BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. AK/AO- 207 /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. N Kumar Housing & Infrastructure Pvt. Ltd. (PAN.AABCN9938J)

In the matter of
M/s. Indo Pacific Software & Entertainment Ltd.

FACTS OF THE CASE

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') observed that as per the shareholding pattern filed by M/s. Indo Pacific Software & Entertainment Ltd. (hereinafter referred to as **'Indo Pacific**'/ '**the company'**) with the Bombay Stock Exchange Limited (hereinafter referred to as '**BSE**') for the quarter ended December 31, 2009 and quarter ended March 31, 2010, the promoter shareholding had increased from 68.81% in December 2009 to 71.29% in March 2010.

2. It was observed that the aforesaid increase in shareholding was due to open-market purchase of three promoter group entities, viz. M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd. during the aforesaid period. It was further observed that the said promoters had failed to make the relevant disclosure under regulation 7(1A) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **'Takeover Regulations'**) for the aforesaid acquisitions within the prescribed time. The aforesaid entities have since been amalgamated in M/s. N Kumar Housing & Infrastructure Pvt. Ltd. (hereinafter referred to as **'the Noticee**') by order of the Hon'ble High Court dated January 21, 2011.

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned was appointed as Adjudicating Officer vide order dated December 6, 2013 under Rule 4 of the Rules read with sub-section (2) of Section 15-I of SEBI Act and 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 the alleged violations of Regulations 7(1A) read with 7(2) of the **Takeover Regulations**.

SHOW CAUSE NOTICE, HEARING AND REPLY

4. A show cause notice (hereinafter referred to as '**SCN**') EAD-6/AK/VG/17343/2014 dated June 18, 2014 was issued to M/s. N Kumar Housing & Infrastructure (the Noticee) under Rule 4 of the Rules. The Noticee was called upon to show cause as to why an inquiry should not be initiated against him and penalty be not imposed under Section 15 A(b) of the SEBI Act for the alleged violations. However, no reply was received from the Noticee. In order to proceed with the matter, vide hearing notice dated July 2, 2014, the Noticee was granted an opportunity of personal hearing on July 14, 2014. The Noticee vide letter dated July 05, 2014 submitted that since their company officials were travelling they required time till July 12, 2014 to file their reply. The said request of the Noticee was acceded to and vide email dated July 7, 2014, the Noticee was granted an extension of time till July 12, 2014 to file a reply to the SCN.

5. The Noticee filed their reply vide letter dated July 10, 2014. Vide the said letter, the Noticee has *inter alia* submitted as follows:
   a) *That the three companies viz. M/s. Splashy Securities Ltd., M/s. Aihar Investment Pvt. ltd. and M/s. Ritesh Securities Ltd. (hereinafter referred to as **'the transferor companies'**), who acquired the shares of Indo Pacific/ the company stand amalgamated, inter alia, with the Noticee vide scheme of amalgamation under Section 391 and 394 of the Companies Act, 1956 before the Hon'ble High Court of Bombay, Nagpur Bench. The said scheme was sanctioned by the Hon'ble High Court on January 21, 2011 by which all transferor companies were amalgamated with the Noticee and the appointed dated was April 1, 2010;*
   b) *That the shares acquired by the aforesaid three transferor companies were before the appointed date of amalgamation;*

c) *That the transferor companies were liable for the acts done by them prior to the "appointed dated" of amalgamation i.e. April 1, 2010 as provided in the scheme. Hence the Noticee being the 'transferee company' should not be held liable for any violation / non compliance by the any transferor company/(ies);*

d) *That the acquirer companies stand dissolved upon the scheme of amalgamation becoming effective from February 11, 2011 and hence ceased to exist in the eyes of law;*

e) *That the Noticee had no knowledge about the activities of the transferor companies prior to the amalgamation, it was only through SEBI SCN dated June 18, 2014 they the Noticee learnt about the acquisition of shares and alleged violations;*

f) *That the shares of Indo Pacific/ the company were not actively traded on the stock exchange, hence no public interest was affected out of alleged violation / non compliance;*

g) *that there was, thus, no violation on part of the Noticee and therefore, no monetary penalty should be imposed on them.*

6. Thereafter, the Noticee was granted an opportunity for personal hearing on August 22, 2014. Mr. Nandkumar Harchandani, Authorized Representative (hereinafter referred to as AR) of the Noticee appeared on their behalf. The Noticee reiterated the submission made in reply dated July 10, 2014 of the Noticee. The AR while admitting the violation of regulation 7(1A) read with 7(2) of Takeover Regulation submitted that the acquisition was due to amalgamation of the three transferor companies viz. M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd. into the Noticee vide their scheme of amalgamation.

7. Vide letter dated August 27, 2014, the Noticee submitted that it had never received any notice from SEBI in the past. The Noticee also enclosed a copy of the Application and Order of the Hon'ble High Court of Bombay, Nagpur Bench approving the Scheme of Amalgamation under which *inter alia M/s.* Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd. were amalgamated into the Noticee.

CONSIDERATION OF ISSUES

8. I have carefully perused the written submissions of the Noticee and the documents available on record. I observe that the allegation is that M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd., who have been amalgamated into the Noticee company, did

not comply with the provisions of Regulation 7(1A) read with 7(2) of the Takeover Regulations within the stipulated time with respect to their acquisitions in Indo Pacific/ the company.

9. The issues that, hence, arise for consideration in the present case are :
   a. Whether M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd., who have been amalgamated into the Noticee company, did not comply with the provisions of Regulation 7(1A) read with 7(2) of the Takeover Regulations within the stipulated time in respect of their acquisitions in Indo Pacific/ the company during the quarter ended March 2010?
   b. Does the violation, if any, attract monetary penalty under Section 15 A(b) of SEBI Act?
   c. 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

10. Before moving forward, it is pertinent to refer to the relevant provisions of the Takeover Regulations, which read as under:

Acquisition of 5 per cent and more shares or voting rights of a company.

7.(1)…

(1A) *Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, or under second proviso to sub-regulation (2) of regulation 11 shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.*

Explanation.—For the purposes of sub-regulations (1) and (1A), the term acquirer' shall include a pledgee, other than a bank or a financial institution and such pledgee shall make disclosure to the target company and the stock exchange within two days of creation of pledge.

(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.

11. I note that for the quarter ended December 31, 2009 and quarter ended March 31, 2010 the promoter shareholding of Indo Pacific/ the company increased from 68.81% in December 2009 to 71.29% in March 2010. The increase in shareholding was due to open market purchase of following three entities:

Acquirer	Date of Acquisition	Pre-acquisition Shareholding	Shares Acquired	Post Acquisition share holding
M/s. Splashy Securities Pvt. Ltd.	25.02.2010	26,63,780 (2.65%)	2,50,000 (0.25%)	29,13,780 (2.90%)
M/s. Aihar Investment Pvt Ltd.	25.02.2010	29,78,400 (2.96%)	12,38,469 (1.24%)	42,16,869 (4.20%)
M/s. Ritesh Securities Ltd.	10.03.2010	40,00,000 (3.98%)	9,96,299 (0.99%)	49,96,299 (4.97%)

12. The aforesaid three entities have been amalgamated into the Noticee company viz. M/s. N Kumar Housing & Infrastructure Pvt. Ltd. The compliance under Regulation 7(1A) read with 7(2) of the Takeover Regulations for the above transactions are observed to have been done with a delay as per details given hereunder:

Acquirer	Due Date of compliance	Actual Date of compliance	Delay (in number of days)
M/s. Splashy Securities Pvt. Ltd.	27-02-2010	30-09-2013	1,313
M/s. Aihar Investment Pvt. Ltd.	27-02-2010	30-09-2013	1,313
M/s. Ritesh Securities Ltd.	12-03-2010	30-09-2013	1,297

13. Regulation 7(1A) states that any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, or under second proviso to sub-regulation 2 of regulation 11 shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale. Regulation 7(2) states that the disclosures should be

made within two days of the receipt of intimation of allotment of shares or the acquisition of shares or voting rights, as the case may be. As per the details mentioned in the tables at Paras 11 and 12 above, I observe that M/s. Splashy Securities Pvt. Ltd. bought 2,50,000 (0.25%) shares of Indo Pacific/ the company on February 25, 2010, M/s. Aihar Investment Pvt Ltd. purchased 12,38,469 (1.24%) shares of Indo Pacific/ the company on February 25, 2010 and M/s. Ritesh Securities Ltd. bought 9,96,299 (0.99%) shares of Indo Pacific/ the company on March 10, 2010. Thus, the cumulative acquisition of the aforesaid entities was 2.48% and in the same financial year. Prior to the purchases, the shareholding of the Promoter group stood at 68.81% and rose to 71.29% post acquisition.

14. Since the cumulative holding of the promoters was above 55% of the shares of the company, it fell within the ambit of Regulation 11(2). SEBI had inserted second proviso to Regulation 11(2) with effect from October 21, 2008, *inter alia*, permitting an acquirer holding shares more than 55% in a target company to acquire additional shares or voting rights entitling him upto 5% shares/voting rights in the target company subject to certain conditions stipulated therein. Pursuant the amendment of Regulation 7(1A), with effect from November 6, 2009, the requirements thereunder also apply to acquisitions made under the second proviso to Regulation 11(2). I note that the acquisitions herein occurred after the insertion of the second proviso to Regulation 11(2) and subsequent to amendment of Regulation 7(1A) of the Takeover Regulations.

15. The purchase was for a total of 2.48 % of the shares of the company, hence, disclosures ought to have been made under Regulation 7(1A) read with 7(2) within two days. However, the disclosures were made by the transferor companies M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd., who have been amalgamated into the Noticee company, with delays as mentioned in the table at Para 12 above. I note that the Noticee has admitted to the delay in complying with the provisions of Regulation 7(1A) of the Takeover Regulations within the stipulated time for the transactions referred to above. The numbers of days of non-compliance in respect of the same have been enumerated in the table at Para 12 above.

16. However, I note that the Noticee has submitted that the transferor companies, i.e. M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd., were liable for the acts done by them prior to the "appointed dated" of amalgamation i.e. April 1, 2010 as

provided in the scheme. Hence the Noticee being the transferee company should not be held liable for any violation / non compliance by the transferor companies. The Noticee has also stated that they had no knowledge about the activities of the transferor companies prior to the amalgamation, it was only through SEBI letter dated June 18, 2014 that they learnt about the acquisition of shares and alleged violations.

17. I am unable to accept this contention of the Noticee. This is because I note from Para 7 of the Scheme of Amalgamation submitted by the Noticee, pursuant to the personal hearing, that as per the same, on and from the Appointed Date, all suits, actions and legal proceeding by or against the Transferor Companies shall be continued and/or enforced by or against the Transferee Company as effectually and in the same manner and to the same extent as if the same had been instituted and/ or pending and/ or arising by or against the Transferee Company. Furthermore, it is also the basic principle whereby an Amalgamated company takes over the assets & liabilities of the amalgamating companies. In such a case, the Noticee cannot escape liability.

18. 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*."

19. 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:

Penalty for failure to furnish information, return, etc.

15A.*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 therefore in the regulations, fails to file return or furnish the same within the time specified therefore 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.

20. While determining the quantum of monetary penalty under Section 15 A(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."

21. 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. It is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of such default by the Noticees. Further from the material available on record, it may not be possible to ascertain the exact monetary loss to the investors on account of default by the Noticees. However, the main objective of the Takeover Regulations is to afford fair treatment for shareholders who may be 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 decision. Thus, the cornerstone of the Takeover regulations is investor protection.

22. As per Section 15A(b) of the SEBI Act, the Noticees are liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less. Further, under Section 15-J 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 Noticees. 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 Noticees.

23. However, I note that the Hon'ble Securities Appellate Tribumal (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."* I further also note that the Hon'ble SAT in *Ashok Jain V. SEBI* (*Appeal no. 79 of 2014 decided on June 09, 2014*), had also observed that: "..... *Under SAST Regulations, 1997 as also under SAST Regulations, 2011, disclosures are liable to be made within specified days irrespective of the scrip being traded on the Exchange or not. Similarly, disclosures have to be made irrespective of whether investors have suffered any loss or not on account of non disclosure within the time stipulated under those regulations..."*

In view of the same, the argument put forth by the Noticee that as the shares of Indo Pacific/ the company were not actively traded on the stock exchange, hence no public interest was affected out of alleged violation / non compliance is not relevant for the given case.

24. 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 the Company's shares on the exchange, where the shares were listed, during the relevant period; and c) the number of occasions in the instant proceeding that the Noticees have violated the relevant provisions of the Takeover Regulations.

25. The paid up capital of Indo Pacific was 10,05,08,000 Equity Shares of Re. 1/- each aggregating to Rs. 10,05,08,000. The market capilization of the company during the relevant period was approx. Rs. 40 crore. I find that that M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd., who have been amalgamated into the Noticee company, made delayed disclosures under the provisions of Regulation 7(1A) read with 7(2) of the Takeover Regulations on one occasion.

26. As Promoters of a listed company, M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd., who have been amalgamated into the Noticee company, had a responsibility to comply with the disclosure requirements in accordance with their spirit, intention and purpose. Non-compliance/ Delayed compliance with disclosure requirements by a listed company and/ or its promoters undermines the regulatory objectives and jeopardizes the achievement of the underlying policy goals.

ORDER

27. After taking into consideration all the facts and circumstances of the case, I impose under Section 15 A(b) of SEBI Act, 1992 a penalty of **Rs.3,00,000/- (Rupees Three Lakh only)** on the Noticee company **M/s. N Kumar Housing & Infrastructure Pvt. Ltd.** (in whom M/s. Splashy Securities Pvt. Ltd., M/s. Aihar Investment Pvt. Ltd. and M/s. Ritesh Securities Ltd. have been amalgamated), for the violation of Regulations 7(1A) read with 7 (2) of the Takeover Regulations, which will be commensurate with the violations committed by it.

28. 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.

29. 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: October 27, 2014 **Anita Kenkare**
Place: Mumbai **Adjudicating Officer**