BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. HB/AO- 02/2012]

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

Shri. Shantibhai Shah (PAN AFZPS1800C)

Smt. Bhartiben Shah (PAN not provided)

Smt. Amita H Shah (PAN not provided)

In the matter of M/s Empower Industries (India) Limited.

FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) conducted investigation in respect of trading of shares of Empower Industries India Ltd. (hereinafter referred to as **"EIL"**) for the period from February 16, 2005 to March 11, 2005 (hereinafter referred to as **"Investigation Period"**). The role of the broker and their clients who traded in the scrip EIL were scrutinized.

2. During investigation period following Announcements were made by EIL:

Sr. No	Date & time of anncmnt.	Subject	Effect of price/volume
1	02.03.2005 at 11:02 AM & 4:44 PM	The board meeting to be held on 08.03.2005 to consider the pricing of the issue and also to consider the options and ways for expansion plans, acquisition and any other related matter for growth of the company	Price increased from closing price Rs.100.15 on March 1, 2005 to Rs.101.90 on next trading day. Volume increased from average daily trading volume of 3685 shares to average daily trading volume of

		and to consider the increase in authorized capital and issue of right/preferential shares.	22606 shares for remaining investigation period.
2	11.03.2005 at 04:31PM	The Board meeting which was scheduled to be held on March 08, 2005 has been postponed as the directors of the company have gone out of station.	The price came down from closing price Rs.113.96 on March 11, 2005 to Rs.110.75 on next trading day. There was negligible effect on the volume.

3. Mr. Devang Master, promoter and director of the company, who was holding 265050 shares (53.01% of paid up capital) on 31st December, 2004 rematerialized 240500 shares and transferred 213000 shares (42.60% of the paid up capital) by off market transfers to various entities including Shri. Shantibhai Shah, Smt. Bhartiben Shah and Smt. Amita H Shah (hereinafter collectively referred to as the **"Acquirers/Noticees"**)

4. The investigation conducted by SEBI revealed that Noticees acting in concert with each other had bought shares from Mr. Devang Master, promoter director of EIL on February 25, 2005. Pursuant to these acquisitions the combined shareholding of the Noticees was 56,000 shares (11.2% of the paid-up capital).

Date	Buyer Name	Quantity	Quantity as a Percentage of Paid up Capital
February 25, 2005	Shanti bhai Shah	28000	5.60%
February 25, 2005	Bhrati Ben Shah	14000	2.80%
February 25, 2005	Amita Shah	14000	2.80%

5. The crossing of threshold limit of 10% by the Noticees attracted provisions of Regulation 7(1) and 7(2) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **"SAST"**) which required making disclosures to the Stock Exchange and the Company. Since no such disclosure was made till date by the Noticees it was alleged that they violated the provisions of the said regulations and therefore, liable for monetary penalty under section 15A(b) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act"**).

6. Further Shri Shantibhai Shah (hereinafter referred to as **'you'** in this paragraph) received 28000 shares of EIL (5.6% of the paid up capital) from Mr. Devang Master, in physical form. This transaction required disclosure under Regulation 13(1) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as **"PIT"**)

however no disclosure was made by you. From the records available, it is observed that through several transactions your shareholding was reduced to below 5%, requiring disclosure under Regulation 13(3) and 13(5) **PIT Regulations**; however no disclosure was made by you for the same. In view of the above, it is alleged that you have violated Regulation 13(1), 13(3) and 13(5) of PIT regulations thereby attracting penalty under Section 15A (b) of **SEBI Act**.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

7. Show Cause Notices for Shri. Shantibhai Shah - ADJ/EIL/HB/PM/186643/2009 dated December 09, 2009, Smt. Bhartiben Shah - ADJ/EIL/HB/PM/186645/2009 dated December 09, 2009 and Smt. Amita H Shah - ADJ/EIL/HB/PM/186646/2009 dated December 09, 2009 (hereinafter referred to as "**SCN**") was issued to the Noticees under rule 4 of the Rules to show cause as to why an inquiry should not be initiated against the Noticees and penalty be not imposed under section 15A(b) of SEBI Act for the alleged violations specified in the SCN.

8. Vide letters dated January 16, 2010 and January 18, 2010, the Noticees had submitted similar replies, which is as under –

   a. *As a common investor any buying and selling in shares which are made by me are through intermediaries like brokers and as an investor I would assume that compliance part is taken care by my broker with the exchange and I was under assumption that if in case there are any other compliance or formalities, I would have been advised by my brokers and would reply on them. I am submitting herewith the copy of contract note, bills of transactions made with broker M/s {}, who are duly registered with SEBI.*
   b. *Though there has been non compliance by me, I would like to assure you that such a non compliance is purely of technical nature with no malafide intention to hurt any other investors.*
   c. *I further state that inadvertence in not filling appropriate declarations within the time limit with is not of such a nature as to prejudice the position of the shareholders or any person concerned with the company.*
   d. *I further state that I will be very regular in complying with any attracted provisions under SEBI and that honour all commitments under the SEBI Act in future.*

e. *I, therefore, respectfully submit that under the circumstances aforesaid it is just and equitable that your goodselves will be please to compound the offence under the subject matter with minimum penalty.*

f. *This application is bonafide and in the interest of justice.*

g. *I, therefore humbly pray that -*

(i) *Considering the circumstances of the matter and in particular that no prejudice will be caused to anyone including shareholders or any other person concerned with the company the offences may be compounded with minimum penalty and I be relieved of all the liabilities in consequence thereof;*

(ii) *A very lenient view to be taken in the matter considering the above facts.*

(iii) *That such other further reliefs may be granted and directions may be given as you may deem fit and proper.*

9. In the interest of natural justice and in order to conduct an inquiry in terms of rule 4(3) of the Rules, the Noticees were granted an opportunity of personal hearing on February 23, 2010 vide notices' dated February 11, 2010. Shri. Amit Samani, appeared on behalf of the Noticees on February 25, 2010. During the hearing Shri Amit Samani, reiterated the reply submitted by the Noticees vide the letters mentioned above. Further while acknowledging the allegations made in the SCN regarding the non-compliances of SEBI (SAST) Regulations 1997 by the Noticees and non-compliance of SEBI PIT Regulations by Shri Shantibhai Shah, it was submitted that non-compliance was purely technical in nature with no malafide intention to harm interest of any other investor. It was further submitted that this non-compliance was the first time and would not be repeated henceforth.

CONSIDERATION OF ISSUES AND FINDINGS

10. I have carefully perused the charges set out in the show cause notice, the written and oral submissions of the Noticees and the documents available on record.

11. In light of the facts and circumstances of the case, the issues that arise for consideration in the present case are -

(i) Whether there was any obligation on the part of the Noticees to comply with the provisions of regulation 7(1) and 7(2) of SAST Regulations in respect of the acquisition of 56,000 shares or alternately acquisition of more than 10% shares of EIL.

(ii) If so, whether the Noticees together had complied with or violated regulations 7(1) and 7(2) of SEBI (SAST) Regulations, 1997?

(iii) Whether there was any obligation on the part of Shri Shantibhai Shah to comply with the provisions of Regulation 13(1), 13(3) and 13(5) of PIT regulations for nondisclosure of change in shareholding in EIL.

(iv) If so, whether Shri Shantibhai Shah had complied with or violated Regulation 13(1), 13(3) and 13(5) of PIT Regulations.

(v) Does the non-compliance, if any, on the part of the Noticees attract monetary penalty under section 15A(b) of SEBI Act?

(vi) If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of SEBI Act?

12. In order to address the above questions, the exact construct of the case needs to be established in perspective. In order to do that it would be appropriate to refer to the relevant provisions of the following regulations of SEBI (SAST) Regulations 1997:

Reg. 7(1): Acquisition of 5 per cent and more shares or voting rights of a company

[Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen per cent [or fifty four per cent or seventy four per cent] shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.]

Reg. 7(2)

The disclosures mentioned in [sub-regulations (1) and (1A)] shall be made within [two 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.

Regulations 2(1)(b) - "acquirer means any person who directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquire or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer.

Regualtion 2(1)(e) - "person acting in concert" comprises –

(1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or

understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.

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

Reg. 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 4 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.

Continual disclosure

Reg.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.

Reg. 13(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.

13. The Noticees submitted that the breach on part of the Noticees was purely due to inadvertence and not due to any malafide intention. I note that the violations committed by Noticees attract provisions of SAST and PIT Regulations and no exemptions can be given to them for the same. The Hon'ble Supreme Court of India in the matter of SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216(SC) held that:

"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation, as contemplated by the Act and the Regulations, is established and hence the intention of the parties committing such violation becomes wholly irrelevant…".

14. In view of the charges as established, and the facts and circumstances of the case, and the various judgments referred to and mentioned hereinabove, the quantum of penalty would depend on the seriousness of the violation. The SAST and PIT Regulation have been framed in order to bring about the transparency in the market and timely disclosure to the investors. Correct and timely disclosures are an essential part of the proper functioning of the securities market and any failure to do so results in preventing investors from taking well-informed decisions. The Noticees, had the responsibility of ensuring compliance to the disclosure norms. The timely disclosure was of importance from the point of view of outside shareholders/other investors, as such disclosure would have prompted them to buy or sell shares of the target company. It is an admitted fact that the Noticee had not made the disclosure as required and hence there was no dissemination of information to the general investor. By virtue of the failure on the part of the Noticees to make the necessary disclosure, the fact remains that the shareholders/investors were deprived of the information. Under these circumstances, the compliance with the disclosure requirements under SAST and PIT Regulation assumes significance and the Noticee's failure to do so need to be viewed seriously.

15. Now, having established that the acquisition by the Noticees was done on February 25, 2005, I find that the collective holding of the Noticees has breached the 5% limit, specified under 7(1) of SAST Regulations. This breach of threshold limit required disclosure under 7(2) of SAST regulations within two days of the acquisition (i.e.) by February 27, 2005. However no such disclosure was made.

16. I also find that the acquisition of shares of EIL by Shri Shantibhai Shah required disclosure under Regulation 13(1) of the PIT Regulations. Further, from the records available it is observed that there were several transactions which reduced his holding to below 5% requiring disclosure under Regulation 13(3) and 13(5) PIT Regulations. However no such disclosure was made.

17. With regard to compliance with the provisions of Regulation 7(1) I shall further rely upon the judgement of Hon'ble SAT in the matter of Mega Resources V. SEBI (Appeal

No. 49/2001). The Hon'ble SAT in the said appeal, vide order dated March 19, 2002 held as under:

"… it is not possible to agree with Shri Banerjee's submission that in view of the use of the word "acquirer" in singular and the absence of the words "acting in concert" in the regulation excludes an acquirer whose individual holding does not exceed 5%, from complying with the requirement of the regulation. In the light of the definition of the expression 'acquirer' and the 'persons acting in concert' and also taking into consideration the purpose of regulation 7, I am of the view that the acquisition of shares by persons acting in league, is very relevant and the disclosure of such concerted acquisition to the target company and the company in turn to the concerned stock exchange is in tune with the objective of the said disclosure. If one is to accept Shri Banerjee 's contention, that would mean that each person acting in concert could acquire upto 5% shares without making the disclosure and continue to do so upto 15%, without attracting the requirements of public offer in terms of regulation 10. Such an interpretation would defeat the very purpose of the Regulations. As already stated one of the objects of the Regulations is to protect the interests of the investors through prompt disclosures. In my view the shares acquired by all those persons acting in league has to be taken as a whole for the purpose of regulation 7. Since the Appellant itself having admitted that the holding of the Appellant with its associate (s) exceeded 5% of the paid up capital of Bombay Dyeing, it was incumbent upon the Appellant to make the disclosure, as per regulation 7(1) to Bombay dyeing"

18. Further, it would be apt to note the observations made by the Hon'ble High Court of Calcutta in W.P. No. 33/2001- *Arun Kumar Bajoria Vs SEBI* and others as under:

"… the object of Regulation 7 is to inform the investors that an individual has acquired 5 per cent shares in the company concerned. If the acquisition has been made by more than one individual in association with each other, it is also obligatory on the part of such individuals to disclose their identity. This can only be done when the information is given to the company. If after the company has received the information, its officer do not read the information and in consequence thereof no information is given to the investors through the concerned Stock Exchanges, the company is to be blamed but unless the company receives the information , the question of the officers of the company reading the information and then transmitting such information to the investors through the Stock Exchanges concerned does not, nor can at all arise. Therefore, it is obligatory on the part of the person so acquiring to inform the company…."

19. Having established the violations as stated in the foregoing paragraphs, the next issue for consideration is as to whether failure on the part of the Noticees to comply with the aforementioned provisions of regulation 7(1) and 7(2) of SAST Regulations, 1997 and on the part of Shri Shantibhai Shah to comply with the regulations 13(1), 13(3) and

13(5) of PIT regulations attracts monetary penalty under section 15 A(b) of SEBI Act, and if so, what would be the monetary penalty that can be imposed on the Noticee.

20. The provisions of section 15 A(b) of SEBI Act is reproduced here under :

Reg. 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.

21. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216 (SC)* held that *"once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established then the penalty is to follow".*

22. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under section 15A (b) of the SEBI Act.

23. While determining the quantum of monetary penalty under section 15A(b) of SEBI Act, I have considered the factors stipulated in section 15J of SEBI Act, which reads as under:-

15J - Factors to be taken into account by the adjudicating officer

While adjudging quantum of penalty under section 15-I, 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.*

24. From the material available on record, it may not be possible to ascertain the exact monetary loss to the investors on account of violations by the Noticees. In Appeal No. 66 of 2003 - *Milan Mahendra Securities Pvt. Ltd. Vs SEBI* – Order dated April 15, 2005 the Hon'ble SAT has observed that, *"the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market".* Though it would be difficult to ascertain the disproportionate gain or unfair advantage accrued to the Noticees due to the aforesaid violations, the mere withholding of the information of, change in shareholding by a substantial percentage (i.e. 5% under Regulation 7(1) of SAST Regulations, 1997 or

5% under Regulation 13(1) of PIT Regulations, 1992) could be considered as a loss to other shareholders/investors.

ORDER

25. After taking into consideration all the facts and circumstances of the case and material available on record, I hereby impose a monetary penalty of Rs.1,50,000/- (Rupees One Lakh and Fifty Thousand only) under Regulation 15A(b) on the Noticees jointly and severally which will be commensurate with the default committed by them.

26. The Noticees shall pay the said amount of penalty by way of demand draft 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 Mr. B. Rajendran, General Manager, Investigation Department - Division – ID6, Securities and Exchange Board of India, SEBI Bhavan, Plot No.C4-A, "G" Block, Bandra Kurla Complex, Bandra (East), Mumbai–400 051.

27. In terms of rule 6 of the Rules, copies of this order are sent to the Noticees and also to the Securities and Exchange Board of India.

Date: **August 31, 2012** **HARINI BALAJI**

Place: **Mumbai** **ADJUDICATING OFFICER**