

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. ISD/HHL/AO/DRK/MD/EAD 3- 46 /2009]

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
Kishorilal Jhunjhunwala
Independent Director of Hercules Hoists Limited
PAN No. – AABPJ3977G

FACTS OF THE CASE IN BRIEF

1. An investigation was conducted by Bombay Stock Exchange Limited (hereinafter referred to as 'BSE') in the trading of the scrip of Hercules Hoists Limited (hereinafter referred to as 'HHL') for the period from October 9, 2007 to November 1, 2007 wherein it was observed that company related entity was found to be dealing in the scrip. In view of the above, BSE referred the matter to SEBI for consideration.
2. SEBI conducted investigation into the trading of the scrip of **HHL**, during the period from October 9, 2007 to November 1, 2007 (hereinafter referred to as '**Investigation Period**'). During this period, the shares of HHL were listed on BSE and National Stock Exchange of India Limited (hereinafter referred to as 'NSE'). Investigation Report (hereinafter referred to as 'IR') observed that Shri Kishorilal Jhunjhunwala (hereinafter referred to as 'noticee') has sold 372 shares @ Rs. 4318.15 amounting to Rs. 16,06,612.20 on October 23, 2007, but failed to make proper disclosures to the company as required under Regulation 13 (4) read with 13 (5) of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 {hereinafter referred to as 'SEBI (PIT) Regulations'} with regard to the sale of the aforesaid shares. When enquired by SEBI, the company vide its letter dated 15th February, 2008, submitted that it has

not received any disclosures in terms of Regulation 13 (4) read with 13 (5) of the SEBI (PIT) Regulations from the noticee.

APPOINTMENT OF ADJUDICATING OFFICER

3. I was appointed as the Adjudicating Officer (subsequent to the transfer of Shri Biju S.) vide order dated December 10, 2008, under section 15 I of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the '**SEBI Act**'), read with Rule 3 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Adjudication Rules**') to inquire into and adjudge under Section 15A(b) of the SEBI Act, the violations of Regulation 13 (4) read with 13 (5) of the SEBI (PIT) Regulations alleged to have been committed by the noticee.

SHOW CAUSE NOTICE, HEARING AND REPLY

4. A Show Cause Notice A&E/DRK/MD/ 152698/2009 dated February 3, 2009 (hereinafter referred to as '**SCN**') was served on the noticee in terms of the provisions of Rule 4(1) of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, seeking reply of the noticee as to why an inquiry should not be held against the noticee in respect of the violations of Regulation 13 (4) read with 13 (5) of the SEBI (PIT) Regulations alleged to have been committed by the noticee.
5. In response to the SCN, the noticee submitted a reply dated March 30, 2009 denying all the charges. The noticee submitted that :-
 - I am an Independent Director of Company & I am not involved in conduct of day to day affairs of the company and also can not have access to any information relating to the company except when I attend the Board Meeting of the company. Firstly I was not aware about trading window concept and about the regulation that as a Director there are some restriction on selling / buying shares in market, when trading window is closed. Secondly I was not aware of company having decided any minimum threshold limits for dealing in securities of the company for which pre-clearances is required during closer of trading window.
 - Kindly note that I was holding 60372 shares as on 23rd October, 2007. Since there was some financial requirement and also to round off my

holding to net 60,000 shares, I sold 372 shares on 23.10.2007 only leaving 60,000 shares in my name. Kindly note that right from the period the shares issued to me, I have not sold any other shares of Hercules Hoists Limited. In our family division, I had given half of the shares to my brother as per family settlement. Apart from, there is no other instance of my selling the shares except 372 shares in question.

- The shares were sold by me on 23rd October, 2007. I had no knowledge that trading window was closed and was opening on 29th October, 2007. Kindly note that the rate at which I have sold the shares was Rs.4318.85 per share. After I sold my shares the rate of the shares has continuously increased. On 30th October, 2007, after the trading window opened, the rate was 7557.20 per share and on 1st November, 2007 highest rate was 8280.85 per share. If I had sold the shares at highest rate on 01.11.2007, I would have received more than Rs. 30 Lakhs for the said sale instead of about Rs. 16 Lakhs. In spite of increase in the price of the shares of Hercules Hoists Limited, I have not sold a single share from the balance 60,000 shares available to me for the sale. Therefore, from what is aforesaid, it is obvious that I had no malafide intentions in selling the shares.
- Further kindly note that I had received agenda of the Board Meeting of the company on 26.10.2007, only after my selling the shares in the market. Therefore, I was not privy to any price sensitive information when I sold the shares. The shares sold by me were less than 0.62% of my holding. The shares sold by me had no effects whatsoever of the market equilibrium. The volume of the total sales of the said share on 23.10.2007 was 24,972, which was much more than my sale of 372 shares. The sale of 372 shares has not caused any damage to any investor. I have also not received any undue advantage out of sale of said shares. I have also never in past sold shares in such way and I shall take all care in future not to repeat the same. The sale of the shares by me on 23rd October, 2007 is nothing but a technical lapse at best. I had sold the shares unknowingly and inadvertently without any intention to influence the market or on taking advantage or any insider information as the Director of the company.
- When it was pointed out to me by the company, instead of defending my action, I had suo motto offered to donate Rs. 25000/- to the Investor Protection Fund of the BSE for the said act after giving my explanation. I promptly paid the said amount to the Bombay Stock Exchange Limited. Even Audit Committee of the Company and the Board of Directors had unanimously concluded that the sale of shares by me had no link to sudden rise in the price of the shares of the company and my not informing selling of shares during trading window period was technical lapse and minor in nature. The Committee members have already opined that I had no unpublished price sensitive information at the time of sale of shares. Therefore, I was asked to be careful in future by the Audit Committee of the company.
- Kindly note that if I had not sold the shares on 23rd October, 2007 and sold it on 1st November, 2007 i.e. after opening of trading window, I would have made about more than 90% additional profit on the said

shares. In fact, looking back I feel I have made losses in selling the shares. I therefore, humbly submit that entire incident be viewed with the leniency. I have already paid the amount of Rs. 25,000/- in lieu of lapse. I therefore, humbly pray that no further action should be taken against me. I assure you that I shall be careful in future in dealing of Company shares.

6. Considering the facts and circumstances of the case, it was decided to conduct an inquiry in the matter and an opportunity of personal hearing was granted to the noticee vide hearing notice dated July 20, 2009, granting a personal hearing to the noticee on August 4, 2009. The 72 years old noticee along with Advocate Ajay Khandhar & co. and noticee's son Shri Ravi K. Jhunjhunwala (hereinafter referred to as the Authorized representative /AR) appeared for the hearing and reiterated the submissions made by him vide his reply dated March 30, 2009. During the personal hearing AR submitted :

- That the shares in the said scrip were allotted to him in the year 1977 and the noticee kept it with him till 2007.
- On October 23, 2007 noticee sold 372 shares in view of his financial needs and in order to round off his holding from 60,372 to 60,000 shares.
- The AR of the noticee further submitted that the agenda paper of the Board meeting was received by him only on October 27, 2007 and his sale was on October 23, 2007 so he was not having any price sensitive information.
- He was not aware of the trading window closure and on learning of his inadvertent mistake of selling shares during closing of trading window, notice voluntarily contributed Rs 25,000 to the BSE Investor Protection Fund.
- In this regard, BSE vide letter dated July 14, 2008 sought clarification from the company seeking the basis on which the above amount of Rs. 25,000 has been recovered from the noticee and the company vide letter dated 23rd July, 2008 clarified to BSE the basis of such recovery and no further clarification was sought by BSE in this regard.
- The notice is still holding 60,000 shares with him.
- The notice also submitted a copy of the minutes of meeting of Board of Directors of Hercules Hoists Ltd held on May 21, 2008.

CONSIDERATION OF EVIDENCE AND FINDINGS

7. The allegation against the noticee is that he has violated Regulation 13 (4) of the SEBI (PIT) Regulations. The text of the Regulation is as follows:-

Continual disclosure.

(4) Any person who is a director or officer of a listed company, shall disclose to the company in Form D, the total number of shares or voting rights held and

change in shareholding or voting rights, if there has been a change in such holdings from the last disclosure made under sub-regulation (2) or under this sub-regulation, and the change exceeds Rs. 5 lakh in value or 25,000 shares or 1% of total shareholding or voting rights, whichever is lower.

(5) The disclosure mentioned in sub-regulations (3) and (4) shall be made within 4 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.

8. It is noted from records that SEBI vide letter dated 12 February 2008, advised the company Hercules Hoist Limited to clarify whether noticee has filed the relevant disclosures under Regulation 13 (4) read with 13 (5) of the SEBI (PIT) Regulations 1992 with regard to the sale of 372 shares of the aforesaid scrip and whether the same has been filed by the company with the Exchange in terms of Regulation 13 (6) of the aforesaid Regulation.

9. It is further noted that the company vide its letter dated 15th February, 2008 informed that the noticee is an Independent Director of the company and the company had not received any disclosures in terms of Regulation 13 (4) of the SEBI (PIT) Regulations 1992. Further the company vide letter dated March 14, 2008 informed SEBI that the violation of Insider Trading Regulations by the noticee is placed for the deliberation of the Audit Committee of the company on March 24, 2008. On 29th March, 2008 the company informed SEBI that the recommendation of the Audit committee held on March 24th, 2008 would be considered at the next Board Meeting of the company and suitable action as may be decided by the Board of the company would be initiated in this regard.

10. Subsequently from the minutes of the board meeting held on 21st May, 2008, submitted by the noticee during the personal hearing, it is noted that the board concluded that the noticee was not in the possession of any Price Sensitive Information before the sale of the said shares, as he got the agenda for the board meeting to be held on October 29, 2007 only on October 27, 2007. The recommendation of the Audit committee is also in

similar lines as mentioned in the aforesaid board minutes. The company vide letter dated June 25, 2008 further informed that the board of directors considered the lapse on the part of noticee as a technical lapse and minor in nature and the same has been done inadvertently to round off his shareholding to 60,000 shares. The company has further concluded that the noticee was not in possession of any price sensitive information before the sale of the said shares. The company further informed that noticee has sent a pay order of 25,000 in favour of "The Stock Exchange Investors Protection Fund" of BSE.

11. It is noted from the records provided by the noticee that BSE vide its letter dated July 14, 2008 requested HHL to clarify the basis on which Rs. 25,000 has been recovered from the noticee. It further requested to clarify the penalties prescribed by the company for contravention of the Code of Conduct framed in terms of SEBI (PIT) Regulations, 1992 and whether the deposit of amount recovered from noticee with the investor protection fund of the stock exchange is compliant with the code of conduct. HHL clarified the above details vide letter dated 23rd July, 2008 and the noticee informed during the personal hearing that there was no further clarification/inquiry by BSE in this regard.

Conclusion

12. I have taken into consideration the facts and circumstances of the case, the submissions advanced by the noticee, and the material available on record. The allegations against the noticee in the SCN is that he has failed to make proper disclosures as required under regulation 13 (4) read with 13 (5) of the SEBI (PIT) Regulations with regard to the sale of 372 shares of HHL. I have noted that noticee had sold only 372 shares out of 60,372 shares held by him. As noted from IR and the submission of the noticee, total sale in the scrip on 23.10.2007 was more than 24,000 shares, which was much higher than the sale of 372 shares by the noticee. It is also noted from IR that the price of the scrip increased considerably after the sale of shares by the noticee. Thus as submitted by the noticee the shares were sold unknowingly and inadvertently without any intention to influence the market

or for taking advantage of any insider information as the Director of the company, therefore it can be concluded that the sale of 372 shares by noticee and non disclosure of the same to the company as required under Regulation 13 (4) read with 13 (5) of SEBI (PIT) Regulations, 1992 was an inadvertent mistake.

13. I have also taken into consideration the recommendation of the Audit Committee, as well as the decision of Board of Directors of the Company and based on the same it can be concluded that the violation of the noticee is minor and technical in nature. Further, I have also taken into consideration that the noticee voluntarily deposited Rs. 25,000 to the BSE Investor Protection Fund.

14. At this juncture it is relevant to mention the judgement of Division Bench of the Hon'ble High Court of Bombay in SEBI vs Cabot International Corporation (2004) 51 SCL 307 (BOM). The following is extracted from the said judgement :

“Though looking to the provisions of the statute, the delinquency of the defaulter may itself expose him to the penalty provision yet, despite, that in the statute minimum penalty is prescribed, the authority may refuse to impose penalty for justifiable reasons like the default occurred due to bonafide belief that he was liable to act in the manner prescribed by the statute or it was too technical or venial breach etc.”

ORDER

15. Though the noticee has not complied with Regulation 13 (4) read with 13 (5) of the SEBI (PIT) Regulations 1992 adjudged under section 15A (b) of SEBI Act, 1992, considering the facts and circumstances of the case and the submissions of the noticee, recommendation of the Audit committee, and the decision of the Board of Directors of the company and taking into account the fact that noticee suo motto deposited Rs. 25,000 to the Investor Protection Fund of BSE for his lapse and the same was accepted

by the Board of directors of the company, I am of the opinion that no further penalty is to be levied on the noticee.

16. 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 Kishorilal Jhunjhunwala and also to the Securities and Exchange Board of India, Mumbai.

Place: Mumbai
Date: August 20, 2009

D. RAVI KUMAR
CHIEF GENERAL MANAGER &
ADJUDICATING OFFICER