clarification was sought from the company and RGPL.

APPOINTMENT OF ADJUDICATING OFFICER

3. I was appointed as the Adjudicating Officer and the same was communicated vide proceedings of the Whole Time Member appointing Adjudicating Officer dated 09.05.2011 under Section 15 I of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**') read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Rules**') to inquire into and adjudge under Section 15A (b) of the SEBI Act, the violation of Regulations 13 (1), 13 (3) read with 13 (5) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as '**PIT Regulations**') and Regulations 7 (1) read with 7 (2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as '**Takeover Regulations**') alleged to have been committed by Shri Abhishek Jain (hereinafter referred to as '**noticee**').

SHOW CAUSE NOTICE, HEARING AND REPLY

4. A Show Cause Notice (herein after referred to as '**SCN**') dated 28.06.2011 was served on the noticee by "Hand Delivery Acknowledgement Due" in terms of the provisions of Rule 4 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 requiring him to show cause as to why an inquiry should not be held against him and why penalty, if any, should not be imposed on him under Section 15A (b) of the SEBI Act. In the said notice, it was stated / alleged that:

- a. From the investigation report it is observed that noticee had offloaded 10,00,000 shares (6% of the paid up share capital of the company) to RGPL on 31.10.2009 in off-market. After the transfer of the shares, noticee's holding in FDIL had become zero. It is alleged that no disclosure has been made by the noticee for such transfer as required under PIT Regulations to the company which has led to the violation of Regulation 13 (3) read with Regulation 13 (5) of PIT Regulations.
 - b. It was further observed that the transferred shares of FDIL have been transferred back to the noticee on 23.12.2009 by RGPL. It is alleged that the noticee had not disclosed his acquisition of shares of FDIL to the company and to the stock exchange as required under Regulations 7 (1) read with 7 (2) of Takeover Regulations.
 - c. Further, it is observed that under Regulation 13 (1) of PIT Regulations, noticee was required to disclose to the company within 2 working days of the receipt of intimation of allotment of shares or the acquisition of shares, as the case may be. However, it is alleged that no disclosure for such acquisition of shares has been made by the noticee to the company as required under PIT Regulations.
5. No reply was received from the noticee for the show cause notice. Therefore, vide personal hearing notice dated 04.08.2011, the noticee was given further time till 12.08.2011 to submit a detailed reply to the show cause notice and attend the hearing on 22.08.2011 at SEBI Bhavan, Mumbai. In response to this the noticee vide his letter dated 16.08.2011 authorized Shri Balveer Singh Choudhary, Chartered Accountant (hereinafter referred to as '**AR**') to attend the scheduled hearing.
6. During the personal hearing the AR submitted that the noticee is not covered under Regulation 7 (1) of SEBI Takeover Regulations but

Regulation 7 (1A) of Takeover Regulations as they are part of Promoter and Promoter Group. The AR submitted that the noticee being pledger is required to make disclosures under Regulations 8 A (1), 8 A (2) and 8 A (3) of Takeover Regulations to the company and to the stock exchange. The AR further submitted that PIT Regulations is not applicable to the noticee since the shares were pledged. The AR undertook to submit a detailed reply to the show cause notice within a week. Accordingly the noticee vide his letter dated 29.08.2011 submitted a reply to the SCN wherein he stated as follows-

- The noticee submitted that he had not offloaded any shares to RGPL on 31.10.2009. The shares were transferred to RGPL as per the Pledge Agreement entered between both the parties and he had filed the reporting under Regulation 7(1A) and Regulation 8(a) of the Takeover Regulations.
- The noticee submitted that as per the agreement all the benefits and voting rights were controlled by them only. There is no need to file any disclosure for pledge of shares under PIT Regulations. As per Regulation 13(5) the noticee had to file the disclosure when there is an allotment of shares or the acquisition or sale of shares or voting rights, as the case may be. Therefore as per the said Regulation there is no need for filing any disclosure under Regulation 13(3) of PIT Regulations.
- Noticee admits that the shares were transferred back to them from RGPL on 23.12.2009 and the reporting under Regulation 7(1A) and Regulation 8(2A) of the Takeover Regulations was filed to Company and as well as to the Stock Exchange on 28th December 2009 and 30th December 2009 respectively. As per the Takeover Regulations he has to file the reporting within two days from the date of transaction, In this regard the noticee would like to mention that 25, 26 and 27 December 2009 were holidays therefore on 28th December 2009 he had filed the report to the company and send a fax on the same day to stock exchange and filed the physical copy on 30th December 2009.
- As per the show cause notice it was alleged that he had not filed the reporting under Regulation 7(1) read with regulation 7(2) of the Takeover Regulations. In this connection the noticee would like to point out that he is the part of Promoter category i.e. he has to file the reporting of

revocation of pledge under Regulation 7(1A) of the Takeover Regulations and not in Regulation 7(1) of Takeover Regulations. Therefore, the noticee requests to kindly drop the alleged violation.

- The noticee further submits that the shares were transferred back to them as per the pledge agreement. There is no need to file any disclosure for pledge of shares under PIT Regulations. As per Regulation 13(1) he had to file the disclosure when there is an allotment of shares or the acquisition of shares or voting rights, as the case may be. Since it is a revocation of pledge therefore as per the said Regulation there is no need for filing any disclosure.

CONSIDERATION OF EVIDENCE AND FINDINGS

7. I have taken into consideration the facts and circumstances of the case and the material made available on record. The allegations in the present matter are that the noticee offloaded 10,00,000 shares of FDIL on 31.10.2009 to RGPL in off-market and the same number of shares were transferred back to the noticee by RGPL on 23.12.2009 but he had failed to make necessary disclosure under Takeover Regulations and PIT Regulations.
8. The noticee has submitted that he had entered into a pledge agreement with RGPL for 10,00,000 shares. However, the investigation report observes that the documents submitted for the proof of the pledge are not in accordance with the provisions of Depositories Act, 1996, SEBI (Depositories and Participants) Regulations, 1996 and the Bye-laws and Business Rules of the Depositories. Pledge or hypothecation under the Depository Regulations does not involve any transfer of shares from the pledger to the pledgee as only an entry is recorded in respect of the securities so pledged or hypothecated, which would evidence the creation of pledge. Since shares from the noticee were clearly transferred in off-market to RGPL and RGPL's demat account does not indicate any creation of pledge, the investigation report observes that the noticee's argument regarding shares were pledged to RGPL may not be accepted.

9. In this regard it may be noted that the said shares are in demat form. The manner of creating pledge is given in the Depositories Act, 1996 and SEBI (Depositories and Participants) Regulations, 1996. It is observed from Section 12 of the Depositories Act, 1996 and Regulation 58 of SEBI (Depositories and Participants) Regulations, 1996 that for creation of pledge, the pledger has to make an application to the depository through the participant and the participant after making a note in its records of the notice of pledge, forward the application to the depository. The depository after confirmation from the pledgee that the securities are available for pledge with the pledger shall within 15 days of receipt of the application creates and records the pledge and send an intimation of the same to the participants of the pledger and the pledgee. On receipt of the intimation the participants of both the pledger and the pledgee shall inform the pledger and the pledgee respectively of the entry of creation of the pledge. An entry in the records of a depository shall be evidence of a pledge.
10. Further, it is also seen from Bye-Law 9.9 of NSDL and Business Rule 12.9 of NSDL that there is a specific procedure for creation of pledge. The pledger has to submit an instruction to the depository participant to initiate a pledge request in the DPM (software provided by NSDL to the depository participant) indicating the option 'create a pledge' in the pledge form. The depository participant will accept the form for processing and issue an acknowledgment for the same to the pledger. The depository participant then will enter the details of the request in the DPM, generate a pledge instruction number for the request and release the request to NSDL. The securities pledged are moved from 'Free balances' to 'Pledged balances' account. The depository participant shall write the pledge instruction number on the pledge form and intimate the same to the pledger. Further, Regulations 58 (6) and 58 (7) of SEBI (Depositories and Participants) Regulations, 1996 lays down the manner of cancellation of a pledge. It

states that a pledge may be cancelled by the depository if the pledger or the pledgee makes an application to the depository through its participant provided there is prior concurrence of the pledge. The depository on the cancellation of the entry of pledge shall inform the participant of the pledger.

11. It is noted from the available records that none of the documents required under Depositories Act, 1996, SEBI (Depositories and Participants) Regulations, 1996, Bye-Law and Business Rule of NSDL as discussed above for creation of pledge such as copy of the instruction to the depository participant given by the pledger to initiate a pledge request or the acknowledgment by the depository participant for processing pledgee's request or pledge instruction number, has not been submitted by the noticee. Rather it is seen from the transaction statements received from NSDL that on 31/10/2009, noticee had transferred in an off-market transaction 10,00,000 shares of FDIL to RGPL. Further, NSDL in its letter dated 03.06.2010 has submitted data for the period from 16.10.2001 to 26.05.2010 regarding creation of pledge in the scrip of FDIL. It is observed from the said data that the noticee has not created any pledge in the scrip of FDIL in favour of RGPL as claimed by the noticee. Further, the noticee has also not submitted a copy of the application made to the depository through his participant to cancel the pledge.

12. In this case, I would like to quote the order of the Hon'ble Securities Appellate Tribunal, in *Parsoli Corporation Limited et al Vs SEBI* dated 12.08.2011 wherein it was held as follows:

"...There is no material on the record to show that the shares were ever pledged. The mere ipse dixit of the appellants cannot be accepted. It is pertinent to mention that there is a procedure prescribed under the Depositories Act and the regulations framed thereunder for pledging shares and when a pledge is created the same is recorded in the records of the depository. Had a pledge been created, as is now sought to be argued, the appellants would have produced the records from the depository..."

13. In view of the facts of the case and the Order of the Hon'ble Securities Appellate Tribunal, noticee's submission that the shares were pledged is not acceptable.
14. The investigation report states that the noticee had offloaded 10,00,000 shares (6% of the paid up share capital of the company) in off-market to RGPL on 31.10.2009 and after the transfer of the shares, noticee's holding in FDIL had become zero. There is nothing on record to show that the noticee had made disclosure about the aforesaid transfer as required under Regulation 13 (3) read with Regulation 13 (5) of PIT Regulations to the company. Noticee's argument that there is no need to file any disclosure for pledge of shares under PIT Regulations is not acceptable as the shares were not pledged as concluded above. Thus, it can be concluded that noticee has violated Regulation 13 (3) read with Regulation 13 (5) of PIT Regulations. The text of the said Regulations is reproduced below:

SEBI (Prohibition of Insider Trading) Regulations, 1992
Continual disclosure.

13 (3) Any person who holds more than 5% shares for voting rights in any listed company shall disclose to the company in Form C the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company.

13 (5) The disclosure mentioned in sub-regulations (3) and (4) shall be made within two working days of:

- (a) the receipts of intimation of allotment of shares, or
- (b) the acquisition or sale of shares or voting rights, as the case may be.

15. Further the investigation report observes that the transferred shares of FDIL were transferred back to the noticee on 23.12.2009 by RGPL. The SCN alleges that noticee has not made disclosure about the acquisition of shares of FDIL to the company and to the stock exchange under Regulations 7 (1)

read with 7 (2) of Takeover Regulations. It is observed from the materials on record that noticee has made disclosure under Regulation 7 (1A) of Takeover Regulations and the same was disseminated by BSE on its website. However, there is nothing on record to show that the noticee has made disclosure as required under Regulation 13 (1) of PIT Regulations to the company. Noticee's argument that he has made disclosure under Regulation 8 A(2) of Takeover Regulations and there is no need for him to file any disclosure for pledge of shares under PIT Regulations is also not acceptable as the shares were not pledged as concluded above. Thus, it can also be concluded that noticee has violated Regulation 13 (1) of PIT Regulations. The text of the said Regulations is reproduced below:

SEBI (Prohibition of Insider Trading) Regulations, 1992

Disclosure of interest or holding by directors and officers and substantial shareholders in a listed companies - Initial Disclosure.

13. (1) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company in Form A, the number of shares or voting rights held by such person, on becoming such holder, within 2 working days of :—

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

16. The said violations attract penalty under Section 15A (b) of the SEBI Act.

The text of Section 15A (b) is as follows:

15A. Penalty for failure to furnish information, return, etc.- If any person, who is required under this Act or any rules or regulations made thereunder,-

...

(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in

the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

17. In this regard, the provisions of Section 15J of the SEBI Act and Rule 5 of the Rules require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely;

- a. the amount of disproportionate gain or unfair advantage wherever quantifiable, made as a result of the default
- b. the amount of loss caused to an investor or group of investors as a result of the default
- c. the repetitive nature of the default

18. With regard to the above factors to be considered while determining the quantum of penalty, it is observed that the investigation report has not quantified the profit / loss for the nature of violations committed by the noticee.

19. In view of the abovementioned conclusion and after considering the factors under Section 15J of the SEBI Act, I hereby impose a penalty of ₹ 2,00,000/- (Rupees Two Lakh only) on the noticee under Section 15A (b) of the Securities and Exchange Board of India Act, 1992 for the violations of Regulation 13 (1), Regulation 13 (3) read with Regulation 13 (5) of SEBI (Prohibition of Insider Trading) Regulations, 1992 which is appropriate in the facts and circumstances of the case.

ORDER

20. In exercise of the powers conferred under Section 15 I of the Securities and Exchange Board of India Act, 1992, and Rule 5 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by

Adjudicating Officer) Rules, 1995, I hereby impose a penalty of ₹ 2,00,000/- (Rupees Two Lakh only) on Shri Abhishek Jain having PAN No. ACZPJ7120M in terms of the provisions of Section 15A (b) of the Securities and Exchange Board of India Act, 1992 for the violation of Regulation 13 (1), Regulation 13 (3) read with Regulation 13 (5) of SEBI (Prohibition of Insider Trading) Regulations, 1992. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the violations committed by the noticee.

21. The penalty shall be paid by way of Demand Draft drawn in favour of “SEBI – Penalties Remittable to Government of India” payable at Mumbai within 45 days of receipt of this order. The said demand draft shall be forwarded to Deputy General Manager- ISD, Securities and Exchange Board of India, Plot No. C4-A, ‘G’ Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400051.

22. In terms of the provisions of Rule 6 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 1995, copies of this order are being sent to Shri Abhishek Jain residing at 51, Kalpavraksh, 27 Ridge Road, Walkeshwar, Mumbai-400006 and also to the Securities and Exchange Board of India, Mumbai.

Place: Mumbai

Date: September 30, 2011

**D. RAVI KUMAR
CHIEF GENERAL MANAGER &
ADJUDICATING OFFICER**