BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PKB/AO – 125/2009]

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
Bajaj Holdings & Investment Limited
(Formerly known as: Bajaj Auto Limited)
(Pan No. AAACB3370K)
In the Matter of:
National Organic Chemicals Industries Limited

FACTS OF THE CASE

1. It was observed that Bajaj Auto Ltd. (hereafter referred to as "the noticee"), trading through member India Bulls Securities Ltd. had sold 41,65,969 shares of 'National Organic Chemicals Industries Ltd.' (hereinafter referred to as "NOCIL") during the period January 04, 2005 to February 11, 2005. From the shareholding pattern of the company NOCIL, it was observed that the noticee held 82, 00,000 shares at the quarter ended December 2004, accounting for 6.69% of the paid up capital (12, 26, 05,700 shares). It was further observed that the above transactions appeared to be more than 2% of the noticee's holding in the company for which no disclosures had been received by it under the relevant provisions of SEBI (Prohibition of Insider Trading) Regulations, 1992.

2. In light of the above, details of trading in the scrip of NOCIL in the said period were sought by SEBI from the noticee. The noticee and NOCIL vide letter dated

April 29, 2005 were advised by SEBI to indicate whether the requisite disclosures under Insider Trading Regulations had been made by both of them.

3. NOCIL vide its letter dated May 06, 2005 informed that it did not receive any disclosure from the noticee with regard to the above sale. The noticee, in its reply dated May 16, 2005 informed that it had sold 73,98,241 shares of NOCIL valuing Rs.16,30,84,692.32 at an average rate of Rs.22.04 on BSE (32,32,272 shares) and on NSE (41,65,969 shares) taken together during the period January 01, 2005 to February 11, 2005. The shares sold by it constituted around 6% of the paid up capital of the company.

4. In view of the above, it was alleged that the noticee had violated Regulations 7 (1) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (hereinafter referred to as "SAST Regulations") and Regulation 13 (3) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as "PIT Regulations").

APPOINTMENT OF ADJUDICATING OFFICER

5. Shri D. Sura Reddy was appointed as Adjudicating Officer vide order dated August 22, 2007 under Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred as "said Rules") to enquire into and adjudge under Section 15A(b) of the SEBI Act, 1992 for the alleged violations committed by Bajaj Auto Ltd. Pursuant to the transfer of D. Sura Reddy, I was appointed as Adjudicating Officer vide order dated December 10, 2008.

SHOW CAUSE NOTICE, REPLY AND HEARING

6. A show cause notice dated June 18, 2008 was issued to the noticee. The noticee vide reply dated July 18, 2008 stated that as part of its treasury operations, the noticee had invested Rs. 10 crores in 13% preference shares of Sushmita Holdings Limited (hereinafter referred to as "SHL") on November 30, 1999. As security, it had obtained guarantees from Vibhadeep Investments and Trading Limited and Mishapur Investments Limited, which were backed up by a pledge of shares of

NOCIL with an asset backing of 150%. Initially, in November / December 1999, a pledge was taken in respect of 67 lakh equity shares of NOCIL. Due to fall in market price of NOCIL shares, the security was refurbished in August 2000 to April 2001 by the pledge of additional 15 lakh shares of NOCIL. The total shares pledged with the noticee were for 82 lakh shares as security against investment in preference shares of SHL.

7. The noticee submitted that at the time of the above transactions in 1999 to 2001, the Regulation 7(1) of SEBI (SAST) Regulations 1997 did not apply, since at that point of time, the term `acquirer' did not include a `pledgee'. Explanation to the said Regulation 7(1) which made the term `acquirer' include the term `pledgee' was introduced only by the amendment which came into effect from 9th September 2002. No disclosure, therefore, was required under this regulation at that stage.

8. The noticee stated that similarly, Regulation 13(1) of SEBI (PIT) Regulations, 1992 necessitating disclosure by a person holding more than 5% shares was also not applicable, since this regulation was inserted for the first time only with effect from 20 February 2002. No disclosure, therefore, was required under this regulation at that stage.

9. The noticee further submitted that when the preference shares fell due for redemption and dividend thereon became due, SHL continued to default. In order to recover the investments made in SHL, the pledge of NOCIL shares was invoked on 30th August 2004 and notice was also given to the guarantors on 14th September 2004 about the company's intention to sell the shares to realize its investment dues. Since the guarantors did not reply to the notice, the shares were sold in the market during the period January – February 2005.

10. It was argued by the noticee that the legal provision of Regulation 7(1) at the time of invocation of pledge in August 2004 was that the term `acquirer' shall include a `pledgee' and hence, invocation of pledge was not an acquisition, since acquisition cannot take place at two stages i.e. at the time of pledge and then again at the stage of invocation of pledge. For this reason, after the insertion of explanation to Regulation 7(1) in September 2002, there was no requirement for

disclosure at the time of invocation of pledge. Accordingly, no disclosure was made by the noticee at that stage. Further, at the time of sale of shares in January-February 2005, Regulation 7(1) did not come into the picture at all, as the said Regulation talks only about acquisition of shares which would entitle the acquirer to more than 5%, 10%, 14%, 54% or 74% as the case may be. Hence, no disclosure was required under Regulation 7(1) at the time of sale of the pledged shares in January-February 2005.

11. The noticee argued that as regards Regulation 13(3) of PIT Regulations, 1992, no disclosure was required at the time of sale of pledged shares in January-February 2005. Regulation 13(3) provides that disclosure would be required where there has been a change in holdings from the last disclosure made under Regulation 13(1). In the instant case, although the change exceeded 2% in the total shareholding in the company, since there had been no disclosure which was required previously, there had been no change in holdings from the last disclosure made. Accordingly, no disclosure was required under Regulation 13(3) as well at the time of sale of the invoked shares.

12. The noticee also submitted, without prejudice to the other arguments made, that the pledge of NOCIL shares was taken purely as security against investment and the sale of the said shares was also effected only to recover the pending dues. The pledge was also invoked only because without doing so, it was not possible to sell the shares which were pledged. There was no interest whatsoever in the voting rights or shares of the company, except to that limited extent. Immediately on completion of the sale of shares, the guarantors were informed of the small excess shares and amounts which the noticee wanted to return to them. Even at the time of invocation of pledge, the guarantors were informed of the proposed action. The sale of shares was not a normal trading transaction by the company and it was only with the limited purpose of recovering the dues on investments. The noticee stressed on the fact that neither had it access to any unpublished price sensitive information relating to NOCIL, nor was it anyway connected with NOCIL or its management. The company had to invoke the pledge and sell the shares only in the interest of protecting its investments and thereby its large body of shareholders.

13. The noticee argued that when the shares were taken on pledge, regulation 13 (1) was not in existence. Further, regulation 13 (3) was applicable about changes in the holdings since the earlier disclosure, which was not necessary in the instant case. It also reiterated that absolutely no *malafide* was involved in the above transactions.

14. The noticee was granted an opportunity to be heard before the undersigned on February 9, 2009. Mr. J. Sridhar, Authorised Signatory of Bajaj Holdings & Investment Ltd. and Mr. Mandar Velankar, Company Secretary, Bajaj Holdings and Investments Ltd., attended the hearing. They expressed their desire to file additional written submissions and were asked to produce a copy of the notice dated September 14, 2004 that was sent to the guarantors about the company's intent to invoke the pledge and also a copy of the document dated August 30, 2004 for invocation of pledge along with documentary evidence to establish that excess money or shares were returned to the pledgor. The noticee provided the abovementioned documents and they were taken on record.

15. Vide letter dated February 12, 2009, the noticee reiterated the submissions made vide letter dated July 18, 2008. It stated that disclosure under Regulation 7 (1) of the SAST Regulations was not required to be made at the time of creation of the pledge, i.e., during 1999-2001, as the term 'acquirer' did not include the 'pledgee' then. Further, Regulation 13 (1) of the Insider Trading Regulations was not in existence at the time of creation of the pledge and disclosure under Regulation 13 (1) was obviously not required to be made then. At the time of invocation of the pledge in 2004, although the term 'acquirer' included 'pledgee', invocation of pledge had not been mentioned as 'amounting to acquisition' in SAST Regulations. Similarly Regulation 13 (1) of the Insider Trading Regulations did not make a mention that invocation of pledge was covered under the term 'acquisition of shares'. For this reason, no disclosure was required to be made then.

16. The noticee also added that it was significant to note that only under the recent amendments to the SEBI Takeover Code dated 28 January, 2009, duty had been cast on promoters as well as the companies to make disclosure of shares pledged by the promoters at three stages viz. initial disclosure (transitional provisions) of

shares already pledged, at the time of further creation of pledge and at the time of invocation of pledge. (Refer sub-regulations 1 to 3 of Regulation 8A of amended regulations). Thus, the concept of invocation of pledge had been brought in as an event for making disclosures for the first time then. Similar provisions did not exist in 2004, when the invocation of pledge took place in its case.

17. The noticee stated that it may also be noted that no transitional provision was introduced in 2002, at the time of amendment to Regulation 7(1), when 'pledgee' was brought within the scope of the term 'acquirer'. Similarly no transitional provision was introduced at the time of introduction of Regulation 13(1) of the SEBI Insider Trading Regulations. This may be seen in the context of transitional provisions introduced by way of Regulation 6 of the SEBI Takeover Code at the time of introduction of these regulations for the first time in 1997.

18. It submitted that the invocation of pledge and subsequent sale of the pledged shares were activities carried out only to realize the outstanding dues and there was no dealing in the shares in the strict sense. Also excess shares and excess amount realized were refunded to the party.

19. Therefore, taking into account the above circumstances, the noticee had not filed the disclosures in terms of Regulations 7(1) of the SEBI Takeover Code and Regulations 13(1) and 13(3) of the SEBI Insider Trading Regulations, since the law as it stood then did not require the noticee to make any such disclosure.

CONSIDERATION OF ISSUES AND FINDINGS

20. I have carefully examined the replies dated July 18, 2008 and February 12, 2009 submitted by the noticee and documents submitted by the noticee on February 02, 2009 during his personal hearing.

21. It is noted that in between 1999 – 2000 pledge of 82 lakh shares of NOCIL were executed as security against investment in preference shares of SHL. I am of the opinion that since at that time the term "acquirer" did not include the term "pledgee", disclosure under Regulation 7(1) of SEBI (SAST) Regulations, 1997,

was not required. I note that by SEBI (SAST) (Second Amendment) Regulation 2002, which came into effect from September 09, 2002, it has been mandated that for the purpose of 7(1) of aforesaid regulation, the term "acquirer" shall include a 'pledgee'. The noticee in para (iv) of its reply dated February 12, 2009 has brought forward that no transitional provision was introduced by the 2002 amendment, similarly no transitional provision was introduced at the time of introduction of Regulation 13(1) of the SEBI (PIT) Regulations. I note that on 30 August, 2004, 82 lakh shares of NOCIL were transferred to Demat Account of the noticee on invocation of pledge, which accounts for 6.69% of the paid up capital. I further note that the noticee trading through member India Bulls Securities Ltd. sold 41,65,969 shares of NOCIL (which accounts for more than 2% of the paid up capital) during the period January 04, 2005 to February 11, 2005.

22. I am of the view that the argument of the noticee made in para (iv) of its reply dated July 18, 2008 that "*the legal provision of Regulation 7(1) at the time of invocation of pledge in August 2004 was that the term `acquirer' shall include a `pledgee' and hence, invocation of pledge was not an acquisition, since acquisition cannot take place at two stages i.e. at the time of pledge and then again at the stage of invocation of pledge*" cannot be accepted. The noticee's contention probably could have been accepted had the pledge been executed on or after September 09, 2002 and the disclosures in accordance with Regulation 7(1) of SEBI (SAST) Regulations, 1997, had been made by the pledgee at the time of creation of the pledge. However, the present matter is not so, as the disclosure has not been made at any stage. I am of the opinion that the lack of a transitional clause cannot be allowed to be misused in this way.

23. I am of the view that the submissions made by the noticee vide para (ii) of the letter dated February 12, 2009 that "A*t the time of invocation of pledge in 2004, although the term 'acquirer' included 'pledgee', invocation of pledge has not been mentioned as 'amounting to acquisition' in SEBI Takeover Code ... For these reasons, no disclosure was required to made then.*" cannot be accepted. I am of the view at when the noticee invoked the pledge in 2004, the shares were transferred to its demat account and at that point in time the title of the shares vested in the noticee. I am of the opinion that the noticee was required to make a disclosure under Regulation 7 (1) of the SAST Regulations because it held 6.69% of the paid-up

capital of the target company, i.e. NOCIL, even though it had not dealt in the shares in any other manner, whatsoever. The very fact of ownership of the shares amounts to acquisition because in terms of Regulation 2 (b), 'acquirer' means "any person, who, directly of indirectly, acquires or agrees to acquire shares or voting rights in the target company…." from where it can be inferred that even an indirect acquisition of shares, like by invocation of a pledge would amount to an acquisition, whether or not the rights associated with such acquisition were intended to be used. The noticee should have made a disclosure the moment it gained title in the shares.

24. I am of the view that the noticee's contention submitted vide para (iii) of its reply dated February 12, 2009 that "*it is significant to note that only under the recent amendments to the SEBI Takeover Code dated January 28, 2008, duty has been cast on promoters as well as the companies to make disclosure of shares pledged by the promoters at three stages viz. initial disclosure (transitional provisions) of shares already pledged, at the time of further creation of pledge and at the time of invocation of pledge (Refer sub-regulations 1 to 3 of Regulation 8A of amended regulations). Thus, the concept of invocation of pledge has been brought in as an event for making disclosures for the first time now.*" cannot be accepted. The disclosure in Regulation 8A is from the perspective of the promoter who is a pledgor and not from the pledgee as in the case of Regulation 7(1) of SEBI (SAST) Regulations and has an altogether different purpose. These two regulations are different and should not be compared and inferences drawn from Regulation 8A should not be imposed on Regulation 7(1). The invocation of pledge definitely is and was an acquisition of shares.

25. In light of aforesaid I am of the view that the allegation of failure to comply with the provisions of Regulation 7 (1) of the SAST Regulations stands established, which read as under:

SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997

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

Regulation 7(1) *– 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.

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.*

26. I am of the view that the submissions made by the noticee vide para (ii) of the letter dated February 12, 2009 that "… *Regulation 13(1) of the SEBI Insider Trading Regulations also does not make a mention that invocation of pledge is covered under the term 'acquisition of share'. For these reasons, no disclosure was required to made then.*" cannot be accepted for the reasons discussed in the preceding paragraph. I am of the view that the noticee was required to make disclosure under Regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992, after acquiring said 6.68% of the paid up capital, on August 30, 2004. I observe that the noticee has not done so. Further, I observe that the noticee did not make disclosure as mandated under Regulation 13(3) of SEBI (Prohibition of Insider Trading) Regulations, 1992, after the noticee trading through member India Bulls Securities Ltd. sold 41,65,969 shares of NOCIL (which accounts for more than 2% of the paid up capital) during the period January 04, 2005 to February 11, 2005. I am of the view that the contention made by the noticee in the para (iv) of letter dated July 18, 2008 that "*…Regulation 13(3) provides that disclosure would be required where there has been change in holdings from the last disclosure made under Regulation 13(1). In the instant case, although the change exceeds 2% in the total shareholding in the company, since there has been no disclosure which was required previously, there has been no change in holdings from the last disclosure made*" cannot be accepted. I am of the opinion that the disclosure under Regulation 13(1) was required at the time of invocation of pledge, however, the noticee failed to do so. Further, I am of the opinion that non-disclosure under Regulation 13(1) does not exonerate the noticee from the liability to disclose under Regulation 13(3). I am of the view that the noticee has violated Regulation 13(1) and 13(3) of SEBI (Prohibition of Insider Trading) Regulations, 1992. However, in the order

appointing Adjudicating Officer it is observed that the noticee has been alleged to have violated Regulation 13(3) only. In the light of above, I am of the view that the allegation of failure to comply with the provisions of Regulation 13(3) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 stands established, which read as under:

SECURITIES AND EXCHANGE BOARD OF INDIA (PROHIBITION OF INSIDER TRADING) REGULATIONS, 1992

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

Continual disclosure

Regulation 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.*

27. Having established that the noticee has violated the above said provision, I am convinced that it is a fit case to impose monetary penalty u/s 15A(b) of the SEBI Act, 1992, which reads as under:

SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

Penalty for failure to furnish information, return, etc.

Section 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 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.

28. While deciding the quantum of penalty, the factors laid down under Section 15J of SEBI Act, 1992 have been given due regard, which are as follows –

a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of default;
b) the amount of loss caused to an investor or group of investors as a result of the default and
c) the repetitive nature of default.

29. There is no material available on record to indicate any disproportionate gain or unfair advantage or amount of loss caused to an investor group of investors and also the repetitive nature of the default on the part of the noticee. I also find that the noticee did not make any profit by sale of the pledged shares but merely recovered his dues because of a default in payment on part of the guarantor. The amount of loss caused to the investors as a result of the default can not be quantified in the present case in view of the absence of any data/material. It is noted that there is no material on record to suggest that the lapse is of repetitive nature.

30. I am of the view that the noticee's contention that it never had any interest or intention to exercise its voting rights gained through the acquisition of the shares of NOCIL and that the sale of shares was not a normal transaction, rather it was the only means for the noticee to recover its dues on investment, may be accepted. The fact that the noticee kept the guarantors informed about its actions and also returned the excess shares and money promptly goes to demonstrate the lack of any ill-intention or malafide on part of the noticee. For the purpose of the quantifying the penalty, this very fact also has been considered.

31. In view of the findings mentioned hereinabove and after taking into account the facts and circumstances of the case, I find that a monetary penalty of Rs. 50,000/- (Rupees Fifty Thousand only) on the noticee viz. Bajaj Holdings & Investment Limited (formerly known as Bajaj Auto Ltd.) would be commensurate with the violations.

ORDER

32. In exercise of the powers conferred upon me under section 15-I (2) and 15A(b) of SEBI Act, 1992 read with Rule 5 of Adjudication Rules, I hereby impose a monetary penalty of Rs. 50,000/- (Rupees Fifty Thousand only) on the noticee

viz. Bajaj Holdings & Investment Limited (formerly known as Bajaj Auto Ltd.), for violation of Regulation 7(1) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 and 13(3) of the SEBI (Prohibition of Insider Trading) Regulations, 1992.

33. The noticee shall pay the said amount of penalty by way of demand draft in favor 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 S Ramann, OSD, Integrated Surveillance Department, Securities and Exchange Board of India, SEBI Bhavan, Plot No. C4-A, "G" Block, Bandra Kurla Complex, Bandra (East), Mumbai–400 051, INDIA.

34. In terms of Rule 6 of the said Adjudication Rules, copies of this order are sent to the noticee and also to the Securities and Exchange Board of India.

Date: September 30, 2009 **P. K. Bindlish**
Place: Mumbai **Adjudicating Officer**