

**BEFORE THE ADJUDICATING OFFICER**

**SECURITIES AND EXCHANGE BOARD OF INDIA**

**[ADJUDICATION ORDER NO. BM/AO- 1/2013]**

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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**

In respect of

**Temptation Foods Limited**

**PAN No. AABCT1689A**

In the matter of Kohinoor Foods Limited

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**FACTS OF THE CASE**

1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") conducted investigation in trading in the scrip of Kohinoor Foods Limited (hereinafter referred to as or "**KFL**") to ascertain whether there was any violation of SEBI Act, 1992 and Rules and Regulations for the period December 31, 2007 to February 17, 2009 (hereinafter referred to as "**investigation period**"). It was observed that Temptation Foods Limited (hereinafter referred to as "**Noticee**") entered into synchronized and self trades thereby allegedly creating artificial volumes in the company thus violated Regulation 3(a), 4(1), 4(2) (a) & (g) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (hereinafter referred to as "**PFUTP Regulations**"). It was further alleged that Noticee violated the provisions of Regulation 7(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as "**Takeover Regulations**") and Regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as "**Insider Trading Regulations**") by making wrong

disclosures; and violated Regulation 13(3) of Insider Trading Regulations by not making any disclosure when the aggregate shareholding of the Noticee exceeded or reduced by 2% of the share capital of the company. It was therefore alleged that Noticee has not complied with the PFUTP Regulations, Takeover Regulations and PIT Regulations and consequently liable for penalty under section 15A (b) and 15HA of the SEBI Act.

#### **APPOINTMENT OF ADJUDICATING OFFICER**

2. The undersigned was appointed as Adjudicating Officer vide order dated March 22, 2012 under section 15 I of SEBI Act read with 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 PFUTP, Takeover regulations and Insider Trading Regulations.

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

3. Show Cause Notice No. EAD-6/BM/VS/15636/2012 dated July 12, 2012 (hereinafter referred to as "**SCN**") was issued to the Noticee under rule 4 of the Rules to show cause as to why an inquiry should not be held and penalty be not imposed under section 15A(b) and 15HA of SEBI Act for the alleged violation specified in the said SCN. Noticee vide letter dated October 10, 2012 denied the charges leveled against them and *inter-alia* submitted the following:
  - a. *That as regards disclosures allegedly not made under Regulation 13(1) of Insider Trading Regulations for the transactions dated 09/09/2008, 20/10/2008 and 19/12/2008, the company has for the market transactions on 09/09/2008 and 19/12/2008 duly informed BSE/NSE/SEBI and KFL.*
  - b. *As regards the alleged off market transactions on 20/10/2008 we would like to point out that this was merely on internal transaction resorted by the broker funding the acquisition. Nevertheless between the company and PAC (Venture*

*Business Advisor Private Limited) there was no change in the % holding and hence were they advised that no disclosure is called for as the % of total holding retained under changed, between TFL and VBAPL (PAC) and was done unilaterally by the broker to merely facilitate the funding for the shares acquired.*

- c. The alleged two off market transactions dated 02/12/2008 and 24/12/2008 is again merely in exchange between TFL and VBAPL (PAC) to get margin funding and was done by this broker to fund this shares. You may also note that the share brokers vide circular dated 28/08/1998 issued by RBI given guideline to fund shares including transfer to their DPID and this cannot be construed as sale/purchase as it is merely lending of securities again funds required. Thus, there is no infringement of Regulation 13 of Insider Trading Regulations as made out to be.*
- d. We have all times within 2 days as was dated submitted the relevant disclosures to concerned authorities. All alleged off market transactions were done within VBAPL and TFL and /or share broker for purpose of margin funding. At no time was there a sell order or buy order and there was no acquisition of fresh shares or disposal of existing shares. Further, Regulation 7(1) of Takeover Regulations relates only to acquisitions of shares and every disclosures has been made. Thus the company has made no wrong disclosures at any time to SEBI and other authorities and have done all it was required to do so as per law. Inferences made by you are without understanding the market conception of how brokers fund against share and nevertheless between VBAPL and TFL all shares acquired match with a depuate disclosures.*
- e. The mere fact that brokers shifted their position on BSE/NSE exchanges as also shuffled internally for margin funding can by to stroke of in regulation construed or violations. If, SEBI is the whatchdog, it should also understand market mechanism and call brokers who will explain mechanism of funding. Aid company or promoter gain anytime by alleged non disclosures?*
- f. Without prejudice to all our above contentious along with seller submitted on 26/02/2008 against the Ad-Interim order, the company is now un liquidation with*

*OL having been appointed by the Hon'ble Mumbai High Court and this letter is being addressed in personal capacity and with you to understand the nuances of market especially low funding is done by marketers.*

4. 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 on October 30, 2012 at SEBI, Head Office, Mumbai vide notice dated October 1, 2012 which was acknowledged by the Noticee. Mr. Vineet Kumar, Authorized Representative (AR) appeared on behalf of Noticee and informed that the Noticee company has been wound up w.e.f March 28, 2012 and order has been passed for winding up. Noticee was advised to submit a copy of the same by November 16, 2012. During the personal hearing Noticee was asked to give details with respect to the specific transactions as to why and how brokers were shifting their positions, whether the positions were shifted within the limit as available to the broker, the market positions etc.; and for margin funding pertaining to those transaction as given in SCN what agreement was entered into. Noticee was further asked to submit the documents for pledge of the shares with Microsec Finance Service Ltd and Nadi Finance & Investment Limited giving details as to date, number of shares etc. Noticee undertook to submit the sought documents /information by November 16, 2012.
5. Vide letter dated November 5, 2012 Noticee submitted winding up order of the Noticee company and sought time till November 30, 2012 to file to the reply to the information /documents sought during the hearing and the extension was given to the Noticee vide email dated November 9, 2012. Thereafter Noticee again sought for extension of time for filing required information /documents till December 20, 2012 vide email dated November 29, 2012 and again sought time till January 15, 2013 vide email dated December 20, 2012. Vide email dated December 20, 2012 Noticee was given time till December 31, 2012 to submit information/ documents as sought

during the personal hearing. However, Noticee failed to submit the requisite information/ documents.

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

6. I have carefully examined the SCN and the documents available on record. The allegations against the Noticee are as follows:

- Noticee entered into synchronized and self trades, created artificial volumes in the KFL
- Noticee did not make disclosures when the aggregate shareholding exceeded 2% of the share capital of KFL and also made wrong disclosures

In view of the above it is alleged that the Noticee violated the provisions of Regulation 3(a), 4(1), 4(2) (a) & (g) of PFUTP Regulations, Regulation 7(1) of Takeover Regulations and Regulation 13(1) & (3) of Insider Trading Regulations.

7. I find from the material available on record submitted by the Noticee after the hearing that a winding up petition was filed by SBI Global Factors Limited against the Noticee and Hon'ble High Court of Judicature at Bombay vide its order Company Petition No. 372 of 2010 dated March 28, 2012 has ordered winding up of Noticee.

8. I have carefully perused the documents available on record. The issues that arise for consideration in the present case are:

- Whether the adjudication proceedings initiated by SEBI against the Noticee can be continued in view of the order of winding up of the Noticee by the Hon'ble Bombay High Court?

9. The details of the events in the present adjudication proceedings are given below in the chronological order:

Sl.No.	Date	Events
1.	March 22, 2012	Appointment of Adjudicating Officer to conduct the adjudication proceedings against the Noticee.
2.	March 28, 2012	Winding up order passed by the Hon'ble Bombay High Court.
3.	July 12, 2012	Issuance of Show cause Notice to the Noticee by the Adjudicating Officer

10. In the light of the above and in order to examine the maintainability of the present adjudication proceedings against the Noticee, it will be appropriate to refer to section 446 of the Companies Act, 1956, (hereinafter referred to as "Companies Act") which reads as under:

**Section 446 of the Companies Act, 1956**

- (1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company except by leave of the (Tribunal) and subject to such terms as the (Tribunal) may impose.*
- (2) Tribunal shall, notwithstanding anything, contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-*
- (a) Any suit or proceeding by or against the company;*
  - (b) Any claim made by or against the company (including claims by or against any of its branches in India)*
  - (c) Any application made under Section 391 by or in respect of the company*
  - (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to rise in course of the winding up of the company.*
- whether such suit or proceeding has been instituted or is instituted or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960)*

(3) (Omitted)

(4) nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

11. Noticee in its reply has claimed that winding up order has been passed on March 28, 2012. Hon'ble Supreme Court of India in *Sudarsan Chits (I) Ltd vs O. Sukumaran Pillai & Ors*, 1984 AIR 1579, 1985 SCR (1) 511 held as under:

*"Sec. 446 (1) envisages two situations in which the court will have jurisdiction to make the order thereunder contemplated. These two situations are: where a winding up order has been made or where the official Liquidator has been appointed as provisional Liquidator. The first of the two situations envisages an order for winding up of the Company having been made and which is subsisting. The second situation is where without making a winding up order, the court has appointed official Liquidator to be the provisional Liquidator. Sec. 450 (1) of the Companies Act confers power on the Company Court to appoint official Liquidator to be provisional Liquidator at any time after the presentation of the winding up petition and before making of the winding up order. The Court before which a winding up petition is presented has power to appoint official Liquidator as provisional Liquidator of the Company even before making the winding up order. If ultimately winding up order is made, the official Liquidator acts as such. And let it be remembered that where a winding up order is made, it relates back to the date when petition for winding up is presented. Referring to Sec. 446 (1) it becomes clear that the court will have jurisdiction to make the order therein contemplated, where a winding up order has been made or prior to the making up of the winding up order, official Liquidator has been appointed as provisional Liquidator as contemplated by Sec. 450 (1)."*

On perusal of the documents available on record I note that winding up order against the Noticee was passed on March 28, 2012 and thus section 446 of Companies Act is applicable in the present matter.

12. Section 446(1) of the Companies Act envisages that when a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company except by leave of the (Tribunal) and subject to such terms as the (Tribunal) may impose. According to Black's Law Dictionary, Sixth Edition, the term "Legal Proceedings" includes all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of remedy. Further, the term "Proceedings" means, any action, hearing, investigation, inquest or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given. Hence, the adjudication proceeding being a legal proceeding is encompassed under Section 446 of the Companies Act.

13. With regard to winding up order passed subsequent to initiation of adjudication proceeding. I would refer to the reasoning given by Madras High Court in *Burmah-Shell Oil Storage vs Associated Industrial* on 23 February, 1971:

*"Through Section 446 of the Companies Act legislature has comprehended two situations: the first is commencement of a suit or other legal proceeding and the second is proceeding with a suit or other legal proceeding if such suit or proceeding was pending at the date of the winding-up order. In the latter case, the proceeding must be a proceeding pending at the date of the winding-up order. Only in such a case, the leave of the court for further proceeding with the proceeding would arise. But in the case of a proceeding to be commenced, there is no question of a proceeding being proceeded with. If a proceeding is commenced without the leave of the court and subsequent to the commencement, leave is asked for the continuation of that proceeding, it would not be a proceeding pending at the date of the winding-up order within the meaning of Section 446 of the Companies Act, and obviously no leave can be granted under Section 446 for that purpose. This conclusion is irresistible, having regard to the use of the expression "pending at the date of the*



*winding-up order". It should be presumed that the legislature deliberately introduced these words in enacting Section 446. Construing the plain language adopted by the legislature, it follows that if a proceeding is commenced without obtaining the leave of the court previously, no leave could be granted for proceeding with that proceeding, as it was not a proceeding pending at the date of the winding-up order. If it were to be held that even if a proceeding is instituted without the leave of the court, it could be permitted to be proceeded with by granting leave, then the expression "if pending at the date of the winding-up order" would be without any meaning and rendered purposeless. That could not have been the intention of the legislature in making this change in the law. The obvious intention of the legislature is that leave could be granted to commence a proceeding only if leave is sought for before the commencement of the proceeding and that leave could be granted to proceed with a proceeding only if the proceeding was pending at the date of the winding-up order. That is the only rational way of interpreting the language employed in Section 446."*

14. While examining the issue of maintainability of the legal proceedings, the Hon'ble High Court of Bombay, in the case of *Deutsche Bank v. S.P. Kala* ((1990) 67 Com Cases) held as under:

*"Section 446 of the Companies Act provides that, when a winding up order is made or the official liquidator is appointed as provisional liquidator, no suit or legal proceedings should be commenced or if pending on the date of the winding-up order, shall be proceeded with, against the company, except with the leave of the court and subject to such terms as may be imposed. Sub-section (2) further lays down that the court which is winding-up the company shall, notwithstanding anything contained in any other law in force, have jurisdiction to entertain or dispose of, inter-alia, any suit or proceeding by or against the company, whether such suit or proceeding has been instituted or is instituted. **A careful examination of these provisions of law makes it clear that once a winding-up order is made or the official liquidator is appointed as provisional liquidator, no proceedings can***

***continue or be instituted against the company without the permission of the court.***

*It is further clear that jurisdiction to entertain or dispose of any suit or proceedings by or against the company is vested in the company court without any kind of restriction..... The expression “any suit or proceeding by or against the company” is wide enough to bring within its sweep any kind of suits.” (emphasis supplied).*

Hon'ble Supreme Court in *Bansidhar Shankarlal v. Mohd. Ibrahim*, September 25, 1970, observed at page 25:

" .....we do not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of a decree against the company and that failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or proceeding instituted without leave of the court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed instituted on the date granting leave."

I note the above observation of the Hon'ble Supreme Court holds good in the matter under consideration where winding up order is passed subsequent initiation of adjudication proceeding. Hence, in order to proceed further in the adjudication proceedings it becomes necessary to take leave of the Company's Court failing to do so makes the proceedings ineffective.

15. I note that the object of Section 446 is to safeguard the assets of the company in winding up against the wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding-up court itself with a view to ensure equitable distribution of the assets among those entitled thereto and also to prevent the administration from being embarrassed by a scramble among the creditors and others having rights against the company. As stated in the “Guide to the Companies Act” by A Ramaiya (16th Edition Reprint 2006), the object of winding up of a company by the court is to facilitate the protection and realization of

its assets with a view to ensure an equitable distribution thereof among those entitled and to prevent the administration from being embarrassed by a general scramble among creditors and others. Consequently, once the court has taken the assets of a company under its control or has passed an order for its being wound up, it will not be proper to allow proceedings to be started or continued against the company and embarrass the administration of its affairs. The section is intended to safeguard the assets of a company in winding up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding up court itself. "Section 446 is wide in its terms and is not restricted to any category of suits or any class of Plaintiffs. It is wide enough to cover all suits and other legal proceedings whoever may be the plaintiff." {Sri Murugan Oil Industries (P.) Ltd.Re, (1970) 40 Com. Cases 77, 82 (Mad) following Ghouse Khan v. Bala Subha Rowthar, AIR 1927Mad 925}.

16. The adjudication proceedings against the Noticee have been initiated on March 22, 2012. The winding-up order of the company was on March 28, 2012 which was before the issue of the show cause notice in July 2012. The Noticee at the time of the hearing on October 30, 2012, informed that the winding up order was passed and submitted documents in that regard. In the light of the provisions of the Companies Act and various judgments as cited the present adjudication proceedings against the Noticee are covered under the provisions of section 446 of the Companies Act and cannot be proceeded with without the leave of the court.

## **ORDER**

17. In view of the foregoing, the adjudication proceedings initiated against the Noticee vide order dated March 22, 2012 cannot be proceeded with and the matter is, accordingly, disposed of.

18. 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: **January 16, 2013**

Place: **Mumbai**

**BARNALI MUJHERJEE**  
**ADJUDICATING OFFICER**