

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. EAD-2/AO/ 140 /2013]

**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**

Against

Shri Bimal Kumar Agarwal

[PAN: ACRPA8154C]

In the matter of

Associated Cereals Limited

Background:

1. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') examined the Letter of offer document dated December 14, 2010 by M/s Ultraplus Housing Estate Pvt. Ltd (Acquirer), to the shareholders of M/s Associated Cereals Limited (Target Company) (hereinafter referred to as ACL). SEBI observed that Shri Bimal Kumar Agarwal (hereinafter referred to as the Noticee), a member of the promoter group of ACL had acquired 10,000 shares constituting 4.17% of the total equity and voting share capital of ACL by way of the inter-se transfer among the promoters on June 30, 1997. The promoters of the ACL were holding 32.21% of the total equity and voting share capital of ACL. In view of the said transfer and change in the shareholding, the Noticee was required to make public announcement in terms of Regulation 11(1) read with Regulation 14(2) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (hereinafter referred

to as SAST Regulations). The Noticee allegedly failed to comply with the said provisions under the SAST Regulations.

Appointment of Adjudicating Officer:

2. In view of the above, SEBI initiated adjudication proceedings against the Noticee and vide Order dated March 29, 2011 appointed the undersigned as the Adjudicating Officer (AO) under Section 15-I of the SEBI Act read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the 'Adjudication Rules') to inquire into and adjudge under Section 15H(ii) of the SEBI Act, 1992 (hereinafter referred to as the Act) the alleged violation of the abovementioned provisions of SAST Regulations.

Notice, Reply & Personal Hearing:

3. Accordingly, the undersigned issued a notice dated April 13, 2011 (hereinafter referred to as the 'SCN') to the Noticee in terms of Rule 4 of the Adjudication Rules requiring to show cause as to why an inquiry should not be held against him for the alleged violations. The SCN was duly delivered to the Noticee. The Noticee vide his e-mail dated May 13, 2011 informed the AO that they were applying for consent process. In the interest of natural justice and in order to conduct an inquiry as per Rule 4 (3) of the Adjudication Rules, an opportunity of personal hearing was granted to the Noticee vide notice dated July 15, 2011 on July 27, 2011. The authorized representative of the Noticee attended the said hearing and made oral submissions.
4. The authorized representative of the Noticee inter alia, submitted that they had acquired the shares in June 1997 whereas the SAST Regulations had come into operation in February 1997. ACL is a small company and that the Noticee was ignorant about the provisions as mentioned under the SAST Regulations at the time of the said acquisition. The Noticee has admitted that he did acquire 10,000 shares constituting to 4.17% of the total equity capital of ACL. The said inter-se transfer had no involvement of public interest and no

loss has been caused to the investors. They would be submitting a detailed reply to the SCN within 10 days.

5. Thereafter, the Noticee, vide letter dated July 30, 2011 forwarded a copy of the consent application so submitted with SEBI. However, in August, 2012 the consent application filed by the Noticee was rejected.
6. In view of the above, I am proceeding with the inquiry taking into account the documents and material as available on record.

Consideration of Issues, Evidence and Findings:

7. I have carefully perused the charges against the Noticee as per the SCN, oral submissions and the materials & documents as available on record. The issues that arise for consideration in the present case are:

(a) Whether the Noticee has violated the provisions of Regulation 11(1) read with Regulation 14(2) of the SAST Regulations?

(b) Does the violation, if any, on the part of the Noticee attract any penalty under Sections 15 H(ii) of the Act?

(c) If yes, what should be the quantum of penalty?

8. Before moving forward, it will be appropriate to refer to the relevant provisions of PIT Regulations which read as under:-

Relevant provisions of SAST Regulations:-

Consolidation of holdings.

11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, not less than 10 per cent but not more than 51 per cent of the shares or voting rights in the 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 2 per cent of the voting rights, with post acquisition shareholding or voting rights not exceeding fifty five per cent, in a period of 12 months unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.

Timing of the public announcement of offer.

14. (2) *In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any, already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in regulation 10 or regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be:*

Provided that in case of American Depository Receipts or Global Depository Receipts entitling the holder thereof to exercise voting rights in excess of percentage specified in regulation 10 or regulation 11, on the shares underlying such depository receipts, public announcement shall be made within four working days of acquisition of such depository receipts.

9. It is also relevant here to refer to the definition of an "Acquirer" which has been defined under Regulation 2(1) (b) of the SAST Regulations. It reads as under:

"any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, either by himself or with any person acting in concert".

It is clear from the said definition that when a person acquires shares of a company and crosses the prescribed threshold limits, he shall be individually and/or collectively liable to be governed by the provisions of the SAST Regulations.

10. I find from the SCN that the Noticee was one of the members of the promoter group of ACL at the relevant period. The promoters of the Target Company/ACL were holding 32.21% of the total equity and voting share capital of ACL. There was an inter-se transfer of 10,000 equity shares constituting 4.17% of the total equity and voting share capital of ACL among the promoters/promoter group i.e. between the Noticee and one Shri Bimal Kumar Sureka on June 30, 1997. The shareholding of the Noticee changed from 0.17% to 4.133%. On account of this acquisition the Noticee acquired more than 2% of the voting rights and was required to make a public

announcement within four working days as per the SAST Regulations. The Noticee allegedly failed to do so.

11. The Noticee did not deny the allegations as leveled in the SCN. The Noticee submitted that ACL is a small company and that the Noticee was ignorant about the provisions as mentioned under the SAST Regulations at the time of the said acquisition. The Noticee has admitted that he did acquire 10,000 shares constituting to 4.17% of the total equity capital of ACL. The said inter-se transfer had no involvement of public interest and no loss has been caused to the investors.
12. I find from the facts available on records, that the Noticee did not make the public announcement as was required for the said acquisition and change in the voting rights. In view of the same, it is amply clear that he has failed to adhere by the statutory requirements under the law. Therefore, I conclude that the Noticee has violated the provisions of Regulation 11(1) read with Regulation 14(2) of the SAST Regulations by failing to make a public announcement for the acquisition of shares of ACL thereby warranting imposition of monetary penalty under Section 15H (ii) of the Act.
13. Section 15H (ii) of the SEBI Act, reads as under:
***15H** Penalty for non – disclosure of acquisition of shares and takeovers.- If any person, who is required under this Act or any rules or regulations made there under, fails to-*
(i).....
***(ii)** make a public announcement to acquire shares at a minimum price; or*
(iii).....
he shall be liable to a penalty of twenty five crore rupees or three times the amount of profits made out of such failure, whichever is higher.
14. The Hon'ble Supreme Court of India in the matter of SEBI vs. Shri Ram Mutual Funds [2006] 68 SCL (216) SC held that " once a violation of statutory regulation is established, imposition of penalty becomes sine

qua non of violation and the intention of the parties committing such violation becomes totally irrelevant. Once the contravention is established then penalty is to follow".

15. While determining the quantum of penalty under section 15H (ii) of the SEBI Act, it is important to consider the factors stipulated in section 15J of the SEBI Act, which reads as under:-

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.*

16. I observe that from the material available on record it is difficult to quantify any gain or unfair advantage accrued to the Noticee or the extent of loss suffered by the investors as a result of the default of the Noticee or to ascertain whether the defaults are repetitive in nature. In this context, I considered the various mitigating factors in favour of the Noticee. I note that the SAST Regulations came in force in February 1997. The objective of incorporating Regulation 11(1) in the SAST Regulations appears to be regulating creeping acquisition by the promoters and the promoter group. When these Regulations came into existence, the creeping acquisition limit was set to be 2 percent of the voting rights which was substituted by 5 per cent by the SAST (Amendment) Regulations, 1998 with effect from October 1998 and later re-substituted to 10 percent by SAST (Amendment) Regulations, 2002 with effect from October, 2002. Further, I note that in the present case, the Noticee has acquired 10,000 shares of ACL, few months after the notification of the SAST Regulations, ie in June 1997, by way of inter-se transfers among the

promoter group and therefore it has not resulted in any change in the total shareholding of the promoter group. Moreover, the acquisition of shares by the Noticee did make a change in his individual shareholding but only to the extent of less than 5% of the total share holding of the company, i.e from 017% to 4.133%. The defaults occurred more than 15 years ago.

Order

- 17.** 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 read with Rule 5 of the Adjudication Rules, I hereby impose a penalty of ₹ 2,00,000/- (Rupees Two lakhs only) on Shri Bimal Kumar Agarwal under Section 15H (ii) of the SEBI Act. In my view, the penalty is commensurate with the default committed by the Noticee.
- 18.** The penalty amount as mentioned above shall be paid by the Noticee through a duly crossed demand draft drawn in favour of “SEBI – Penalties Remittable to Government of India” and payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to the Division Chief, CFD-DCR, Securities and Exchange Board of India, Plot No. C4-A, ‘G’ Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.
- 19.** In terms of the Rule 6 of the Adjudication Rules, copies of this order is sent to the Noticee and also to Securities and Exchange Board of India.

Date: January 15, 2013

Place: Mumbai

**P K KURIACHEN
ADJUDICATING OFFICER**