

**BEFORE THE ADJUDICATING OFFICER**  
**SECURITIES AND EXCHANGE BOARD OF INDIA**  
**[ADJUDICATION ORDER NO.: - PG/AO/AA/94/2013]**

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**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**

**Against**

**Shri Pradip Kumar Khaitan  
PAN : AFYPK7991R**

**In the matter of  
M/s Suzlon Energy Limited**

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**BRIEF FACTS OF THE CASE:**

1. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') investigated into various price sensitive disclosures made by M/s Suzlon Energy Limited (hereinafter referred to as '**Suzlon/the company**') for the period of November 3, 2009 and December 2, 2009.
2. During the course of investigation it was observed that Suzlon had amended its code of internal procedures and conduct for prevention of insider trading for listed companies ("**Code of Conduct**") in line with amendments in SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as "**PIT Regulations**")

notified on November 19, 2008 only on February 4<sup>th</sup>, 2011 i.e. after a delay of more than 2 years. Further no mechanism for pre-clearance of trades was incorporated in the Code of Conduct despite being mandated by the PIT Regulations.

3. It was alleged that the Code of Conduct was to be implemented under the overall supervision of the Board of Directors of Suzlon (hereinafter referred to as “**the Board**”). Shri Pradip Kumar Khaitan (hereinafter referred to as “**the Noticee**”), was a Non-Executive Independent Director of the Company during the relevant period. As a member of the Board, the Noticee was also allegedly responsible for the delay in amendment and implementation of the Code of Conduct. As a result of this delay, the Board, including the Noticee, was alleged to have violated Clause 1.2 of Model code of Conduct in Part A, Schedule I provided under Regulation 12(1) of the PIT Regulations and was therefore liable for monetary penalty under section 15HB of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “**SEBI Act**”).

### **APPOINTMENT OF ADJUDICATING OFFICER**

4. The undersigned was appointed as the Adjudicating Officer vide order of SEBI dated April 17, 2012 under section 15-I of the Act read with rule 3 of SEBI (Procedure for holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the **Adjudicating Rules**) to inquire into and adjudge under Section 15HB of the Act, the alleged violation of the provisions of Clause 1.2 of Model code of Conduct in Part A, Schedule I provided under Regulation 12(1) of the PIT Regulations.

## **SHOW CAUSE NOTICE, REPLY AND HEARING**

5. A show cause notice (hereinafter referred to as SCN) in terms of the provisions of Rule 4(1) of the Adjudicating Rules was issued to the Noticee on June 19, 2012 seeking reply of the Noticee as to why an inquiry should not be held against him in respect of the violations alleged to have been committed by him.
6. In response to the said SCN, Authorised Representative of the Noticee vide letter dated June 27, 2012 sought extension of time till September 10, 2012 to file a reply. An extension upto July 31, 2012 was granted to Noticee for filing his reply.
7. Authorised Representative of the Noticee again vide letter dated July 26, 2012 sought extension of time till August 31, 2012 to file a reply. In the said letter it was submitted that the Noticee has ceased to be a Director of Suzlon with effect from April 28, 2011 and that the Noticee has neither committed any default nor has violated any of the provisions as alleged.
8. The Noticee submitted a detailed reply vide letter dated July 31, 2012 and desired a personal hearing in the matter. The Noticee's main submissions in respect of the charges in the SCN are given as under :
  - *" I respectfully state and submit that the Notice proceeds on the incorrect assumption that I was present in the Board meetings on 31 July 2009, 29 May 2010, 13 August 2010 and 4 February 2011 when the issue of change in Code of Conduct was discussed. This will be evident from the Constitution of Board alongwith the Directors attending the meeting during the relevant period which is enclosed as Annexure IV of the said Notice. The fact that I did not attend and*

*was not present at the Board Meetings held on 31 July 2009, 29 May 2010, 13 August 2010 and 4 February 2011 has also been confirmed by Mr. Hemal Kanuga on behalf of the Company in his mail dated 28 July 2012 upon a specific request being made by Khaitan & Co on my behalf. ....*

- I was a Non-Executive Independent Director of the Company during the period 25 August 2004 to 28 April 2011. During the said relevant period as non-Executive Independent Director of the said Company, I had nothing to do with the day to day management of the said company or its affairs or any of its departments nor I had control over or knowledge of day to day working and management of the affairs of the Company nor was I in charge of or responsible to the Company for the conduct of its day to-day business in any manner. As a non-Executive Independent Director I used to participate, whenever possible, in the meetings of the board of directors of the Company. I had nothing to do with any of the alleged activities or violation which are the subject matter of the aforesaid Notice. Consequently I did not have any knowledge of the alleged contravention.*

- ..... it is well settled that simply because a person is a director of a Company, for this reason alone no proceedings could be initiated or held against him under the aforesaid provisions. There is no evidence to show that there was any act committed by me from which a reasonable inference could be drawn implicating me for the alleged contravention in any manner whatsoever. It is now well settled that only when it is established that a director was actually responsible for the affairs of the Company that a director can be said to be liable and not otherwise. In this connection reference may kindly be made, inter alia, to the following cases:*

1. G. L. Gupta -vs- D. N. Mehta (AIR 1971 S.C. 2162)
2. B.P. Khaitan -vs- Special director, Enforcement Directorate 1977 Cr. L.J. 1821 (Cal.).

• *In the aforesaid Calcutta High Court judgement the Hon'ble Court was pleased to hold, inter alia, that in order to be made vicariously liable, the person must be shown to have been a person who was in charge of or was responsible to the Company for the conduct of the business of the Company. A director simplicitor as such cannot be said to be the person who was in charge of and was responsible to the Company for the conduct of its business.*

• *In the premises I could not be made or held liable or responsible for the alleged contravention the said provisions. I further state and submit that none of the conditions precedent for invoking the aforesaid provisions of the Act, Rules and/or the Regulations mentioned above have been or are satisfied and/or fulfilled in the case and, therefore, none of the said provisions could be applied and/or made applicable. ....*

• *..... Requirements of mens rea or actual act of commission or omission by the person charged with violation of the said provisions of the said Act, Rules and/or Regulations are essential. The conditions precedent for invoking the said provisions against me have not been or cannot be satisfied. I respectfully state and submit that the contravention, if at all any, had taken place without my knowledge or consent or connivance and the same was not attributable to any negligence on my part....."*

9. In the interest of natural justice and in order to conduct an inquiry as per rule 4 (3) of the Rules, the Noticee was granted an opportunity of personal hearing before me on August 8, 2012. The Noticee attended the said hearing through his authorized representatives (hereinafter referred to as the 'AR') and reiterated the submission made in the reply dated July 31, 2012. It was emphasized that the Noticee did not attend the Board meetings in which the issue was considered. AR also submitted copies of the following judgments in support of his contention:
- i. M/s Vijay Remedies Ltd. & Ors v. SEBI (Appeal No. 49 of 2003 decided on February 11, 2005)
  - ii. G. L. Gupta -vs- D. N. Mehta (AIR 1971 S.C. 2162)
  - iii. B.P. Khaitan -vs- Special director, Enforcement Directorate 1977 Cr. L.J. 1821 (Cal.).
10. After the hearing, the Noticee again vide letter dated August 10, 2012 submitted, inter alia, that *"In the course of personal hearing, from the submissions made on behalf of SEBI as also from the Record of Hearing, it transpires that the scope and purport of the aforesaid show cause notice is being sought to be completely changed by contending that certain factual allegations made in the said show cause notice were inadvertently included. It further transpired that vicarious liability is sought to be invoked by SEBI for fastening liability on me notwithstanding my not having attending any Board meeting at which the relevant agenda was considered. While maintaining that such an attempt is legally untenable and impermissible, I pray and submit that the moment the assumption on the basis of which the said show cause notice has been issued is removed nothing survives in the present proceedings and the show cause notice is liable to be and should be dropped and/or quashed and/or rescinded...."*

11. Noticee vide letter dated August 22, 2012 further submitted that "*..... mens rea or guilty intention becomes and is relevant for the purpose of deciding whether there has been any breach of the provisions of the Act as alleged which are quasi criminal in nature. I further state and submit that even in the case of breach of civil obligation or civil liability provisions, the principles of mens rea have relevance while determining the quantum of penalty to be imposed which is discretionary. Such discretion is required to be exercised judiciously. In the appropriate cases such as the present one penalty may not be imposed at all. Existence of special and attenuating circumstances or factors as mentioned in my earlier reply justify the waiver of penalty. I further submit that your honour is not required or obliged to impose penalty, much less maximum penalty, under all the circumstances. Absence of malafides or malafide intention in the alleged infraction of the relevant provisions is relevant on the question of quantum of penalty. Thus, lack of mens rea or guilty intention, as in the present case, is a relevant consideration in determining the quantum of penalty. Your honour has discretion while determining the quantum of penalty even in those cases where mens rea is not essential for fixing the civil liability. Such discretion, in my respectful submission, is required to be exercised judiciously.*"
12. To further support his argument, the Noticee in the letter dated August 22, 2012 referred to cases of *Shanti Prasad Jain v. Director of Enforcement* (AIR 1962 S.C. 1764), *Hindustan Steel Ltd. v. State of Orissa* {(1972) 83 I.T.R. 26 (S.C.)} and *Bharjatiya Steel Industries v Commissioner of Sales Tax, U.P.* {(2008) 11 SCC 617}.

## **CONSIDERATION OF ISSUES AND FINDINGS:**

13. I have carefully perused the charges against the Noticee mentioned in the SCN, the submissions of the Noticee and the documents available on record. The issue that arises for consideration in the present case is stated and determined, as follows:

- **Whether the Noticee has violated Clause 1.2 of Model code of Conduct in Part A, Schedule I provided under Regulation 12(1) of the PIT Regulations?**

14. Before proceeding to decide the above issue, it is important to have a look at the abovementioned provisions as they existed at the relevant time, which interalia are reproduced below.

### ***PIT Regulations***

#### ***“Code of internal procedures and conduct for listed companies and other entities.***

*12. (1) All listed companies and organisations 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 organisations recognised or authorised by the Board;*

*(c) the recognised 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.”*

***Model Code of Conduct, Schedule I, Part A under Reg. 12(1) of PIT Regulations***

*1.0 Compliance Officer*

*1.1 ...*

*1.2 The compliance officer shall be responsible for setting forth policies, procedures, monitoring adherence to the rules for the preservation of “Price Sensitive Information”, pre-clearing; of designated employees’ and their dependents’ trades (directly or through respective department heads as decided by the company), monitoring of trades and the implementation of the code of conduct under the overall supervision of the Board of the listed company.”*

15. Suzlon, as a listed company, was required to comply with the PIT Regulations and accordingly had to implement code of Conduct as required by Regulation 12(1) of the PIT Regulations. The PIT Regulations were amended and the amendments were notified in official gazette on November 19, 2008. Accordingly, Suzlon was required to amend its code of conduct in line with the amendments in PIT Regulations. However, Suzlon implemented the amended Code of Conduct only on February 4<sup>th</sup>, 2011, which is more than 2 years after the notification. This huge delay occurred in spite of Suzlon’s Board of Directors being aware about the changes in PIT Regulations. The Board was informed about the changes in the PIT regulations in the meeting dated July 31, 2009 by Mr. Sundar

Rajagopalan, who was the President (Legal) and General Counsel of Suzlon. The Board unduly delayed the implementation of revised Code of Conduct by deferring the matter when it was listed as agenda item in the Board meetings dated May 29, 2010 and August 13, 2010 and the code was subsequently passed in the board meeting dated February 4, 2011.

16. It is clear from the material available on record that the Board was aware of the requirement to implement a new code of conduct and in spite of this, the Board deferred the deliberation on the code of conduct for two meetings. Thus, it is clear that Suzlon delayed the implementation of new code of conduct. As per Clause 1.2 of Model code of Conduct in Part A, Schedule I provided under Regulation 12(1) of the PIT Regulations, the compliance officer is responsible for implementation of Code of conduct under the overall supervision of the Board. In the present matter it is clear that the Board, by delaying the implementation, has acted in violation of the above mentioned provision.
17. The Noticee in his reply and during personal hearing put forward various contentions and it was emphasized that the Noticee did not attend the Board meetings in which the issue was considered.
18. I note that the Noticee was admittedly Non-Executive Independent Director of the Company during the period August 25, 2004 to April 28, 2011. The Board of Suzlon, after granting approval for drafting a new code of conduct, was supposed to discuss it in the meeting held on May 29, 2010. The time period between authorization for drafting a new code and discussing it is nearly 10 months, which appears to be excessive. However, the new code of conduct could not be discussed by the Board on May 29, 2010 and it was kept in

abeyance. The said draft was supposed to be considered again in the meeting dated August 13, 2010, but even in this meeting the issue could not be discussed. Finally, the draft was considered and approved in the meeting held on February 4, 2011 which was after more than 2 years of amendment of PIT Regulations.

19. I have perused the papers relating to the Board of directors of Suzlon at the time of relevant Board meetings i.e. from November 19, 2008 till February 4, 2011. I note that the Noticee's name figured in the list of the Board of Directors of Suzlon in all the four relevant meetings when the issue of change in the code of conduct was to be discussed. However, it is observed from the details of Board meeting attendance provided by Suzlon that the Noticee did not attend these four Board meetings.
20. The Hon'ble Securities Appellate Tribunal in the case of *N. Narayanan v. The Adjudicating Officer, SEBI* (Appeal No. 29 of 2012 decided on October 5, 2012) while commenting on the role of directors, had observed that *"With the changing scenario in the corporate world the concept of corporate responsibilities is also rapidly changing day by day. The director of a company cannot confine himself to lending his name to the company but taking light responsibility for its day to day management. While functions may be delegated to professionals, the duty of care, diligence, verification of critical points by directors cannot be abdicated. The directors are expected to have a hands on approach in the running of the company and take up responsibility not only for the achievements of the company but also the failings thereto."*
21. Thus the role of director and the responsibilities attached to that position in a listed company cannot be underestimated. Even though

the Noticee was a Non-executive Independent Director of the Company and not involved in day to day management, it was expected from him to oversee the functioning of the company. As the Noticee was not present in any of the four Board Meetings dealing with the issue of change in the code of conduct, it would be difficult for the Noticee to monitor this issue. Although the entire Board of the company is responsible for the delay of over 2 years in the implementation of the code of conduct, it would be difficult to attribute the said delay on the Noticee. Thus, I am of the opinion that the Noticee can be given benefit of doubt for the delay caused in implementation of code of conduct by Suzlon.

22. In view of the above observations, findings and material on record I conclude that the allegation of violation of Clause 1.2 of Model code of Conduct in Part A, Schedule I provided under Regulation 12(1) of the PIT Regulations by the Noticee is not proved.

### **ORDER**

23. In view of the foregoing, the alleged violation of the provisions of PIT Regulations by the Noticee, as specified in the SCN dated June 19, 2012 does not stand established and the matter is, accordingly, disposed of.
24. In terms of the Rule 6 of the Adjudicating Rules, copies of this order are sent to the Noticee and also to Securities and Exchange Board of India.

**Date: September 30, 2013**  
**Place: Mumbai**

**PIYOOSH GUPTA**  
**ADJUDICATING OFFICER**