

BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PKB/AO-37/2011]

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 Mahesh Kothari

(PAN - AACPK2951Q)

In the Matter of: Alka Securities Limited

BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as “SEBI”) observed a sudden spurt in the price and trading volumes in the shares of Alka Securities Limited (hereinafter referred to as “**the Company**”). It was observed that large volume of off market transfers in the shares of the Company were executed and on many occasions the Promoters of the Company were also involved in the off market transfers and these shares were subsequently traded at Bombay Stock Exchange (hereinafter referred to as “BSE”).
2. SEBI conducted detailed investigations in respect of dealings in the scrip of the company during the period from September 2008 to July 2009 (hereinafter referred to as the “**investigation period**”). On analysis of the beneficial owner accounts of the promoters in the depository system and information obtained from Registrar & Share Transfer Agent [Purva Sharegistry (India) Pvt. Ltd.], it was observed that the shareholding pattern disclosed by the Company to BSE was significantly different from the actual shareholding, particularly with respect to the promoters.
3. It was observed that during the investigation period, Shri Mahesh Kothari, (hereinafter referred to as the “**Noticee**”) had sold/transferred 15,00,000 shares of the Company; details of which are as follows:

Mahesh Kothari

Date	Sold/transferred	% of the paid up Capital	Violations observed SAST/PIT
25-Mar-2009	15,00,000	3%	7(1A)/13(4)

4. It was observed that the Noticee dealt substantially in the shares of the Company, but failed to make disclosures as required under the SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as the “**PIT Regulations**”) and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (hereinafter referred to as the “**SAST Regulations**”). In view of the aforesaid it was alleged that the Noticee has violated the provisions of Regulation 13 (4) read with 13 (5) of SEBI (Prohibition of Insider Trading) Regulations, 1992, and Regulation 7 (1A) read with 7 (2) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997.
5. The undersigned was appointed as the Adjudicating Officer vide Order dated March 31, 2010 to inquire into and adjudicate under Section 15A(b) of the SEBI Act, 1992, the alleged violation of provisions of Regulation 13 (4) read with 13 (5) of PIT Regulations and Regulation 7 (1A) read with 7 (2) of SAST Regulations.

SHOW CAUSE NOTICE, HEARING & REPLY

6. A Show Cause Notice (hereinafter referred to as “**SCN**”) in terms of the provisions of Rule 4(1) of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as “**Adjudication Rules**”) was issued to the Noticee on July 15, 2010, calling upon him to show cause why an inquiry should not be held against him under Rule 4(3) of the Adjudication Rules for the alleged violations.
7. The Noticee vide letter dated July 20, 2010 acknowledged the receipt of the SCN and informed that he would be opting for consent proceedings in the matter. Subsequently, the Noticee filed the consent application with SEBI. However, as no reply was received from the Noticee, Notice of Inquiry dated January 20, 2011 was issued to the Noticee under Rule 4(3) of the Adjudication Rules vide which an opportunity of personal hearing was given to the Noticee which was scheduled for February 07, 2011. The Noticee was advised to submit his reply, if any, on or before the date of hearing and was also informed that notwithstanding application for consent order, the Adjudication

Proceedings would continue and the passing of the appropriate Adjudication Order would be kept in abeyance till the conclusion of consent proceedings.

8. The Noticee vide letter dated January 31, 2011 acknowledged the receipt of the Notice of Inquiry dated January 20, 2011 and submitted that *"Whole Time Member, Mr. Prashant Saran had passed an order in the matter dated 30 December 2010 and the said order deals with the same matter and clauses concerning the Show Cause Notice dated July 20, 2010"* and also requested for termination of the Adjudication Proceedings. Thereafter, vide letter dated February 02, 2011, the Noticee was informed that the Proceedings concluded by the Order of the Whole Time Member, Shri Prashant Saran dated December 30, 2010 as referred by him and the present Adjudication Proceedings initiated by the undersigned vide SCN dated July 15, 2010 were two separate and independent civil proceedings. Vide the said letter dated February 02, 2011, the Noticee was once again advised to appear before the undersigned for personal hearing on February 07, 2011 as previously informed vide Notice of Inquiry dated January 20, 2011 and to submit his reply, if any, on or before the aforesaid date of personal hearing.
9. Thereafter, vide letter dated February 07, 2011 the Noticee requested for 2-3 days time for filing of written reply and also requested for another opportunity of personal hearing. Vide letter dated February 08, 2011 the Noticee made certain submissions and stated that the Whole Time Member of SEBI had passed an order in the matter dated December 30, 2010 and that they cannot be vexed twice for the same allegations and based on the same set of facts. In this regard I note that in the aforesaid order dated December 30, 2010, the Whole Time Member of SEBI has, *inter-alia*, mentioned in paragraph 8 that Adjudication Proceedings against the Noticee have been initiated under and consequently, the issues raised in the same has not been dealt with in the order dated December 30, 2010. Para No. 8 of the order dated December 30, 2010 of the Whole Time Member states as below:

"8. I note that after the completion of the investigation, the charges finalized against Mahesh Kothari Shares & Stock Brokers Private Limited (hereinafter individually referred to as 'MKSSBPL') as broker have been referred to proceedings under intermediary regulations and proceedings against it for non compliance of summons have been initiated under Adjudication. I observe that Adjudication proceeding are also pending against Alka Pandey, Brijesh Kothari, Mahendra Pandey and Mahesh Kothari. It is noted that these charges have also germinated from the interim order dated July 28, 2009 as mentioned earlier which was later confirmed on October 16, 2009 under section 11(4) and 11(b). I am limiting my inquiry to the remaining charges brought out under the SCN dated August 31, 2010."

10. Hence, it is apparent that the proceedings concluded by order dated December 30, 2010 and the present Adjudication Proceedings are two separate and independent proceedings dealing with different allegations. Further, vide letter dated February 08, 2011 the Noticee reiterated his request for another opportunity of personal hearing. Accordingly, another opportunity of personal hearing was granted to the Noticee vide Notice of Inquiry dated February 15, 2011 and the Noticee was advised to attend the hearing on February 23, 2011. However, none appeared for the hearing on the scheduled date. Vide letter dated February 23, 2011, the Noticee requested for adjournment of the personal hearing *"to any day in the coming week"*. The Noticee's request for adjournment was duly considered and vide letter dated February 23, 2011 the Noticee was advised to appear for personal hearing on March 03, 2011. Subsequently, vide letter dated March 03, 2011, Mr. Sean Wassoodew, the Advocate of the Noticee, requested another date for personal hearing.
11. In the interest of natural justice and in order to conduct a fair inquiry, one last and final opportunity of personal hearing was granted to the Noticee vide Notice of Inquiry dated March 21, 2011 and the Noticee was advised to appear on April 07, 2011. However, on April 07, 2011, Mr. Anirban Tripathy, the Advocate of the Noticee submitted a letter dated April 06, 2011, wherein Shri Mahendra Pandey on behalf of the Company and all the promoters of the Company submitted that they had lost their office copy of reply dated February 08, 2011 in transit to their advocate's office and requested for a copy of the said reply dated February 08, 2011. Accordingly, on April 07, 2011, a copy of the reply dated February 08, 2011, along with all its annexures, as submitted by the Noticee, was handed over to Mr. Anirban Tripathy, the Advocate of the Noticee.
12. In this regard, I note that subsequent to the reply dated February 08, 2011, sufficient time and opportunities were given to the Noticee to appear for personal hearing and make further submissions in this matter in compliance with the principles of natural justice. I also note that in total, the Noticee was given four opportunities of personal hearing and the Noticee has failed to avail the opportunity on all occasions. I further note that till date, the Noticee has not made any further submissions before me. Therefore, I note that the principles of natural justice have been duly complied with. Subsequently, SEBI has also informed that the consent application of the Noticee has been rejected. Hence, I am proceeding with the inquiry taking into account the material available on record.

ISSUES FOR CONSIDERATION

13. After perusal of the material available on record, I have the following issues for consideration, viz.,

- A. Whether the Noticee has violated provisions of Regulation 13 (4) read with 13 (5) of PIT Regulations?
- B. Whether the Noticee has violated provisions of Regulation 7 (1A) read with 7 (2) of SAST Regulations?
- C. Whether the Noticee is liable for monetary penalty under Section 15A(b) of the SEBI Act, 1992?
- D. What quantum of monetary penalty should be imposed on the Noticee taking into consideration the factors mentioned in Section 15J of the SEBI Act, 1992?

FINDINGS

14. On perusal of the material available on record and giving regard to the facts and circumstances of the case, I record my findings hereunder.

ISSUE 1: Whether the Noticee has violated provisions of Regulation 13 (4) read with 13 (5) of PIT Regulations?

15. The provisions of Regulation 13 (4) and 13 (5) of PIT Regulations read as under:

SEBI (Prohibition of Insider Trading) Regulations, 2003

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

13 (4) *Any person who is a director or officer of a listed company, shall disclose to the company and the stock exchange where the securities are listed 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 of such person and his dependents (as defined by the company) 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.*

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

16. I note that the requirement of Regulation 13(4) read with 13(5) of PIT Regulations are two fold, i.e., disclosure to the company and to the Stock Exchange by any person who is a Director or Officer of a listed company, 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 which exceeds Rs. 5 lakh in value or 25,000 shares or 1% of total shareholding or voting rights, whichever is lower; and such disclosure has to be made within two working days of acquisition or sale of shares or voting rights, as the case may be. From the depository transaction statement of the Noticee (enclosed with the SCN as "Annexure III") and the shareholding pattern of the Company as on March 20, 2009 and March 31, 2009 as submitted by Purva Sharegistry (India) Pvt. Ltd. (enclosed with the SCN as "Annexure IV") I note that on March 25, 2009 the Noticee had sold/transferred 15,00,000 (Fifteen Lakhs) shares of the Company. I also note that the aforesaid transaction of the Noticee amounted to transfer of shares comprising 3% of the paid up capital of the Company.

17. However, it is observed that Regulation 13(4) of PIT Regulations puts an obligation for disclosure on *"Any person who is a director or officer of a listed company"* during the relevant period. From the material available on record it appears that the Noticee was neither an officer nor a director of the Company during the investigation period. Hence, it cannot be conclusively established that the Noticee was under obligation to make disclosure under Regulation 13(4) of PIT Regulations to the Company and to the Stock Exchange. Therefore, the Noticee is not guilty of violating the provisions of Regulation 13(4) read with 13(5) of PIT Regulations.

ISSUE 2: Whether the Noticee has violated provisions of Regulation 7 (1A) read with 7 (2) of SAST Regulations?

18. The provisions of Regulation 7 (1A) and 7 (2) of SAST Regulations read as under:

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997

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

- 7(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.*
- 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.

19. I note that the provisions of Regulation 7(1A) of SAST Regulations is quite clear in its import and makes it obligatory to disclose purchase or sale aggregating two per cent or

more of the share capital of the company to the company and the Stock Exchange. As already observed, on March 25, 2009, the Noticee had sold 15,00,000 shares of the Company which amounted to transfer of shares comprising 3% of the paid up capital of the Company. Therefore, the Noticee was under obligation to make disclosure under Regulation 7(1A) of SAST Regulations to the Company and to the Stock Exchange. However, no disclosure had been made by the Noticee under the aforesaid regulation.

20. I note that the Noticee's letter dated February 08, 2011 does not contain any submissions relating to the issue of not making disclosures under Regulation 7(1A) of SAST Regulations. However, vide reply dated February 08, 2011, the Noticee along with other promoters of the Company has submitted that some of the promoters had pledged the shares of the Company with Dena Bank and subsequently upon settlement of the dues of Dena Bank the shares were released and pledged to certain other entities at the request of the promoters. The Noticee has also submitted that the discrepancy in figures between the shares disclosed and actual shares held was on account of pledged shares. The Noticee has further submitted that *"The shares were pledged with Dena Bank as security for loans taken by Ashwini Trading Private Limited way back in 1999. The bank had merely held the shares as security and the shares were at no time actually transferred to the bank but held by the bank on the terms and conditions of the pledged document.....Merely because there is a failure to comply with Regulation 58 of the Depositories Participants Regulations would not have the effect of converting the pledge into a transfer. At the highest, it can be said that the pledge is irregular"*. The Noticee has also submitted that *"till 28 January 2009 there was no requirement to disclose pledged shares separately. With the result, there was no separate disclosure of pledged shares by the promoters up to 31st December 2008. Thereafter for the quarters ended 30th March 2009 and 30th June 2009 we have separately disclosed the pledged shares"*.

21. I note that the procedure for pledging of demat shares is clearly laid down within the bye-laws of the Depositories framed under the Depositories Act, 1996 and SEBI (Depositories and Participants) Regulations, 1996. Therefore, I don't agree with the Noticee as accepting such an argument would only mean circumventing the statutory provisions of Regulation 58 of SEBI (Depositories and Participants) Regulations, 1996. The requirement therein is that shares pledged have to be identified separately as 'pledged' shares. However, no such 'pledge' was seen identified in the demat statement of the Noticee. In this regard, I also refer to the observations made by the Securities Appellate Tribunal in Appeal No. 83 of 2010 (Liquid Holdings Pvt. Ltd. vs. SEBI,

decided on 11-03-2011) – “.....The law also prescribes a mode for the creation and revocation of a pledge. The parties cannot agree to create a pledge contrary to the provisions of Regulation 58.....In the case of shares held in demat form, the Depositories Act and the Regulations framed thereunder provide the manner in which the pledge is to be created and invoked.....”.

22. From the shareholding disclosed by the Company to BSE for the quarter ending March 31, 2009 it is observed that no shares are shown as pledged or otherwise encumbered against the name of the Noticee. Further, from the demat statement of the Noticee (for account IN300020 – 10884708), it is observed that no share is shown as pledged in the demat statement. Hence, the submission of the Noticee that the discrepancy in figures between the shares disclosed and actual shares held was on account of pledged shares is incorrect and consequently not acceptable. In view of the above it is now apparent that the Noticee had sold 15,00,000 shares of the Company on March 25, 2009 which amounted to transfer of shares comprising 3% of the paid up capital of the Company. Therefore, the Noticee was under obligation to make disclosure under Regulation 7(1A) of SAST Regulations to the Company and to the Stock Exchange, which he failed to disclose. Hence, I hold that the Noticee has violated the provisions of Regulation 7(1A) of SAST Regulations.

ISSUE 3: Whether the Noticee is liable for monetary penalty under Section 15A(b) of the SEBI Act, 1992?

23. The provisions of Section 15 A(b) of the Act reads,

“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;”

24. As already observed, the Noticee dealt substantially in the shares of the Company, but failed to make disclosures as required under Regulation 7 (1A) of SAST Regulations. Therefore, I find that the Noticee is liable for monetary penalty under Section 15A(b) of the SEBI Act, 1992.

ISSUE 4: What quantum of monetary penalty should be imposed on the Noticee taking into consideration the factors mentioned in Section 15J of the Act?

25. While imposing monetary penalty it is important to consider the factors stipulated in Section 15J of the 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.”

26. In the absence of material on record, the amount of disproportionate gain or unfair advantage made as a result of the default and the amount of loss caused to the investors due to the said default cannot be quantified. However, by virtue of the failure on the part of the Noticee to make the necessary disclosures on time, the fact remains that the investors were deprived of the important information at the relevant point of time. In other words, by not complying with the regulatory obligation of making the disclosure, he had concealed the vital information which is detrimental to the interest of investors in securities market.

27. In the forgoing paragraphs it is now established that the Noticee failed to make necessary disclosure under Regulation 7 (1A) of SAST Regulations. Considering the facts and circumstances of the case and the violation committed by the Noticee, I find that imposing a penalty of ₹ 2,00,000/- (Rupees Two Lakhs only) on the Noticee would be commensurate with the violations committed by the Noticee.

ORDER

28. Considering the facts and circumstances of the case, in terms of the provisions of section 15A(b) of Act and Rule 5(1) of the Adjudication Rules, I hereby impose a penalty of ₹ 2,00,000/- (Rupees Two Lakhs only) on Shri Mahesh Kothari for not making necessary disclosures under Regulation 7 (1A) of SAST Regulations.

29. The penalty shall be paid by way of demand draft drawn 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 Shri Biswajit Choudhury, Deputy General Manager, Investigation Department, Securities and Exchange Board of India, Plot No. C4-A, ‘G’ Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400051.

30. In terms of the provisions of Rule 6 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 1995, copies of this Order are being sent to the Noticee and also to Securities and Exchange Board of India.

Date: June 28, 2011
Place: Mumbai

P. K. Bindlish
Adjudicating Officer