

BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. AO/UN/1/2012]

**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
Mr. Hemant Kumar Motihar
having his address at
47-B, Akash Ganga Colony,
Sector 6, Plot No:17,
Dwarka, New Delhi- 110075

FACTS OF THE CASE IN BRIEF

1. Investigations were conducted by Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') into the transactions made by Mr. Hemant Kumar Motihar (hereinafter referred to as **the noticee**) in the scrip of Sarda Plywood Industries Ltd (hereinafter referred to as **the Company**) during the period January 01, 2007 to November 16, 2007 (hereinafter referred to as **investigation period**). The scope of the investigation included examining whether accurate and timely disclosures were made by the noticee in connection with transactions done by him in the scrip of the Company during the investigation period.

2. As per disclosures made by the noticee to the Bombay Stock Exchange (hereinafter referred to as **BSE**), as on January 19, 2007, he was holding 1,85,000 shares constituting 5.08% of the share capital of the Company. Based on the total share capital of the Company at that point of time, it was observed that the noticee's acquisition amounted to 5.07% of the share capital of the Company. It is therefore alleged that the disclosures as per the provisions of regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter to as **PIT Regulations**) and regulation 7(1) read with 7(2) of SEBI (Substantial Acquisition of Shares and Takeovers Regulations, 1997 (hereinafter referred to as **SAST Regulations**) were incorrect.
3. By March 02, 2007, the noticee was holding 2,58,347 shares constituting 7.08% of the share capital of the Company. Therefore, he ought to have made relevant disclosures to the Company as per the provisions of regulation 13(3) read with regulation 13(5) of PIT Regulations as also regulation 7(1)(A) of the SAST Regulations. It is alleged that the same was not done.
4. As per disclosures made in terms of regulation 13(1) of PIT Regulations by the noticee, on June 07, 2007, he acquired 15,000 shares of the Company, post which, his shareholding in the Company increased to 10% of the share capital of the Company. It is alleged that the actual number of shares acquired by the noticee on June 07, 2007 is 16,000 and that the requisite disclosures should have been made in terms of regulation 13(3) read with regulation 13(5) of PIT Regulations as also regulation 7(1)(A) of the SAST Regulations. Further, it is alleged that the disclosures were received by the Company on June 18, 2007 and therefore, the disclosures were not submitted within the time limit prescribed under regulation 13(5) of PIT Regulations (within four working days from the date of acquisition) as also regulation 7(2) of the SAST Regulations (within two working days from the date of

acquisition). Also, since the shareholding of the noticee had reached 10% of the share capital of the Company, he ought to have made requisite disclosures in terms of regulation 7(1) read with regulation 7(2) of SAST Regulations. It is alleged that the same was not done.

1. As per information available at BSE, on August 16, 2007, the noticee gifted 2,02,754 shares constituting 5.57% of the share capital of the Company to Ms. Shabnam Motihar (the mother of the noticee). Therefore, the noticee ought to have made requisite disclosures in terms of regulation 13(3) read with 13(5) of PIT Regulations as also regulation 7(1)(A) of the SAST Regulations. It is alleged that the same was not done.

APPOINTMENT OF ADJUDICATING OFFICER

2. I was appointed as the Adjudicating Officer vide order dated January 23, 2009, under section 15 I of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the '**SEBI Act**'), read with Rule 3 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Adjudication Rules**') to inquire into and adjudge under Section 15A(b) of the SEBI Act, the violation of regulation 7 of the SAST Regulations as well as the violation of regulation 13 of the PIT Regulations alleged to have been committed by the noticee.

SHOW CAUSE NOTICE, REPLY AND HEARING

3. A Show Cause Notice ADK-1/UN/200742/2010 dated March 26, 2010 (hereinafter referred to as '**SCN**') was served in terms of the provision of Rule 4(1) of the Adjudication Rules, seeking reply from the noticee as to why an inquiry should not be held against the noticee in respect

of the violation alleged to have been committed by him. In the absence of any response from the noticee, a reminder was issued on August 05, 2010.

4. Vide letter dated August 16, 2010, the noticee requested that he be provided copies of the documents relied upon during the adjudication proceedings and also requested that he be granted a week's time to file the reply post receipt of the documents sought. While his request was being processed, the noticee, vide his letter dated August 23, 2010, furnished his reply to the SCN. It was submitted that:

- i. As on January 19, 2007, the noticee was holding 1,85,000 shares. As per the calculations of the noticee, the same constituted 5.08% of the share capital of the Company and timely disclosures were made under 7(1) read with 7(2) of SAST Regulations and 13(1) read with 13(6) of PIT Regulations. Moreover, the noticee cannot be prosecuted or penalized even if assuming there was a calculation error of 0.01% as such a negligible variation has not caused any prejudice to the Company and the general public.
- ii. The allegation of requirement of disclosure of 7.08% shareholding under regulation 7(1A) of SAST Regulations and under regulations 13(3) and 13(5) of PIT Regulations is misplaced and unsustainable in the eyes of law. There was no statutory requirement on the part of the noticee to make disclosures of shareholding other than disclosures of shareholding at the stage of holding 5% and 10% which was duly complied with by the noticee.
- iii. The noticee made disclosure under regulation 7 of SAST Regulations on June 07, 2007 itself when the shareholding of the noticee crossed 10% (15,000 shares) of the share capital of the Company. The noticee acquired 1000 shares in a

subsequent transaction as is evident from the log register of the broker. The noticee made timely and appropriate disclosure of his shareholding as required under the law i.e. within two working days of acquisition as required under regulation 7 of SAST Regulations and within four working days as specified under regulation 13 of PIT Regulations.

- iv. Regarding the gift of shares constituting 5.57% of the share capital of the Company to Ms. Shabnam Motihar on August 16, 2007, the noticee made due disclosures as per regulation 13(3) of PIT Regulations.
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- 5. Vide letter issued on September 20, 2010, the noticee was sent copies of the documents he had requested for, and also given an opportunity of personal hearing on October 05, 2010. However, due to unforeseeable administrative reasons, the hearing was postponed to November 23, 2010 under intimation to the noticee. At the hearing where the noticee was represented by self, the noticee undertook to make further submissions in the matter by December 15, 2010.
 - 6. Vide email dated December 15, 2010, the noticee stated that BSE had informed him that proof in respect of any disclosures made by him to BSE shall be provided to SEBI if requested by SEBI. Subsequently, vide email dated December 21, 2010, BSE provided proof of disclosures made by Mr. Motihar.
 - 7. Vide email dated December 16, 2010, the noticee was requested to make further submissions, if any, in a hard copy form. However, in the absence of response from the noticee, a reminder was issued to him on January 06, 2011. The noticee replied vide email dated January 21, 2011, whereby he enclosed a copy of the order passed by the Company Law Board (CLB) on a petition filed by the Target Company and inter alia stated that he had no further submissions to make. A perusal of the order passed by CLB reveals that in respect of the disclosures made by the noticee under regulation 7 of SAST Regulations and regulation 13 of PIT Regulations, CLB has stated as

follows-“for having this bench held non-compliance of disclosure of acquisitions within 15% of the paid-up capital under regulation 7 of Takeover Regulations and Regulation 13 of Insider Trading Regulations will not attract section 11A of the Act, this bench will not even get subject matter jurisdiction to hold above non-compliance, if any, as violation under the regulations supra. However, SEBI being competent authority to deal with the same and to pass directions; this bench has not given any holding as to purported violation of Regulation 7 of Takeover Regulations and Regulation 13 of Insider Trading Regulations by the respondents over the issue raised by the petitioner.
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CONSIDERATION OF EVIDENCE AND FINDINGS

8. I have taken into consideration the facts and circumstances of the case, the submissions made by the noticee and the material made available on record.
9. The allegations against the noticee in the SCN are that:
 - v. The disclosures made by the noticee under regulation 13(1) of PIT Regulations and regulation 7(1) of SAST Regulations pursuant to acquisition of shares on January 19, 2007 were incorrect.
 - vi. Upon his shareholding reaching 7.08% of the total share capital of the Company on March 02, 2007, the noticee did not make requisite disclosures under regulation 13(3) read with regulation 13(5) of PIT Regulations and regulation 7(1A) read with regulation 7(2) of SAST Regulations.
 - vii. Pursuant to a transaction done on June 07, 2007, the shareholding of the noticee increased to 10% of the total share

capital of the Company. Therefore, the noticee ought to have made disclosures under regulation 13(3) read with regulation 13(5) of PIT Regulations as well as under regulations 7(1) and 7(1A) read with regulation 7(2) of SAST Regulations. The disclosures were made by the noticee under regulation 13(1) of PIT Regulations. Also, the number of shares held by the noticee was not disclosed correctly.

viii. Pursuant to the gift of shares constituting 5.57% of the share capital of the Company to Ms. Shabnam Motihar on August 16, 2007, the noticee ought to have made due disclosures as per regulation 13(3) read with regulation 13(5) of PIT Regulations as well as regulation 7(1A) read with regulation 7(2) of the SAST Regulations. However, no such disclosures were made by the noticee.

10.. I have examined the show cause notice, replies of the noticee and the material available on record. The provisions of law alleged to have been violated by the noticee read as follows:

Regulation 7 of SAST- Acquisition of 5 percent or more shares or voting rights of a company

(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 to the stock exchanges where shares of the target company are listed.

(1A) Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11 shall disclose

purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.

(2) The disclosures mentioned in sub-regulation (1) and (1A) shall be made within two working days of, -

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

Regulation 13 of PIT- Disclosure of interest or holding by directors and officers and substantial shareholders in a listed company – Initial Disclosure

(1) any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company, the number of shares or voting rights held by such person, on becoming such holder, within 4 working days of :-

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

(2)

Continual Disclosure

(3) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company 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.

(4)

(5) The disclosure mentioned in sub-regulations (3) and (4) shall be made within 4 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.

11. Regarding the transaction done by the noticee on January 19, 2007 whereby the noticee acquired 1,85,000 shares of the Company, I observe that the percentage of shares acquired by the noticee amount to 5.07% of the total share capital of the Company at that point of time and therefore, the percentage disclosed by the noticee is incorrect. However, I also note that the number of shares acquired has been accurately disclosed by the noticee and the difference between the two percentage figures is only 0.01%. I therefore conclude that while there is a violation of regulation 13(1) of PIT Regulations and regulation 7(1) of the SAST Regulations, the same is technical in nature and the difference not of grave consequence.

12. In respect of the transaction done by the noticee on March 02, 2007 whereby the shareholding of the noticee increased to 7.08% of the total share capital of the Company, the noticee has contended that there was no statutory requirement to make any disclosures regarding this acquisition either under regulation 7(1A) of SAST Regulations or under regulation 13(3) of PIT Regulations.

- a. I observe that disclosure under regulation 7(1A) is necessary only if the acquirer has acquired shares under regulation 11(1) of SAST Regulations. Regulation 11(1) of the SAST Regulations states as follows- *“No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15% or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.”* Since regulation 11(1) applies only to those acquirers who hold 15% or more of the total voting capital of a company, it follows that disclosure under regulation 7(1A) is also attracted only by those who hold 15% or more of the total voting capital of a company. It is therefore concluded that the noticee was not required to make disclosure under regulation 7(1A) upon his shareholding reaching 7.08% of the total voting capital of the Company.
- b. As regards disclosure to be made under Regulation 13(3) of PIT Regulations, the noticee was holding more than 5% of the total voting capital of the Company and his acquisition on March 02, 2007 was in excess of 2% of the total voting capital of the Company. The noticee was therefore required to make disclosures in terms of regulation 13(3) read with regulation 13(5) of the PIT Regulations. As no such disclosure was made by the noticee, he has violated regulation 13(3) read with regulation 13(5) of the PIT Regulations.

13. Regarding the transaction done by the noticee on June 07, 2007, the noticee has claimed that as soon as he purchased 15,000 shares, his shareholding reached 10% of the total voting capital of the Company and that accurate and timely disclosures were made by him on the same day and that subsequently, another 1000 shares were acquired by him. A perusal of the log register of the broker provided by the noticee shows that all 16,000 shares were purchased by the noticee on June 07, 2007 through multiple orders placed through the broker.

- a. I note that the noticee was required to make disclosures under regulation 7(1) as he had reached the threshold limit of 10% stipulated therein. As per regulation 7(1) read with regulation 7(2) of the SAST Regulations, requisite disclosures should be made to the stock exchange within two working days from the date of acquisition. As the shareholding of noticee was less than 15%, he was not required to make disclosures in terms of regulation 7(1A) of the SAST Regulations but was required to make them under Regulation 7(1) of the SAST Regulations. However, the disclosures were made by the noticee under regulation 7(1A) and not under regulation 7(1) of the SAST Regulations. Thus, the noticee made disclosures under the wrong sub-regulations. As per the records of the Bombay Stock Exchange, disclosures made by the noticee under regulation 7(1A) of the SAST Regulations were received by BSE by way of fax on June 08, 2007. Therefore, the noticee's contention that he submitted necessary disclosures on the day that his shareholding reached 10% of the total voting capital of the Company is wrong. Further, in the light of the fact that the noticee himself had placed orders with his broker to buy another 1000 shares the same day, he should logically have waited till the end of the day until he knew the execution status of all the orders placed by him that day, before submitting disclosures to

the stock exchanges. The wording of the regulations does not in any way suggest that an entity is required to report to the stock exchange the moment he crosses the stipulated threshold limits. The Regulations in fact provide a time limit of 2 days is provided to make the requisite disclosures. Thus, there is no justifiable reason for the exclusion of the additional 1000 shares acquired on the same day in the disclosures made by the noticee. Further, the disclosures were received by the Company only on June 18, 2007, i.e. delayed by six working days. However, the gravity of the violations is lightened by the fact that the information that noticee had crossed the threshold shareholding of 10% has come out in the disclosures made by him to the stock exchange and were submitted to the stock exchange within the stipulated time, albeit under the wrong sub-regulations and with a slight error in the number of shares acquired.

- b. As per regulation 13(3) read with regulation 13(5) of the PIT Regulations, requisite disclosures ought to be made by an acquirer to the target company within four working days from the date of acquisition. The target company is then required to submit disclosures received under regulation 13(3) of the PIT Regulations to the stock exchange within two working days of receipt of the same. As the change in shareholding of the noticee since the last disclosure made by the noticee under regulation 13 (which was in January, 2007 pursuant to his shareholding reaching 5.08% of the total voting capital of the Company) exceeded 2% of the total voting capital of the Company, he was required to make disclosures under regulation 13(3) read with regulation 13(5) of PIT Regulations. The disclosures were received by the Company on June 18, 2007, i.e. delayed by four working days. The disclosures submitted to the Company were made under regulation 13(1) and not under

regulation 13(3) of the PIT Regulations. The number of shares acquired was also incorrectly stated in the disclosures submitted to the Company. However, the seriousness of the violation is alleviated by the fact that the noticee did disclose that he has crossed the 10% threshold limit in his disclosure to the BSE although under the wrong sub-regulation (the disclosure was made under regulation 13(1) of PIT Regulations).

14. In respect of the transaction made by the noticee on August 16, 2007, it is noted that two disclosures were required to be made- i) by the buyer of the 5.57% shareholding under regulation 7(1) read with regulation 7(2) of the Takeover Regulations since with the said acquisition, the buyer crossed the 5% limit stipulated under regulation 7(1) of the Takeover Regulations as well under regulation 13(1) of PIT Regulations and ii) by the seller, i.e. the noticee under regulation 13(3) read with regulation 13(5) of PIT Regulations, as the change in shareholding of the noticee since the last disclosure made by the noticee under regulation 13 (which was in June, 2007 pursuant to his shareholding reaching 10% of the total voting capital of the Company), exceeded 2% of the total voting capital of the Company.

15. No proof of disclosures made by the noticee to the Company in respect of the aforesaid sale is available. However, as per the records of BSE, the noticee made disclosures under regulation 13(3) of PIT Regulations notifying the sale to BSE on August 17, 2007. It is observed that regulation 13 (3) read with 13(5) of the PIT Regulations require the entity who acquires/sells shares exceeding stipulated limits to disclose such transactions to the target company and not to the stock exchanges. Under the relevant section of the PIT Regulations, it is the company which is expected to then disclose these transactions to the stock exchanges. In the instant case, it is noted that disclosures under

regulation 7(1) of SAST Regulations were made by his mother to whom the noticee gifted 5.57% shares. When this public disclosure of acquisition of 5.57% of the total voting capital of the Company by the mother of the noticee is considered alongside the disclosure by the noticee to the Company in June, 2007 that he held >10% of the total voting capital of the Company, it is fair to consider the possibility that the Company may have been misled to conclude that the noticee along with his family now held shares exceeding 15%, in non-compliance of SAST Regulations. It is possible that the public was also similarly misled. That the noticee made disclosures to the stock exchange regarding the sale of shares by him when no such disclosure was required to be made to the stock exchange (the onus on the noticee was to disclose to the company) cannot be considered as substitute and a mitigating factor for not disclosing the reduction in his individual shareholding to the Company, which is what the PIT Regulations mandate. Therefore, I conclude that the noticee has violated the provisions of regulation 13(3) read with regulation 13(5) of PIT Regulations in connection with the transaction done by him on August 16, 2007.

16. The violation mentioned in above paragraphs makes the noticee liable to penalty under Section 15A(b) of the SEBI Act. The relevant text of the section as it stood during the period of violation is stated hereinafter:-

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,—*

(a).....

(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 not exceeding five thousand rupees for every day during which such failure continues;”

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. It is also to be noted that the investigation report has not quantified the profit / loss for the nature of violation / transactions carried out by the noticee and no quantifiable figures are made available on record to assess the disproportionate gain or unfair advantage and amount of loss caused to an investor or group of investors as a result of the default by the noticee.

19. Considering the nature and totality of violations committed by the noticee, I hereby impose a penalty of Rs.2,00,000/- (Rupees Two Lakh only), on the noticee, which is appropriate in the facts and circumstances of the case.

ORDER

20. 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 Rs.2,00,000/- (Rupees Two Lakh only), on Mr. Hemant Kumar Motihar having his address at 47-B, Akash Ganga Colony, Sector 6, Plot No. 17, Dwarka, New Delhi – 110075, in terms of the provisions of Section 15A(b) of the Securities and Exchange Board of India Act, 1992 for his failure to abide by the provisions of Regulation 7 of the SAST Regulations and Regulation 13 of PIT Regulations. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the violation committed by the noticee.

21. 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 Chief General Manager, Integrated Surveillance Department, Securities and Exchange Board of India, Plot No. C4-A, ‘G’ Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

22. 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 Mr. Hemant Kumar Motihar having his address at 47-B, Akash Ganga Colony, Sector 6, Plot No. 17, Dwarka, New Delhi – 110075 and also to the Securities and Exchange Board of India, Mumbai.

Place: Mumbai

USHA NARAYANAN

Date: 30th March, 2012

ADJUDICATING OFFICER