

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. AK/AO-98/2014]

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. Ethelbari Tea Company Limited (PAN No. AAAC9719J)

In the matter of

M/s. Ethelbari Tea Company Limited

FACTS OF THE CASE

1. M/s. Ethelbari Tea Company Limited (hereinafter referred to as “the **Noticee/the Company**”) is a company incorporated under the Companies Act. M/s Jashbhai Patel & Sons HUF, Smt. Kantaben A. Patel, Shri Niraj Patel, Shri Bipin Bhai Patel, Shri Danish Nirajbhai Patel, Smt. Ansuyaben Patel, Bipinbhai & Sons HUF, Niraj Kumar Patel HUF, Smt Nita Patel, Shri Hemang Mahendrabhai Patel, Shri Mahendra Kumar Patel, Smt Pritaben Patel, Mahendra Kumar & Sons HUF and Smt Arpana Patel (collectively referred to as ‘**Acquirers**’) had filed a Letter of Offer to acquire upto 10,000 fully paid up equity shares representing 20.00% of the Paid Up Equity Share Capital and resultant voting rights of the company at Rs. 1,384/- per equity share. The public announcement for the same was made on December 15, 2010 and the shares of the company were listed on The Calcutta Stock Exchange Ltd. (hereinafter referred to as **CSE**).
2. While examining the letter of offer document of the Acquirer to acquire the shares of the Noticee, it was observed that the Noticee did not comply with the provisions of Regulation 8(3) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (hereinafter referred to as ‘**Takeover Regulations**’) during the period from 1998 to

2008 within the stipulated time. Based on the aforesaid information with respect to the non-compliance of Takeover Regulations, Adjudication proceedings under Chapter VI-A of SEBI Act, 1992 (hereinafter referred to as “**Act**”) were initiated against the Noticee under Sec 15 A (b) of SEBI Act, 1992 to inquire into and adjudicate the alleged violation of the provision of regulation 8(3) of the Takeover Regulations.

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned was appointed as the Adjudicating Officer, vide order dated September 02, 2013 under Section 15-I of the SEBI Act read with rule 3 of SEBI Rules to inquire into and adjudge under Section 15A(b) of the SEBI Act for the alleged violation of Regulations 8(3) of Takeover Regulations committed by the Noticee.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. A Show Cause Notice (hereinafter referred to as “**SCN**”) Ref. No. EAD-6/AK/VRP/4680/2014 dated February 11, 2014 was issued to the Noticee under rule 4(1) of SEBI Rules communicating the alleged violation of Takeover Regulations as detailed below:

Regulation	Due Date of compliance	Date of compliance	Delay - in no. of days
8(3)	30.04.1998	24.04.2009	4004
8(3)	30.04.1999	24.04.2009	3639
8(3)	30.04.2000	24.04.2009	3274
8(3)	30.04.2001	24.04.2009	2909
8(3)	30.04.2002	24.04.2009	2544
8(3)	30.04.2003	24.04.2009	2179
8(3)	30.04.2004	24.04.2009	1814
8(3)	30.04.2005	24.04.2009	1449
8(3)	30.04.2006	24.04.2009	1084
8(3)	30.04.2007	24.04.2009	719
8(3)	30.04.2008	24.04.2009	354

5. The Noticee was called upon to show cause as to why an inquiry should not be initiated against it and penalty be not imposed under Section 15 A(b) of the SEBI Act for the alleged violations. The said SCN was returned undelivered with a remark "Addressee moved". The copy of the said SCN was sent at the registered office of the Noticee vide letter dated April 4, 2014 and the same was duly acknowledged by the Noticee. The Noticee vide email dated April 16, 2014 requested for one month time to attend the hearing.
6. The Noticee vide letter dated May 09, 2014 *inter alia* submitted as follows:
- 6.1. *That pursuant to an open offer made in 2010, the Company underwent change in the management and the new management of Patels took over since March 2011;*
 - 6.2. *That prior to the new management taking over the Company, its erstwhile management had failed to comply with the continuous disclosure requirement under Regulation 8(3) of the Takeover Regulations with CSE, where the shares of the Company were listed, and that the Company complied with such continued disclosure under the said Regulations 8(3) on April 24, 2009;*
 - 6.3. *That such show cause notice ought to have been issued to the erstwhile management. The new management has no part to play on a matter of non compliance which has taken place long back and also regularized on April 24, 2009 by the erstwhile management;*
 - 6.4. *That CSE was not functioning for a long time and that trading of shares in companies listed with it was also not taking place during the relevant time;*
 - 6.5. *That the instant notice, it appears has been now issued almost after five years from the date of the regularization of the matter complained of by the erstwhile management. This, it clearly makes the show cause against the company barred by limitations;*
 - 6.6. *That if any of the persons in the management of the Company have been guilty of dereliction of duty, it is only the erstwhile management and the new management has no role to play in the same and the entire matter is beyond its control;*

- 6.7. *That the company does not have mens rea or guilty mind to not comply with any of the statutory provisions and the same is specifically entrusted to its management which is responsible for compliance thereof. The matter complained of admittedly relates to the period when the Company was under the ownership and control of the erstwhile management;*
- 6.8. *Further, that for all the relevant years of delay mentioned in the show cause notice, there was no change in shareholding of earlier promoters in excess of 2% of the shares holding or voting right of the company. Moreover, the aforesaid increase of 2% shareholding in promoter holding was only made to comply with the Companies (Amendment) Act, 2000 which prescribed that every public limited company shall have minimum paid up capital of Rs.5,00,000/-;*
- 6.9. *Also, that there is no allegation that any gain or advantage has been made as a result of the delay in compliance. There is no investor or investor group alleging any loss, and further, trading in the securities on CSE was itself not happening. The defaults in any event were all complied and regularized in April 2009.*
7. In the interest of natural justice and in terms of rule 4(3) of the SEBI Rules, the Noticee was granted an opportunity of hearing on May 16, 2014 vide notice dated April 21, 2014. Shri Mahendra Patel, Managing Director of the Noticee, Mr. S. Jeyakumar, COO-Head Investment Banking, M/s. Dalmia Securities Private Ltd. and Mr. Indrajit Bhagat CO-Head, Merchant Banking, M/s. Dalmia Securities Private Ltd., Authorized Representatives (hereinafter collectively referred to as "**ARs**") of the Noticee reiterated the submission made vide letter dated May 09, 2014. During the course of the hearing, the ARs submitted that the Noticee was desirous of availing Settlement Order and that accordingly they would confirm their decision by June 4, 2014 along with a copy of the settlement application filed. However, subsequently the Noticee vide email dated June 12, 2014, submitted a scanned copy of letter dated May 26, 2014, to the effect that they do not intend to avail the facility of settlement proceedings as prescribed under Securities and Exchange Board of India (Settlement of Administrative and Civil

Proceedings) Regulation, 2014 and reiterated the submissions made earlier vide letter dated May 9, 2014 as well as during the hearing.

CONSIDERATION OF ISSUES

8. I have carefully perused the written submissions of the Noticee and the documents available on record. It is observed that the allegation against the Noticee is that they have failed to make the relevant disclosure under the provisions of Regulation 8(3) of the Takeover Regulations during the period from 1998 to 2008.
9. The issues that, therefore, arise for consideration in the present case are:
 - 9.1. Whether the Noticee has violated the provisions of Regulation 8(3) of the Takeover Regulations during the period from 1998 to 2008?
 - 9.2. Does the violation, if any, attract monetary penalty under Section 15 A (b) of SEBI Act?
 - 9.3. If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in Section 15J of SEBI Act?

FINDINGS

Before moving forward, it is pertinent to refer to the provisions of Regulation 8(3) of Takeover Regulations, which reads as under:

8. Continual disclosures.

(1).....

(2).....

(3) Every company whose shares are listed on a stock exchange, shall within 30 days from the financial year ending March 31, as well as the record date of the company for the purposes of declaration of dividend, make yearly disclosures to all the stock exchanges on which the shares of the company are listed, the changes, if any, in respect of the holdings of the persons referred to under sub regulation (1) and also holdings of promoters or person(s) having control over the company as on 31st March.

10. The issue for consideration is whether the Noticee failed to make the relevant disclosures under Regulation 8(3) of the Takeover Regulations for eleven (11) consecutive financial years from 1997-98 to 2007-08 within the stipulated time. As per Regulation 8(3) of the Takeover Regulations, Noticee was required to make yearly disclosure within 30 days from the financial year ending March 31, to stock exchanges on which the shares of the company were listed, the changes, if any, in respect of the holdings of the persons referred to under sub regulation (1) and also holdings of promoters or person(s) having control over the company as on 31st March.
11. With regard to the disclosures for the financial years 1997-98 to 2007-08, I find that the Noticee vide its reply dated May 09, 2014 has *inter alia* submitted that the erstwhile management had failed to comply with the continuous disclosure requirement under Regulation 8(3) of the 1997 Takeover Regulations with CSE. The Noticee, I find, has *inter alia* further stated that such show cause notice ought to have been issued to the erstwhile management as the new management has no part to play on a matter of non compliance which has taken place long back. I do not agree with the said contention of the Noticee. When a company is incorporated, it becomes a legal personality which is separate from its promoters, directors and its shareholders. This separate legal personality has its own legal rights and obligations, just as individuals. Under Regulation 8(3) of the Takeover Regulations, it was the company which was required to make certain disclosures within the stipulated time, which it failed to make. I find that the Noticee has not disputed the said fact.
12. Further, I also note that the Noticee has stated that the company does not have mens rea or guilty mind to not comply with any of the statutory provisions. In the matter, unless there is something in the language of the statute indicating the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred. I further find that the Noticee has submitted that CSE was not functioning for a long time and that trading of shares in companies listed with it was

also not taking place during the relevant time. I, however, find that CSE was functional till April 04, 2013, when it had to temporarily suspend its on-line trading platform viz. “C-Star” in compliance with SEBI’s Notice u/s Section 12A of Securities Contracts (Regulations) Act, 1956 for non-compliance with Regulation 3 of Securities Contracts (Regulations) Stock Exchanges and Clearing Corporations) Regulations, 2012 (SECC Regulations 2012). The Noticee has also stated that the show cause against the company is barred by limitation. I, however, find that under the SEBI Act there is no limitation on initiation of adjudication proceedings for violation of various provisions of Act and Regulations made thereunder. Further, the provisions of Limitation Act apply only to proceeding in Courts and have no application to Quasi Judicial Bodies, notwithstanding the fact that such bodies may be vested with certain specified powers conferred on Courts under the Civil or Criminal Procedure.

13. I find from the above that the Noticee has specifically admitted to have failed to comply with the continuous disclosure requirement under Regulation 8(3) of the Takeover Regulations. Thus, it is established without doubt that the Noticee has violated the provisions of Regulation 8(3) of the Takeover Regulations for the financial years from 1997-98 to 2007-08. The respective number of days of non-compliance in respect of each financial year has been enumerated in the table at Para 4 above.
14. 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...”*. Further in the matter of *Ranjan Varghese v. SEBI* (Appeal No. 177 of 2009 and Order dated April 08, 2010), the Hon’ble SAT had observed *“Once it is established that the mandatory provisions of Takeover Code was violated the penalty must follow.”*

15. 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, which reads as under:

Section 15A(b) after SEBI (Amendment Act), 2002 w.e.f 29-10-2002

Penalty for failure to furnish information, return, etc.-

15.A(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.*

Section 15A(b) prior to SEBI (Amendment Act), 2002

Penalty for failure to furnish information, return, etc.-

15.A(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 not exceeding five thousand rupees for every day during which such failure continues.*

16. While determining the quantum of monetary penalty under Section 15A(b), I have considered the factors stipulated in Section 15-J 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.”

17. In view of the charges as established, the facts and circumstances of the case and the judgments referred to and mentioned hereinabove, the quantum of penalty would depend on the factors referred in Section 15-J of SEBI Act and stated as above. The main

objective of the Takeover Regulations is to afford fair treatment for shareholders who are affected by the change in control. The Regulation seeks to achieve fair treatment by *inter alia* mandating disclosure of timely and adequate information to enable shareholders to make an informed decision and ensuring that there is a fair and informed market in the shares of companies affected by such change in control. Correct and timely disclosures are also an essential part of the proper functioning of the securities market and failure to do so results in preventing investors from taking well-informed decisions. Thus, the cornerstone of the Takeover regulations is investor protection.

18. As per Section 15A(b) of the SEBI Act, with effect from 29.10.2002, the Noticee is liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less. Prior to the same, the Noticee is liable to a penalty not exceeding five thousand rupees for every day during which such failure continues. Further, under Section 15-I of the SEBI Act, the adjudicating officer has to give due regard to certain factors which have been stated as above while adjudging the quantum of penalty. It is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of such non-compliance by the Noticee. Further from the material available on record, it is not possible to ascertain the exact monetary loss to the investors on account of non-compliance by the Noticee.
19. I further note that the Hon'ble Securities Appellate Tribunal (SAT) in the matter of Komal Nahata Vs. SEBI (Date of judgment- January 27, 2014) has observed that:
“Argument that no investor has suffered on account of non disclosure and that the AO has not considered the mitigating factors set out under Section 15J of SEBI Act, 1992 is without any merit because firstly penalty for non compliance of SAST Regulations, 1997 and PIT Regulations, 1992 is not dependent upon the investors actually suffering on account of such non disclosure.”
In view of the same, the argument put forth by the Noticee that there is no investor or investor group alleging any loss is not relevant for the given case.

20. In addition to the aforesaid, I am also inclined to consider the following mitigating factors while adjudging the quantum of penalty: a) the paid-up capital/ market capitalization of the company at the relevant point of time; b) the trading volumes of Noticee's shares on CSE during the relevant period; c) the changes in promoters shareholding, if any during the relevant period; and d) the number of occasions in the instant proceeding that the Noticee has violated the relevant provisions of the Takeover Regulations.
21. From the letter of Offer, I note that the paid-up capital of the Noticee before August 14, 2002 was 49,000 equity share of Rs. 10/- each aggregating Rs.4,90,000/-. I further note from a perusal of the letter of Offer that 1,000 shares were allotted on August 14, 2002 to the promoters on preferential basis to comply with the provisions Companies (Amendments) Act, 2000, which prescribed that every public limited company shall have minimum paid up capital of Rs. 5,00,000/-. Thus with effect from August 14, 2002, the paid-up capital of the Noticee was 50,000 equity share of Rs. 10/- each aggregating Rs.5,00,000/-. I further note that 42,147 shares, i.e. 84.29% of the paid-up capital was held by promoters from 1997-98 to 2001-02. On preferential allotment of 1,000 shares, the promoters holding became 43,147 shares i.e. 86.29% of the paid-up capital and continued as such from 2001-02 to 2003-04. The holding increased to 86.69% in 2004-05 and continued as such upto the period of non-disclosure. The number of public shareholders of the Noticee as per the letter of Offer were only 73. During the period of non-disclosure, I note that the change in promoters holding was largely due to transmission of shares, preferential allotment of 1,000 shares and open market acquisition of 200 shares. The letter of Offer further states that there was no trading in the shares for a very long time period. I find that the Noticee had not made the disclosure to the exchange under the provisions of Regulation 8(3) of the Takeover Regulations on 11 occasions during the period from 1998 to 2008 within the stipulated time.

22. As a listed company, the Noticee had a responsibility to comply with the disclosure requirements in accordance with their spirit, intention and purpose so that the investors could take a decision whether to buy, sell, or hold the Noticee's securities. Non-compliance/ Delayed compliance with disclosure requirements by a listed company undermines the regulatory objectives and jeopardizes the achievement of the underlying policy goals.

ORDER

23. After taking into consideration all the facts and circumstances of the case, I impose a penalty of **Rs 5,00,000/- (Rupees Five Lakh only)** under Section 15 A(b) on the **Noticee M/s. Ethelbari Tea Company Limited** which will be commensurate with the violations committed by the Noticee.
24. The Noticee 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 should be forwarded to Shri V S Sundaresan, Chief General Manager, Corporation Finance Department, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.
25. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to the Securities and Exchange Board of India.

Date: June 27, 2014
Place: Mumbai

Anita Kenkare
Adjudicating Officer