

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO.EAD/ NP/JS/AO- 2/2016]

**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
Balashri Commercial Limited
301, Sukh sagar, N.S. Patkar Marg,
Girgaum Chowpaty,
Mumbai. 400007
(PAN AACCB2631H)
In the matter of M/s Indianivesh Limited

BRIEF FACTS OF THE CASE

Securities and Exchange Board of India (hereinafter referred to as “SEBI”) detected transfer of shares of IndiaNivesh Limited (hereinafter referred to as indiaNivesh/ Company), during the period from May 01, 2013 to December 24, 2013 (hereinafter referred to as “Investigation Period”), which required disclosures under SEBI (Prohibition of Insider Trading) Regulations, 1992.

1. The enquiry conducted by SEBI revealed that IndiaNivesh Ltd (hereinafter referred to as company), is a company listed at the Bombay Stock Exchange (BSE). Balashri Commercial Ltd is one of the promoters of IndiaNivesh Ltd holding 18,06,850 shares of the company at end of September 2013, which constitutes 4.79 percent of the issued capital of IndiaNivesh. M/s Balashri Commercial Ltd (hereinafter referred to as noticee), having PAN AACCB2631H, transferred 10,00,000 shares (which constitute 2.65% share capital of IndiaNivesh) through off market to Mangal Keshav Capital Ltd. (MKCL) on June 27, 2013. Subsequently, the noticee received back 10,00,000 shares through off market from MKCL on July 11, 2013. The details of the transferred shares is given below:

Date	Client Name	Credit /Debit	Counterparty	No. of shares	scrip
27/06/2013	Balashri Commercial Ltd	Debit	Mangal Keshav Capital Ltd	10,00,000	Indianivesh Ltd
11/07/2013	Balashri Commercial Ltd	Credit	Mangal Keshav Capital Ltd	10,00,000	Indianivesh Ltd

- As per the department's findings, noticee being promoter of IndiaNivesh and holding 4.79 percent of shares was required to disclose the above mentioned transfer of shares to MKCL under Regulation 13(4A) and 13(5) of SEBI (Prohibition of Insider Trading) Regulations, 1992 to IndiaNivesh under regulation 13(4A) and IndiaNivesh in turn to stock exchange under regulation 13(6) of the regulation. However, BSE vide email dated June 25, 2014 informed SEBI that no such disclosure under Regulation 13(6) was made to BSE by IndiaNivesh as regards the transfers of shares from noticee's beneficiary account to MKCL and back from MKCL to noticee's beneficiary account.

APPOINTMENT OF ADJUDICATING OFFICER

- The undersigned had been appointed as Adjudicating Officer, vide order dated December 29, 2015, under section 15- I of SEBI Act and rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as "**Rules**") to enquire into and adjudge under section 15A(b) of SEBI Act for the alleged violations of Regulation 13(4A) and 13(5) of SEBI (Prohibition of Insider Trading) Regulations, 1992.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

- A show-cause notice no. EAD/NP/JS/OW/0005/2016 dated February 12, 2016 was issued to the noticee asking as to why an inquiry should not be held against noticee in terms of Rule 4 of SEBI Adjudication Rules and penalty be imposed under section 15A(b) of SEBI Act for non disclosures under Regulations 13(4A) & 13(5) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as SEBI PIT Regulations) for transfer of 10,00,000 shares of IndiaNivesh Limited on June 27, 2013 and receiving back the same quantity of shares on July 11, 2013.

5. M/S Balashri Commercial Limited in its reply to SCN vide its letter dated March 21, 2016 submitted as under:

“We are a Non-Banking Finance Company registered with Reserve Bank of India (RBI) having registration No.B.05.01520 for more than 8 years (copy of Registration Certificates are enclosed and marked as Annexure 'A'). We are into the business of Investment and Trading in Shares and Securities and also Non-Banking Finance activity such as Inter Corporate Deposits (ICD), Short Term Financing and Bridge Loans etc. We in the furtherance of our business place (pledge) the shares belonging to us with the other Non-Banking Finance Company (NBFC) for raising the funds for business.”

We submit that we had pledged 10,00,000 shares of IndiaNivesh Limited with Mangal Keshav Capital Limited on 27.6.2013. We submit that the said 10,00,000 shares of IndiaNivesh Limited were de-pledged and received back on 11.7.2013 from Mangal Keshav Capital Limited.

The aforesaid transaction was not an off-market trade for buy and / or sale of shares of IndiaNivesh Limited but was merely a transaction of Pledge and de-pledge of shares. The provision of Reg. 13(4A) read with 13(5) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 does not cast any obligation on the entity (being a promoter) to submit the disclosure under Form D for pledge and de-pledge of shares.

**FACTUAL ASPECTS RELATING TO SHARES OF INDIANIVESH LIMITED
DEBITED / CREDITED IN OUR DEMAT ACCOUNT**

- i. *Our Company has opened account with Mangal Keshav Capitals Limited (MKCL) (a Non-Banking Finance Company registered with RBI) in the year 2011 to avail temporary loans against pledge of shares.*
- ii. *Mangal Keshav Capital Limited vide its sanction letter dated November 9, 2011 had sanctioned their in-principle approval for Rs.9,00,00,000/- (Rupees Nine Crore only) as loan against shares and had executed Loan Agreement dated November 9, 2011.....*
- iii. *Mangal Keshav Capital Limited had subsequently vide its letter dated June 18, 2013 had increased the sanctioned amount by Rs. 1,00,00,000/- (Rupees One*

*Crore only) and renewed the previous loan tenure by further period of six months
.....*

- iv. The movement of shares to from our DP to the DP of MKCL was on account of pledge of shares. There was margin shortfall during that period since the share price of Gitanjali Gems Limited fell down (which were already pledged with MKCL) and the shares of IndiaNivesh Limited were pledged to replenish the margin so as to maintain the comfortable levels of margins with MKCL.*
- v. The fact that shares were moved off-market for the purpose of pledge was noted in the Delivery Instruction slips executed by the company wherein it was categorically stated "Trf. to Margin A/c".....*
- vi. Similarly on 11.07.2013, the said 10,00,000 shares of IndiaNivesh Limited were de-pledged pledged and remitted back by MKCL in the DP account of the Company. There was no buy transaction when the shares were de-pledged and remitted back by MKCL to the company*
- vii. We clarify that beneficial ownership of shares of IndiaNivesh Limited, when pledged and de-pledged with MKCL belonged to us only at all point of time.*
- viii. Hence, from the above, it is apparent that the shares transferred to MKCL was in form of pledge and there was no off-market sale of shares and consequently when shares were un-pledged there was no off-market purchase of shares, no actual / real / effective transfer of beneficial ownership was intended and none was passed on to MKCL.*
- ix. In other words, the shares when pledged with MKCL – we did not receive any consideration when shares were pledged to replenish the margin so as to maintain the comfortable levels of margins with MKCL nor did we pay any consideration when the shares were de-pledged and received back from MKCL.*
- x. The financial statement for the entire year 2013-14 from MKCL was enclosed which signifies that the loan was received from MKCL from time to time against pledge of shares and interest was charged regularly on the outstanding loan amount (TDS was also deducted and duly deposited with requisite authority on*

timely manner by the Company which further clearly reflects that the account with MKCL was loan account and shares were pledged and loan was availed and interest were paid against loan.

PERSONAL HEARING

7. The noticee requested for grant of opportunity of a personal hearing in the matter. Vide letter dated April 1, 2016 the noticee was informed of opportunity of personal hearing scheduled on April 20, 2016. The noticee vide his letter dated April 18, 2016 informed that Mr Rajesh Nuwal, Director and Mr Jinesh Doshi, Authorized official of the company would appear on behalf of the Company on April 20, 2016. On the scheduled date of hearing, Mr Jinesh Doshi only appeared for personal hearing.
8. During the course of personal hearing and subsequent written submission, the noticee relied upon its reply dated march 21,2016 to SCN and made following additional submissions as under:
 - i. *MKCL has also categorically stated that the DP Account 1202470000162906 is used by them specifically for the purpose of holding securities which are deposited with MKCL as collateral by clients whom loans are disbursed by MKCL.*
 - ii. *The fact that shares were moved off-market for the purpose of pledge was noted in the Delivery Instruction slips executed by the Company wherein it was categorically stated 'Trf. to Margin A/c'.*
 - iii. *We respectfully submit that it is clear from the above that the said account of MKCL was maintained for the purpose of holding the securities of the Client to whom the loan are disbursed and separate from their own DP account.*
 - iv. *We once again clarify that the beneficial ownership of shares of IndiaNivesh Limited, when pledged and de-pledged with MKCL belonged to us only at all point of time and the fact of the same has also been mentioned in the letter received from MKCL.*

- v. *Hence, from the above it is apparent that the shares transferred to MKCL was in form of pledge and there was no off-market sale of shares and consequently when shares were un-pledged there was no off-market purchase of shares, no actual / real / effective transfer of 'beneficial ownership' was intended and none was passed on to MKCL.*
- vi. *In other words, the shares when pledged with MKCL - we did not received any consideration (shares were pledged to replenish the margin so as to maintain the comfortable levels of margins with MKCL) nor did we paid any consideration (when the shares were de-pledged and received back from MKCL).*

In the view of submissions made, Noticee prayed that the SCN be set aside and no further action is initiated in the interest of justice.

ISSUES UNDER CONSIDERATION AND FINDINGS

9. The issues under consideration in respect of the case are as under:
 - a) Whether there is any violations of the provisions of regulations 13(4A) read with 13(5) of SEBI (PIT) Regulations by the noticee.
 - b) Does the violation, if any, attract monetary penalty under section 15A(b) of the SEBI Act?
 - c) If so, what should be the quantum of monetary penalty to be imposed?
10. It would be important to refer to the relevant provisions of the Regulations which read as under:

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

13(4A), " Any person who is a promoter or part of promoter group 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 from the last disclosure made under Listing Agreement or under sub-regulation (2A) 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.

FINDINGS

11. Upon perusal of the documents available on record and submissions made by the noticee, I find that the noticee was sanctioned a loan of Rs. 9,00,00,000 (Rs Nine Crore) as Loan against shares subject to conditions stipulated in the agreement dated November 09, 2011 between MKCL and the noticee.. Vide another sanction letter dated June 18, 2013, the noticee was granted additional loan of Rs 1,00,00,000, thereby making the loan eligibility of the noticee upto Rs 10,00,00,000 (Rs ten crores) as loan against shares subject to conditions as specified in the said agreement. The loan agreement, inter-alia, provided that :

"Designated Demat Account means a Demat Account opened by the Borrower with the DP designated by MKCL.

Margin means cash deposit and /or such percentage of the value of securities held in Designated Demat Account or pledged by the Borrower, as is required to be funded by the Borrower. Margin shall be prescribed by MKCL and may be varied from time to time and from one Security to another.

The Borrower shall irrevocably instruct Designated Broker to credit the securities on the relevant pay-out date wholly and exclusively to the Designated Demat Account of the Borrower. The borrower agrees to pledge all securities lying in the Borrower's Designated Demat account as a security for repayment of all the dues from the Borrower to MKCL under this agreement. Without prejudice to the foregoing, the Borrower shall give an irrevocable power of attorney to MKCL to create pledge on Securities in the Designated Demat Account. The Borrower also agrees that to top up the Margin requirement, the borrower may also pledge in favour of MKCL any and/or all the securities lying in the borrower's demat account other than the designated Demat Account. The borrower also agrees and undertakes that if they shall not create any charge or encumbrance or lien or any other adverse rights on the Securities that would be received from the pay-

out and/or available in the Designated Demat Account from time to time, other than in favour of MKCL as aforesaid.”

The borrower shall execute in favour of MKCL, an irrevocable and unconditional power of Attorney in form and substance agreeable to MKCL, authorising MKCL to, inter alia, operate designated DP account and the bank account, as well as to do all acts, deeds, and things that are necessary, in opinion of MKCL to safeguard its interest.....

12. The noticee along with documentary evidence submitted that the transfer of shares to designated DP A/c as per Loan agreement as alleged in the SCN were for the purpose of pledge of shares to top up margin and not for sale or purchase of shares. The noticee transferred ten lacs shares of IndiaNivesh to MKCL's Designated Demat A/c by issuing delivery instruction slip with mandate "Transfer to Margin A/c" on June 27, 2013. Again on July 11, 2013, ten lacs shares of IndiaNivesh were transferred back to noticee's DP account by MKCL on account of release of pledge. No consideration was paid by MKCL to the noticee, on or after 27/06/2013, when shares were transferred into designated DP A/c and on 11/07/2013 or thereafter when shares were transferred back to noticee's DP account.
13. The statement of Loan account with of MKCL for the financial year 2013-14 submitted by noticee shows that loan amount had been disbursed to the noticee from time to time for which interests had been charged to the noticee. The noticee had deducted and deposited TDS from the interest payable to MKCL. The transactions between the broker and the noticee are therefore bona fide financial transactions for loan against shares in terms of the said agreement. The statement also shows a credit of Rs. 4,00,000/- on 07/10/13 being the dividend received against the shares of Gujarat Heavy chemical pledge in the designated DP A/c with MKCL by noticee.
14. The pledge provisions as outlined in the Depositories Act, 1996 are as under:
"12. Pledge or hypothecation of securities held in a depository.
(1) Subject to such regulations and bye-laws, as may be made in this behalf, a beneficial owner may with the previous approval of the depository create a pledge or hypothecation in respect of a security owned by him through a depository.
(2) Every beneficial owner shall give intimation of such pledge or hypothecation to the depository and such depository shall thereupon make entries in its records accordingly.

(3) Any entry in the records of a depository under sub-section (2) shall be evidence of a pledge or hypothecation.”

The provisions of pledge as enumerated in the SEBI (Depositories and Participants) Regulations 1996 is as under:

“Manner of creating pledge or hypothecation.

58. (1) If a beneficial owner intends to create a pledge on a security owned by him he shall make an application to the depository through the participant who has his account in respect of such securities.

(2) The participant after satisfaction that the securities are available for pledge shall make a note in its records of the notice of pledge and forward the application to the depository.

(3) The depository after confirmation from the pledgee that the securities are available for pledge with the pledger shall within fifteen days of the receipt of the application create and record the pledge and send an intimation of the same to the participants of the pledger and the pledgee.

(4) On receipt of the intimation under sub-regulation (3) the participants of both the pledger and the pledgee shall inform the pledger and the pledgee respectively of the entry of creation of the pledge.

(5) If the depository does not create the pledge, it shall send along with the reasons an intimation to the participants of the pledger and the pledgee.

(6) The entry of pledge made under sub-regulation (3) may be cancelled by the depository if pledger or the pledgee makes an application to the depository through its participant: Provided that no entry of pledge shall be cancelled by the depository without prior concurrence of the pledgee.

(7) The depository on the cancellation of the entry of pledge shall inform the participant of the pledger.

(8) Subject to the provisions of the pledge document, the pledgee may invoke the pledge and on such invocation, the depository shall register the pledgee as beneficial owner of such securities and amend its records accordingly.

(9) After amending its records under sub-regulation (8) the depository shall immediately inform the participants of the pledger and pledgee of the change who in turn shall make the necessary changes in their records and inform the pledger and pledgee respectively.”

The master circular CIR/DP/11 /2014 dated April 07, 2014 issued by SEBI overrides all other circular issued by SEBI on the subject. On perusal of this circular it is noted that the following provisions related to pledge has been stated therein:

Separate Accounts

“9. The DP shall open separate accounts in the name of each of the beneficial owners and securities of each beneficial owner shall be segregated and shall not be mixed up with the securities of other beneficial owners and/or DP’s own securities held in dematerialized form.

10. The DP shall not facilitate the Beneficial Owner to create or permit any pledge and /or hypothecation or any other interest or encumbrance over all or any of such securities submitted for dematerialization and/or held in demat account except in the form and manner prescribed in the Depositories Act, 1996, SEBI (Depositories and Participants) Regulations, 1996 and Bye-Laws/Operating Instructions/Business Rules of the Depositories.”

4.6 Pledge of Shares through depository system

i. Section 12 of the Depositories Act and Regulation 58 of the SEBI (Depositories and Participants) Regulations, 1996 (hereinafter referred to as DP Regulations) along with the relevant Bye Laws of the Depositories clearly enumerate the manner of creating pledge. It is felt that there is a need to communicate to the BOs that any procedure followed other than as specified under the aforesaid provisions of law shall not be treated as pledge.

ii. In order to clarify the same, the depositories are advised to issue a communiqué to the DPs advising them to inform BOs about the procedure for pledging of shares held in demat form as enumerated in the relevant sections of the Depositories Act and SEBI (Depositories and Participants) Regulations, 1996. Depositories may also advise DPs that an off-market transfer of shares leads to change in ownership and cannot be treated as pledge. Further, this issue may also be taken up in the investor awareness programs wherein the manner of creation of pledge can be effectively communicated to the BOs directly.”

15. It is noted that procedure to create pledge as per Depositories Act and DP Regulations requires a time of fifteen days to create and record the pledge. As per then practice prevalent in the market, shares were transferred to designated DP A/C and borrower issue Power of Attorney in favour of lender to liquidate the shares

rather than following the procedure for creating pledge as per Depositories Act and Regulations. This has been clarified by SEBI vide its master circular dated April 07, 2014 that the DP shall not facilitate the BO to create or permit any pledge and/or hypothecation or any other interest or encumbrance over all or any of such securities submitted for dematerialization and /or held in demat account except in the form and manner prescribed in the Depositories Act, 1996, SEBI (DP) Regulations, 1996 and Bye-Laws/Operating Instructions/Business Rules of the Depositories. Further the said circular also state that it is felt that there is a need to communicate to the BOs that any procedure followed other than as specified under the aforesaid provisions of law shall not be treated as pledge. This confirms to then prevalent market practice to create a pledge.

16. The transfer of shares to designated DP A/c by noticee was made on June 27, 2013 and were returned back to DP A/c of noticee on July 11, 2013. In a time span of 14 days securities were restored in the DP A/c of noticee. The clarifications issued by SEBI vide circular dated April 07, 2014 is subsequent to the transfers of shares. The fact is that shares were transferred to designated a/c to pledge the same in terms of the loan agreement between noticee and MKCL by marking on DP transaction slip as "transfer to margin A/c". The financial statement confirms the loan transactions and payment of interest to lender after deducting TDS. The loan A/c also shows the credit of Dividend received against share pledged by noticee in the designated DP A/c. The cause for transfer of shares by noticee to MKCL designated DP account was to replenish sudden shortage in the margin a/c because of abrupt drop in the price of shares of Gitanjali gems.
17. In view of the same, I find that transfer of shares was to designated DP A/c in terms of the loan agreement for a pledge, and were returned to the noticee's DP A/c on De-pledge. Though the shares stand transferred to designated A/c of lender as per agreement, the right of lender to liquidate shares in market was subject to default by borrower. The beneficial ownership of the pledged shares remained with Noticee as the corporate benefits arising on these shares in the designated DP A/c were credited to noticee. This is akin to shares lying in the pool account of a broker where beneficial ownership is buyer but if the buyer fails to meet pay-in obligations in time, broker has a right to liquidate client's shares lying in the pool account in market to recover its dues.

18. Though the noticee did not follow the procedure for creation of Pledge and De-pledge as laid down in the Depositories Act and DP Regulations however, the said default is considered as technical in nature as the transfer of shares were made in compliance of the conditions as per the loan agreement between the noticee and the MKCL, Noticee marked on DP transaction slip as "transfer to margin A/c, the financial statements which confirms the loan transaction and payment of interest to lender after deducting TDS, the dividend received on pledge shares were credited to Noticee and with in time of 14 days the pledge and de-pledge of shares took place. In the case of **Reliance Industries Ltd. v SEBI Appeal No. 39/2002**, wherein the company failed to make relevant disclosure in time under Regulation 7(1) of Takeover Regulations, then Hon'ble Securities Appellate Tribunal observed that "*The High Court in Cabot's case has pronounced that if a breach was merely technical and unintentional, it does not merit penal consequence. It ultimately depends on the facts of each case.*"

In relation to levying penalty in venial acts the observation of the Hon'ble Supreme Court in **Akbar Badrudin Badrudin Jiwani V. Collector of Customs, Bombay AIR 1990 SC 1579** is noteworthy to mention wherein the Hon'ble Court had stated that :- Para 61: "*We refer in this connection the decision of Merck Spares v. Collector of Central Excise & Customs, New Delhi, 1983 ELT 1261, Shama Engine Valves Ltd., Bombay v. Collector of Customs, Bombay (1984) 18 ELT 533 and Madhusudhan Gordhandas & Co. v. Collector of Customs, Bombay, (1987) 29 ELT 904, wherein it has been held that in imposing penalty the requisite mens rea has to be established. It has also been observed in Hindustan Steel Ltd., v State of Orissa, (1970) 1 SCR 753; (AIR 1970 SC 2563) by this Court that:- **"The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard to its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."***"

19. I find that though, noticee did not follow the procedure to create Pledge and De-Pledge of shares as laid down in the Depositories Act and DP Regulations, the violations are considered to be technical in nature as pledge and DE- Pledge was as per then prevalent market practices.

20. I also note the fact that noticee was holding 4.79% of shares of IndiaNivesh as on March 31, 2013, and it was categorized as promoter group. Being promoter it was required to disclose transfer of shares under Regulation 13 (4A) and 13(5)(b) on acquisition or sale of shares or voting rights as the case may be. I find that the shares were transferred in and out of the Designated DP A/c of MKCL for the purpose of pledge and De- Pledge, and beneficial ownership remained with the Noticee, and conclude that the noticee did not violate the provisions of section 13(4A) and 13(5) of the SEBI PIT Regulations and the show-cause notice is accordingly disposed of

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: Sept. 2, 2016

Place: Mumbai

Nagendraa Parakh

Adjudicating Officer