

**BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. EAD-12/SM/141-144/2018]**

UNDER SECTION 15 I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 ("SEBI ACT") READ WITH RULE 5 OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995)

In respect of:
**M/s Unicon Merchants Private Limited (PAN: AAACU6553H)
Mr. Akash Gupta (PAN: ABCPG9924G)
Ms. Preeti Gupta (PAN: AEIPB8454R)
M/s IFCI Factors Limited (PAN: AAACF0937E)**

In the matter of M/s. Shiva Cement Limited

Facts of the Case:

1. Securities and Exchange Board of India ("SEBI") pursuant to examination of the scrip M/s. Shiva Cement Limited had observed that Unicon Merchants Private Limited, Akash Gupta and Preeti Gupta (hereinafter referred to as "Noticee No. 1, 2 and 3 respectively"), the promoters of M/s. Shiva Cement Limited (hereinafter referred to as the "Company/SCL") had violated Regulation 31(2) read with 31(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 (hereinafter referred to as the "SAST Regulations") and IFCI Factors Limited (hereinafter referred to as "Noticee No. 4") had violated Regulation 29(1) read with Regulation 29(3) of the SAST Regulations for the transactions dated April 21, 2014 in the scrip of SCL.
2. It was observed that Noticee No. 1, 2 and 3 had pledged certain shares of SCL and the said pledged shares were released during the examination period. Thus, upon release of the pledge, the promoters were required to make the necessary disclosures as prescribed under the SAST Regulations. However, it was observed that the Noticee No. 1, 2 and 3 had failed to make the said disclosures. BSE vide its communication dated August 05, 2014 has confirmed that desired disclosure by Notice no. 1, 2 & 3 was not received by it. Hence it was alleged that Noticee No. 1, 2 and 3 had not made the relevant disclosures and hence violated Regulation 31(2) read with 31(3) of SAST Regulations.
3. The details of shares release are as under:

Date	Noticee Name	Pledge Type	Noticee (Counterparty) Name	No. of Shares
21/04/2014	M/s Unicon Merchants Pvt. Ltd	Release	M/s IFCI Factors Limited	1,80,,50,000
21/04/2014	Mr. Akash Gupta	Release	M/s IFCI Factors Limited	98,00,000
21/04/2014	Ms. Preeti Gupta	Release	M/s IFCI Factors Limited	71,50,000

4. Further, on analysis of the counterparty shareholding after the release of the pledge, it was observed that the counterparty to the aforesaid transactions was IFCI Factors Limited (Noticee 4) which had acquired certain shares of SCL. Upon the said acquisition, the Noticee 4 was required to make the necessary disclosures as prescribed under Regulation 29(1) of the SAST Regulations. However, it was observed that the Noticee had failed to do so. BSE in its communication dated December 23, 2014 had confirmed that no disclosures were received from noticee No. 4 for the above transactions. Hence it was alleged that Noticee No. 4 has violated Regulation 29(1) read with 29(3) of SAST Regulations.

Appointment of Adjudicating Officer

5. SEBI had initiated adjudication proceedings against Unicon Merchants Pvt. Ltd, Akash Gupta, Preeti Gupta and IFCI Factors Limited and undersigned was appointed as Adjudicating Officer vide order dated August 24, 2017 under Section 15 I of SEBI Act read with Rule 3 of the SEBI AO Rules to inquire into and adjudge under Section 15A(b) of the SEBI Act for the alleged violation of Regulation 31(2) read with 31(3) of SAST Regulations by Noticee 1-3 and Regulations 29(1) read with 29(3) of SAST Regulations by Noticee 4.

Show Cause Notice, Reply and Personal Hearing

6. Based on the findings, Show Cause Notice dated September 28, 2017 ("SCN") was issued to all the Noticees. SCN was duly delivered at the respective addresses of the Noticees.
7. Noticee No. 1,2 and 3 vide letter dated November 18, 2017 has inter alia made the following submissions:
 - a. *We deny the aforesaid allegations that we have not filed the relevant disclosures and hence violated Regulation 31(2) read with 31(3) of SAST Regulations. We most humbly state that though belatedly we have duly filed necessary disclosures in compliance with Regulation 31(2) read with 31(3) of SAST Regulations with BSE Ltd. and Calcutta Stock Exchange Ltd vide our letter dated 23.01.2017.*
 - b. *We most humbly submit that the said delay was inadvertent as we were neither aware nor advised of the said requirement of compliance with Regulation 31(2) read with 31(3) of SAST Regulations at the relevant time. We most humbly submit that no sooner were we advised of the said noncompliance, did we file the necessary disclosures. We pray that the said delay in filing the disclosure be viewed leniently.*
 - c. *We respectfully submit that vide sanction letter dated 19.10.2010 we were sanctioned a loan of Rs. 10 crore by IFCI Factors Ltd. (Noticee no. 4 herein. against pledge of 1,80,50,000 shares of Shiva Cements Limited by us. At the relevant time SEBI (SAST) Regulations 1997 were in force. It may be appreciated that under the provisions of the said regulations the filing of disclosure for creation of pledge was not mandated. Thereafter, SEBI (SAST) Regulations, 2011 came in force.*
 - d. *Subsequently the loan was repaid and 1, 80, 50,000 shares were released by IFCI Factors Ltd on 21.04.2014 which called for compliance under Regulation 31(2) and 31(3) of SEBI (SAST) Regulations 2011. The said provisions required us as one of the promoter of Shiva Cement Ltd. to disclose details of release of*

said encumbered of shares within seven working days from the date of release thereof. However, at the relevant time we were neither aware nor advised of the said requirement due to the coming of force of the 2011 Regulations.

- e. Subsequently at the time of making open offer by JSW Cement Limited (the 'Acquirer') for acquisition of 6,24,00,000 shares of the Company, Shiva Cement Ltd., to the public equity shareholders of the Company, it was first time reported by the Merchant Bankers, JM Financial Institutional Securities Ltd, while conducting due diligence, that the compliance of Regulation 31(2) and 31(3) of SEBI (SAST) Regulations 2011 w.r.t to aforesaid release of encumbered shares by IFCI Factors Ltd on 21.04.2014, is pending.
- f. Thereupon, immediately vide our letter dated 23.01.2017, i.e prior to the issue of the instant SCN, we have duly filed necessary disclosures in compliance with Regulation 31(2) read with 31(3) of SAST Regulations with BSE Ltd Calcutta Stock Exchange.
- g. We state that we had no malafide intention to suppress any information or document. As is evident, we have neither enjoyed any unfair advantage over general public nor made any undue gain. The alleged lapse was totally inadvertent.
- h. We rely upon the judgment of Honorable Bombay High Court in SEBI Vs. Cabot International Capital Corporation, 2004, wherein it was held as under:
 - i. "Though looking to the provisions of the statute, the delinquency of the defaulter may itself expose him to the penalty provision yet despite, that in the statute, minimum penalty is prescribed, the authority may refuse to impose penalty for justifiable reasons like the default occurred due to the bonafide belief that he was not liable to act in the manner prescribed by the statute or there was too technical or venial breach etc."
 - ii. Now, the question, of the penalty, by the Adjudicating Authority, in the facts and circumstances of the case, was warranted or not. We find that the allotment in question was undoubtedly covered under the exemption provided in regulation 3(1). There could not have been insistence by the Appellants-SEBI to comply with the requirements of regulation 3(4). It is also clear that when an acquisition is covered under regulation 3 the acquirer is required to report to the Board under the regulation 3(4) within the specified time, as referred above. In view of this undisputed position, merely because there was no Report filed, that itself cannot be read as serious defect or non-compliances of the said provisions. The Appellate Authority, after considering the material on record, including the events, referred in the pleadings, found that the respondents-company had no intention to suppress any material information from the appellants or the shareholders.
- i. We most humbly state that though there was an inadvertent delay in filing the disclosures under Regulation 31(2) read with 31(3) of SAST Regulations, 2011 the same was available in public domain as the said details were reflected vide

quarterly results and share holding pattern filled from time to time with the Exchange.

8. Noticee No. 4 in its reply dated October 27, 2017 stated that

- a. *It is reiterated that IFCI Factors Ltd. is a Govt. Company under Section 2(45) of Companies Act, 2013, by virtue of being subsidiary of a Public Financial Institution i.e. IFCI Ltd. (A Govt. of India Undertaking). We operate as a NBFC and are registered with Reserve Bank of India as 'NBFC Factor')*
- b. *Further, as per Section 45-I(c) of Reserve Bank of India Act, 1934, we are covered as a Financial Institution.*
- c. *We would like to refer the proviso of Section 29 of SAST Regulations 2011 which is reproduced herewith as under:*
 - i. *"Provided that such requirement shall not apply to a scheduled commercial bank or public financial institution as pledge in connection with a pledge of shares for securing indebtedness in the ordinary course of business."*
- d. *Given the contents mentioned in point no.1 above and as per the above proviso, it is evident that the said Section 29 of SAST Regulations 2011 does not apply in our case. It may be pertinent to note that IFCI Factors Ltd. is engaged in the business of providing factoring services under the Factoring Regulation Act, 2012. Pledge of shares is taken as a security for securing indebtedness in the ordinary course of business, wherever applicable.*
- e. *In addition to above, we would like to submit that as per The Gazette of India published on 05.08.2016, IFCI Factors Ltd. has been specified as "**Financial Institution**".*

Hearing:

9. In order to conduct an inquiry in the matter, a personal hearing was granted to all the Noticees on November 28, 2017. Hearing notice was delivered to all the Noticees. All the Noticees had appeared for hearing on November 28, 2017.

Consideration of Issues, Evidence and Findings

10. I have carefully perused the charge levelled against Noticees in the SCN and all the documents available on record. In the instant matter, the following issues arise for consideration and determination in respect of
 - I. Whether Noticee No. 1, 2 and 3 has violated Regulation 31(2) read with 31(3) of SAST Regulations.
 - II. Whether Noticee No. 4 has violated Regulation 29(1) read with 29(3) of SAST Regulations.

III. Does the violation, if any, on the part of noticees attract monetary penalty under Section 15 A (b) of the Act?

IV. If so, what would be the quantum of monetary penalty that can be imposed on noticees taking into consideration the factors mentioned in Section 15J of the Act?

11. Before proceeding further, I would like to refer to the relevant provisions of the SAST regulations which read as under:

Disclosure of acquisition and disposal.

29(1) Any acquirer who acquires shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, aggregating to five per cent or more of the shares of such target company, shall disclose their aggregate shareholding and voting rights in such target company in such form as may be specified

29(3) *The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within two working days of the receipt of intimation of allotment of shares, or the acquisition of shares or voting rights in the target company to,—*

(a) every stock exchange where the shares of the target company are listed; and

(b) the target company at its registered office.

Disclosure of encumbered shares.

31(2) *The promoter of every target company shall disclose details of any invocation of such encumbrance or release of such encumbrance of shares in such form as may be specified.*

31(3) *The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within seven working days from the creation or invocation or release of encumbrance, as the case may be to,—*

(a) every stock exchange where the shares of the target company are listed; and

(b) the target company at its registered office.

Findings:

Noticee 1,2 & 3

12. I have carefully perused the allegations levelled in the SCN and the replies submitted by the Noticees. I find that the promoters had pledged their shares with Noticee 4 and the same was released later which required the Noticees 1, 2, & 3 to make requisite disclosures as prescribed under the SAST Regulations. Further, upon release of the pledge, Noticee 4 was also required to make necessary disclosures as prescribed under the SAST Regulations. However, the Noticees failed to make the said disclosures. I find from the submissions made by the Noticees that they have admitted their failure to make the necessary disclosures under the SAST Regulations.

13. Further, I do not find any merit in the submissions of the Noticees that the non disclosures were unintentional and not wilful. Also, I do not find any merit in the submissions of the Noticees that they have not made any illegal or undue profits. In this context, I note that the Hon'ble Securities Appellate Tribunal in the matter of Komal Nahata Vs. SEBI vide order dated January 27, 2014 has observed that:

“Argument that no investor has suffered on account of nondisclosure 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 nondisclosure.”

14. Further, I also note that in Appeal No. 78 of 2014 in the case of Akriti Global Traders Ltd. Vs. SEBI, the Hon'ble Securities Appellate Tribunal vide order dated September 30, 2014 has observed that:

“... Argument of appellant that the delay was unintentional and that the appellant has not gained from such delay and therefore penalty ought not to have been imposed is without any merit, because, firstly, penal liability arises as soon as provisions under the regulations are violated and that penal liability is neither dependent upon intention of parties nor gains accrued from such delay”.

15. Noticee 1, 2, and 3 have accepted that there was a delay on their part, however they have argued that since shares were pledged by them with IFCI factors in the year 2010 when SAST 1997 were in force and there was no requirements of disclosure for pledge creation under that Regulation. I am not inclined to accept this argument of Noticee 1, 2 & 3 as these Noticees have been booked for non-disclosure of release of pledged release which has happened during April 21, 2014 and at the relevant time SEBI SAST 2011 was in force and which has mandated disclosure of release of pledge release. I also note that desired disclosure was made by Noticees with the delay of over 32 months in January 25, 2017. In view of the above, I find Noticee 1, 2 & 3 guilty of non-disclosure of pledge release as per Regulation 31(2) read with 31(3) of SAST Regulations within stipulated time.

Noticee 4

16. Noticee 4's claim that since it is the subsidiary of a Public Financial Institution (hereinafter referred to as PFI) hence it is exempted for the compliance requirement as per Regulation 29(1) of the SAST Regulation is not tenable as the holding company in the instant matter is a PFI and by the virtue of holding company being a PFI, its subsidiaries doesn't suo moto becomes PFI. Section 2(72) of Companies Act, 2013 has mentioned names of certain institutions to be considered as PFI and has also mentioned other institutions can be PFI provided name of such institution has been notified by the central government in consultation with Reserve Bank of India. Noticee 4 has not brought any Government Notification to the effect that it is a PFI. Also the argument that proviso of Regulation 29(4) is also applicable to it is without any merit as it is clearly mentioned in the Regulation that proviso is applicable only to scheduled Commercial Banks and PFIs. In view of the above, I find Noticee 4 guilty of non-compliance of Regulation 29(1) read with 29(3) of the SAST Regulation.
17. In view of the above, I conclude that the Noticees, by not making the necessary disclosures upon release of pledge of shares of Shiva cements, have violated the following provisions of law which warrants imposition of monetary penalties as prescribed under Section 15A (b) of the SEBI Act, 1992:
- (a) Noticees 1, 2 & 3 have violated the provisions of Regulation 31(2) read with and 31(3) of the SAST Regulations
 - (b) Noticee 4 has violated the provisions of Regulation 29(1) read with 29(3) of the SAST Regulations.
18. Section 15A(b) of the SEBI Act, 1992 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 there under,--*
- (b) to file any return or furnish any information, books or other documents within the time specified there for in the regulations, fails to file return or furnish the same within the time specified there for 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.*
19. The Hon'ble Securities Appellate Tribunal, in Appeal No.66 of 2003 order dated April 15, 2005 - Milan Mahendra Securities Pvt. Ltd. Vs SEBI, has also observed that, "*the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market. We cannot therefore subscribe to the view that the violation was technical in nature*".

20. 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..."*.
21. While determining the quantum of penalty under Section 15A(b) of the SEBI Act, 1992, it is important to consider the factors stipulated in Section 15J of the SEBI Act, 1992 which reads as under:-
22. **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.*
- Explanation:** *For removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under Sections 15A to 15E, Clauses (b) and (c) of Section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.*
23. I observe that, from the material available on record, any quantifiable gain or unfair advantage accrued to the Noticees or the extent of loss suffered by the investors as a result of the default cannot be computed. I note that the default of the Noticees are not repetitive in nature. I note that correct and timely disclosures play an essential role in the proper functioning of the securities market and failure to do so results in depriving the investors from taking well informed investment decision. I, therefore, conclude that the Noticees, by failing to make the necessary disclosures as required under the SAST Regulation are liable for monetary penalties under the SEBI Act, 1992.

ORDER

24. In view of the above, after considering all the facts and circumstances of the case and exercising the powers conferred upon me under Section 15-I (2) of the SEBI Act, 1992 read with Rule 5 of the Adjudication Rules, I hereby impose the following monetary penalties on the Noticees:

Notice No.	Name of the Noticee	Provisions of Law Violated	Penalty Provision	Penalty Amount (in Rs.)
1	M/s Unicon Merchants Private Limited	Regulations 31(2) read with 31(3) of the SAST Regulations	Section 15A(b) of the SEBI Act	3,00,000/- (Three Lakhs)
2	Mr. Akash Gupta			
3	Ms. Preeti Gupta			
4.	M/s IFCI factors Limited	Regulation 29(1) read with 29(3) of the SAST Regulations		2,00,000/- (Two lakhs)

25. Noticees shall remit/pay the said amount of penalty shall be paid within 45 days of receipt of this order either by way of demand draft in favor of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, or by e-payment facility into Bank account the details of which are given below:

Bank Name	State Bank of India
Branch	Bandra Kurla Complex
RTGS Code	SBIN0004380
Beneficiary Name	SEBI - Penalties Remittable to Government of India
Beneficiary A/c No	31465271959

26. The said demand draft or forwarding details and confirmation of e-payment made in the format as given in table below should be forwarded to " General Manager (Enforcement Department - DRA- I), Securities and Exchange Board of India, SEBI Bhavan, Plot no C-4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 052.

1	Case Name	
2	Name of Payee	
3	Date of Payment	
4	Amount Paid	
5	Transaction No	
6	Bank Details in which payment is made:	
7	Payment is made for: (like penalties/ disgorgement/ recovery/Settlement amount and legal charges along with order details)	

27. 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 05, 2018
Place: Mumbai

SAHIL MALIK
ADJUDICATING OFFICER