

**BEFORE THE ADJUDICATING OFFICER**  
**SECURITIES AND EXCHANGE BOARD OF INDIA**  
**[ADJUDICATION ORDER NO. SEL/ NK/AO/DRK/DS/EAD3-350/16-2013]**

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**UNDER SECTION 15 I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5(1) OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995**

Against  
**Shri. Nirmal Kotecha**  
[PAN No. AEZPK2016H]  
601, Sukh Castle, Opp. HDFC Bank,  
Bhandarkar Road, Matunga (CR), Mumbai – 400 019

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**FACTS OF THE CASE IN BRIEF**

1. SEBI had conducted an investigation into the trading in the scrip of SEL Manufacturing Co. Ltd. (hereinafter referred to as 'SEL') during the period from August 21, 2007 to August 27, 2007 (hereinafter referred to as 'Investigation Period'). The scrip of the company is listed at the Bombay Stock Exchange Ltd (hereinafter referred to as 'BSE') and National Stock Exchange of India Ltd (hereinafter referred to as 'NSE').

**APPOINTMENT OF ADJUDICATING OFFICER**

2. I was appointed as the Adjudicating Officer under section 15 I of the Securities and Exchange Board of India Act, 1992 read with Rule 3 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as 'Rules') to inquire into and adjudge under 15A(b) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the 'SEBI Act') the alleged violation of the provisions of Regulation 13(3) of the Securities and Exchange Board of India (Prevention of Insider Trading) Regulations, 1992 (hereinafter referred to as the 'PIT Regulations') in respect of the dealings of Shri Nirmal Kotecha (hereinafter referred to as the noticee/he) in the scrip of SEL during the investigation period.

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

3. A Show Cause Notice dated September 27, 2012 was issued to the noticee in terms of the provisions of Rule 4 of the Rules, requiring him to show cause as to why an inquiry should not be held against him and why penalty, if any, should not be imposed on him under Section 15A(b) of the SEBI Act for the alleged violation of the provisions of Regulation 13(3) of the PIT Regulations.
4. The Investigation Report (hereinafter referred to as 'IR') observed that the noticee had received 5,00,000 shares of SEL in the pre-IPO placement. The noticee traded through multiple stock brokers and bought 12,85,000 shares of SEL on August 21, 2007 and 189 shares of SEL on August 27, 2007 that amounts to 12,85,189 shares of SEL [8,00,000 shares at NSE and 4,85,189 shares at BSE] bringing his shareholding in SEL at 11.72%. It is also observed that the noticee had sold 5,67,904 shares of SEL [3,00,000 shares at NSE and 2,67,904 shares at BSE] amounting to 3.73% in SEL during August 21, 2007 to August 27, 2007. Post IPO the noticee continue to hold 12,17,285 shares of SEL.
5. It was observed from the disclosure made by the noticee to the Stock Exchanges under Regulation 7(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, that post IPO the noticee was holding 11.72% shareholding of SEL. It was observed that the noticee had reduced his shareholding by 3.73% through sale of shares in market on August 27, 2007.
6. Therefore it was alleged that the noticee had failed to make the necessary disclosure of change in shareholding in SEL which exceeds 2% of the total shareholding, to SEL as required under Regulation 13(3) of the PIT Regulations. In view of same, it was alleged that the notice had violated the provisions of Regulation 13(3) of the PIT Regulations.
7. The SCN stated that the reply shall reach within 15 days from date of receipt of the notice, failing which it shall be presumed that the noticee

has no reply to submit and the matter shall be proceeded on the basis of material available on record.

8. Vide his reply dated November 09, 2012, the noticee made the following submissions:

- a) The observations made in relation to the share holding pattern of the noticee in SEL during the pre and post IPO Period and his trading in the said scrip are matters of fact and record.
- b) The notice admitted that he was holding 11.73% of the share holding of SEL post its IPO and had eventually reduced the said holding by 3.73% through sale of SEL shares in the open market on the day of August 27, 2007.
- c) The noticee denied that he had failed to make disclosure under Regulation 13 (3) of the PIT Regulations.
- d) The noticee had duly intimated to the company and both the stock exchanges (NSE as well as BSE) regarding the change in his shareholding under Regulation 7(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.
- e) The noticee had also intimated the company of his revised pattern of shareholding under Form C of PIT Regulations, but due to some communication error or technical fault at the end of the company the said disclosure was not received by it.

9. Vide hearing notice dated January 18, 2013, the noticee was provided an opportunity of being heard and was advised to attend the hearing on February 15, 2013 at SEBI Bhavan, Mumbai. The noticee vide letter dated February 14, 2013 authorised Shri Aditya Bhansali and Shri Manish Chhangani, Advocates, Mindspright Legal to appear on his behalf for the hearing on February 15, 2013. The authorised representatives (ARs) of the noticee appeared for the hearing and made the following submissions:

- a. The noticee had been sending all the communications regarding the disclosures to the company by way of fax. In the present case also the noticee had forwarded the disclosures to the company by the usual mode of communication i.e. fax. The disclosure sent by fax could not be delivered to the company due to technical error. However, the noticee does not have any proof to show that the disclosure was delivered to the company.

- b. The ARs also stated that they have no further submissions to make in this matter.

### **CONSIDERATION OF EVIDENCE AND FINDINGS**

10. I have taken into consideration the facts and circumstances of the case, and the material available on record.
11. It was alleged in the SCN that the noticee had failed to make the necessary disclosure of change in shareholding in SEL which exceeds 2% of the total shareholding, to SEL as required under Regulation 13(3) of the PIT Regulations.
12. As per the requirement of Regulation 13(3) of the PIT Regulations, any person who holds more than 5% shares or voting rights in a 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 a 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.
13. The noticee has submitted that he had made the said disclosure in the prescribed format by way of fax. It is due to technical default on part of SEL that SEL did not receive the disclosure. In this regard, I would like to quote the observation made by the Hon'ble Securities Appellate Tribunal (SAT) in Appeal No. 49/2001, Mega Resources Ltd. Vs. SEBI, order dated March 19, 2002:
- ".... the regulation is not simply on sending the information, it requires disclosure. Mere dispatch of the information is short of the said requirement....Thus the requirement is that the information should reach the person to whom it is meant. The obligation does not end by simply posting the information in a letterbox..."*
14. In view of the above observation of the Hon'ble SAT, it can be concluded that the noticee failed to make disclosure to SEL in the prescribed

format. The noticee should have ensured that the disclosure made by him has reached/received by SEL. Thus the onus of ensuring that the disclosure has reached the company lies on the noticee.

### **CONCLUSION:**

15. In view of the facts and material made available on record, it can be concluded that the noticee had failed to comply with the provisions of Regulation 13(3) of the PIT Regulations. The text of the said provision is as follows:-

#### **"Disclosure of interest or holding in listed companies by certain persons - Initial Disclosure**

##### **13. ...**

##### **Continual disclosure.**

(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.

...

(5) The disclosure mentioned in sub-regulations (3) and (4) shall be made within four working days of :

- (a) the receipts of intimation of allotment of shares, or
- (b) the acquisition or sale of shares or voting rights, as the case may be."

16. The aforesaid failure makes the noticee liable to penalty under Section 15A(b) of the SEBI Act which is reproduced below:

#### **"Penalty for failure to furnish information, return, etc.**

15A. If any person, who is required under this Act or any rules or regulations made thereunder,—

...

(b) to file any return or furnish any information, books or other documents within the time specified 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;"

17. In this regard, the provisions of Section 15J of the SEBI Act and Rule 5 of the Rules require that while adjudging the quantum of penalty, 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.*

18. With regard to the above factors to be considered while determining the quantum of penalty, it is noted that the disproportionate gain or unfair advantage made by the noticee or loss caused to the investors as a result of the failure of the noticee to make the disclosures are not made available on record. Further, it is difficult to quantify the unfair advantage made by the noticee or loss caused to the investors in a default of this nature.

19. At this juncture, I would like to quote the judgement of the Hon'ble Supreme Court of India in the matter of SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216(SC) wherein it was held that :

*"once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established, then the penalty is to follow".*

20. Having considered the facts and circumstances of the case and after taking into account the factors under section 15J of the SEBI Act, 1992, I find that a penalty of ` 4,00,000/- [Four Lakhs only] on the noticee

would be commensurate with the failure of the noticee in making the mandatory disclosure in this case.

**ORDER**

21. In exercise of the powers conferred under Section 15 I of the Securities and Exchange Board of India Act, 1992, and Rule 5 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, I hereby, impose a penalty of ₹ 4,00,000/- [Four Lakhs only] on Shri. Nirmal Kotecha in terms of the provisions of Section 15A(b) of the Securities and Exchange Board of India Act, 1992 for the failure to comply with the provisions of Regulation 13(3) of the Securities and Exchange Board of India (Prevention of Insider Trading) Regulations, 1992. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the failure of the noticee to make the disclosures.
22. The penalty shall be paid by way of Demand Draft drawn in favour of “SEBI – Penalties Remittable to Government of India” payable at Mumbai within 45 days of receipt of this order. The said demand draft shall be forwarded to the General Manager, IVD-ID-4, Securities and Exchange Board of India, Plot No. C4-A, ‘G’ Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.
23. In terms of the provisions of Rule 6 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 1995, copies of this order are being sent to Shri Nirmal Kotecha and also to the Securities and Exchange Board of India, Mumbai.

**Place: Mumbai**

**Date: March 28, 2013**

**D. RAVI KUMAR  
CHIEF GENERAL MANAGER &  
ADJUDICATING OFFICER**