BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PG/AB/AO-26/2012]

UNDER SECTION 23-I OF SECURITIES CONTRACTS (REGULATION) ACT, 1956 READ WITH RULE 5 OF SECURITIES CONTRACTS (REGULATION) (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 2005

In respect of

Mr Dilip Hanmant Jambhale

(PAN: AGTPJ9641F)

In the matter of

Indo Pacific Software and Entertainment Ltd.

FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (**"SEBI / Board"**) conducted investigation into trading in the scrip of M/s Indo Pacific Software and Entertainment Ltd. (**"IPSE/Company"**) which was incorporated on 26th October 1999 and was in the business of providing software development, entertainment activities, development of multiplexes etc. SEBI had conducted an investigation into the dealing in the shares of IPSE during 2007.

2. The investigations revealed that 16 entities had entered into off market transactions in the shares of IPSE, during the period of investigation. It was observed that out of these 16 entities, ten

entities had transferred / received shares in off market transactions. In all, 70,78,108 shares have been transacted off-market amongst the entities in question. Dilip Hanmant Jambhale (“DHJ/Noticee”) was also one of the entities who had undertaken off market transfer in the shares of IPSE.

3. It is alleged that the Noticee entered into 6 off market transfers with 4 entities.

4. It was alleged that the Noticee had entered into off market transactions whereby he had violated Sections 13 and 18 r/w Section 2(i) of Securities Contracts (Regulation) Act, 1956 (“**SCR Act”**) and was liable for penalty under section 23H of SCR Act.

APPOINTMENT OF ADJUDICATING OFFICER

5. The undersigned was appointed as the Adjudicating Officer vide order dated January 17, 2011 under Rule 3 of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005 (**SCR Rules**) to inquire into and adjudge under section 23H of SCR Act, the alleged violations of the provisions of SCR Act.

SHOW CAUSE NOTICE, HEARING AND REPLY

6. Show Cause Notice dated July 4, 2011 was issued to the Noticee to show cause as to why an inquiry should not be held against the Noticee and penalty be not imposed under Section 23H of SCR Act for the alleged violations specified in the said SCN. A person named Sakharam Janu More replied stating that the Noticee was

his tenant 4 years ago and he is not aware of the address of the Noticee.

7. The Board also issued a corrigendum to appointment order of the Adjudicating Officer and in order to inform the Noticee about the corrigendum, an SCN dated March 7, 2012 (**"SCN"**) under Rule 4 of the SCR Rules was sent afresh. The said SCN was affixed on the last known address of the Noticee. No reply was received for the SCN within the stipulated time.

8. In the interest of natural justice and in order to conduct an inquiry as per rule 4(3) of the Rules, the Noticee was granted an opportunity of hearing on March 28, 2012 vide notice dated March 21, 2012. The said hearing notice was affixed at the last known address of the Noticee. The Noticee did not appear for the hearing and did not file any submissions with regard to the SCN.

9. In absence of any reply from the Noticee, the matter is proceeded with *ex parte* based on material available on record.

CONSIDERATION OF ISSUES AND FINDINGS

10. The issues that arise for consideration in the present case are :
    a) Whether the Noticee had violated the provisions of Section 13 and 18 r/w Section 2(i) of the SCR Act?
    b) Does the violation, if any, on the part of the Noticee attract monetary penalty under Sec. 23H of the SCR Act?
    c) If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in Sec. 23J of SCR Act?

11. Before moving forward, it will be appropriate to refer to the relevant provisions of SCR Act, which read as under:

SCR Act

Definitions

2. In this Act, unless the context otherwise requires, -

…

(i) spot delivery contract means a contract which provides for,-

(a) actual delivery of securities and the payment of a price therefor either on the same day as the date of the contract or on the next day, the actual period taken for the dispatch of the securities or the remittance of money therefor through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality;

(b) transfer of the securities by the depository from the account of a beneficial owner to the account of another beneficial owner when such securities are dealt with by a depository;

Contracts in notified areas illegal in certain circumstances

13. If the Central Government is satisfied, having regard to the nature or the volume of transactions in securities in any State or area, that it is necessary so to do, it may, by notification in the Official Gazette, declare this section to apply to such State or area, and thereupon every contract in such State or area which is entered into after date of the notification otherwise than between members of a recognised stock exchange in such State or area or through or with such member shall be illegal.

…

Exclusion of spot delivery contracts from sections 13, 14, 15 and 17

18. (1) Nothing contained in sections 13, 14, 15 and 17 shall apply to spot delivery contracts.

(2) Notwithstanding anything contained in sub-section (1), if the Central Government is of opinion that in the interest of the trade or in the public interest it is expedient to regulate and control the business of dealing in spot delivery contracts also in any State or area (whether section 13 has been declared to apply to that State or area or not), it may, by notification in the Official Gazette, declare that the provisions of section 17 shall also apply to such State or area in respect of spot delivery contracts generally or in respect of spot delivery contract for the sale or purchase of such securities as may be specified in the notification, and may also specify the manner in which, and the extent to which, the provision of that section shall so apply.

Findings

12. It is observed that Noticee was a party to 6 off market transfers, the details of which are specified in Table I. The Noticee could not be serve summons and there is no proof as to payment by/to the Noticee to/from the counterparties. In absence of any proof of reversal of the shares transferred by the Noticee, it can be logically presumed that the transactions were in nature of sale/purchase of securities and accordingly should have complied with provisions of SCR Act.

Table I: Off-Market Transactions of Dilip Hanmant Jambhale

Date	Quantity	Transferor	Transferee
25-Apr-07	548641	DILIP HANMANT JAMBHALE	VINAYAK MARUTI BHANAGE
11-Oct-07	30000	DILIP HANMANT JAMBHALE	SANTOSH SHUKLA
12-Oct-07	20000	DILIP HANMANT JAMBHALE	DINESH RAMCHANDRA PANDEY
12-Oct-07	28000	DILIP HANMANT JAMBHALE	
12-Oct-07	20000	DILIP HANMANT JAMBHALE	VIJAY KUMAR BOHRA

24-Oct-07	250000	DILIP HANMANT JAMBHALE	

13. A reading of Section 13 of SCR Act makes it clear that it empowers the Central Government to make the provisions of this section applicable in any State or States or area and upon its doing so, every contract in such State, States or area is required to be entered into from the date of the notification only between the members of a recognized stock exchange or recognized stock exchanges or through or with such member(s). Section 13 also provides that contracts entered into in any other manner shall be illegal. The Central Government by its notification dated 29.11.1957 had made the provisions of Section 13 applicable to the area comprising Greater Bombay, which is the relevant area here. Going only by the provisions of Section 13 of the Act read with the notification issued by the Central Government, no person could execute transactions in securities in Greater Bombay otherwise than through members of a recognized stock exchange(s) or through or with such member(s).

14. Section 18(1) of the SCR Act, however, carves out an exception. It provides that nothing contained in Section 13 shall apply to spot delivery contracts. When Sections 13 and 18(1) are read together, it can be said that as a general rule, every contract in securities in notified areas should be executed through members of recognized stock exchange(s) or through or with such member(s) and the only exception thereto is spot delivery contract(s). In other words, every contract in securities in notified areas must be executed through the stock exchange mechanism unless it is a spot delivery contract.

15. Thus, the transactions entered into by the Noticee would violate Sec. 13 unless they were spot delivery contracts. Sec. 2(i) of the SCR Act defines spot delivery contracts. Sec. 2(i)(a) was a part of the original enactment. However, after introduction of Depositories Act, 1996, Sec. 2(i)(b) was inserted so as to cover transactions done through depository mechanism as well.

In the light of the foregoing, it would be pertinent to refer to the observations and decision of the Hon'ble Securities Appellate Tribunal in a recent decision in the case of *Mrs. Bhanuben Jaisukhlal Shah v. SEBI* (Appeal No. 271 decided on March 5, 2010) in which the SAT has discussed on the interplay between Section 13 and Section 2(i) of the SCR Act. While discussing the issue of spot delivery contract the SAT stated as follows:

"A spot delivery contract has been defined in section 2(i) of the Act the provisions of which, before and after the amendment, have been reproduced hereinabove. Since all the securities prior to the coming into force of the Depositories Act were held in the physical form, spot delivery contract was defined to mean a contract which provided for the actual delivery of the securities and the payment of price therefor either on the same day as the date of the contract or on the next day. In other words, a spot delivery contract is a contract between two persons buying and selling securities off-market where the delivery and payment is effected either on the same day or on the next day. As already observed, such contracts are permissible being exempt from the provisions of section 13 of the Act."

16. If the facts of the present case are tested with the touchstone of the decision of the SAT in the above matter, it would follow that the transfer of shares did not comply with the requirements of

provisions of either sections 13 or 2(i) of SCRA. In absence of any specific proof regarding the nature of transaction and payment, these transactions are clearly in the nature of sale/purchase transactions entered into with 3rd party. Thus, it is very clear that the transaction done by the Noticee is not in compliance with the requirements laid down for spot delivery contracts under Sec. 2(i) of the SCR Act. Therefore, it can be said that the transaction was illegal and consequently, in violation of provisions of sections 13 and 18 read with Section 2(i) of SCR Act.

17. Further, reliance can be placed upon the judgment of the Hon'ble Securities Appellate Tribunal in the matter of ***Classic Credit Limited Vs. SEBI*** *(*Appeal No. 68 Of 2003*, Date of Decision* December 8, 2006*)* regarding the significance of the filling the reply to the show cause notice, which stated as follows *"the appellant did not file any reply to the second show cause Notice. This being so, it has to be presumed that the charges alleged against them in the show cause notice were admitted by them."*

18. In the present case, the Noticee had not filed any reply to the SCN. Hence, it can be said that the Noticee has admitted the charges leveled against it by the SCN, thus making the Noticee liable for penalty.

19. The Hon'ble Supreme Court of India in the matter of ***SEBI v. Shri Ram Mutual Fund*** **[2006] 68 SCL 216(SC)** *inter alia* held: *"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. The provisions of Sec. 23H of SCR Act as prevailing at the relevant time are reproduced hereunder:

"***Penalty for contravention where no separate penalty has been provided.***

23H. Whoever fails to comply with any provision of this Act, the rules or articles or byelaws or the regulations of the recognised stock exchange or directions issued by the Securities and Exchange Board of India for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees."

21. While imposing monetary penalty it is important to consider the factors stipulated in Section 23J of SCR Act, which reads as under:

"23J <u>- Factors to be taken into account by the adjudicating officer:</u>

While adjudging quantum of penalty under section 23-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."

22. In the instant matter it is not possible to quantify the gains made by the Noticee or the loss caused to investors as a result of the off market transactions entered into by the Noticee. What makes the transactions by the Noticee even more serious is the fact that huge off market transfer of shares was done by the Noticee without providing any credible reason. The fact of such high volume off market transfer by the Noticee and his counterparties signifies a deep rooted conspiracy. The Noticee could have been a part of the conspiracy. Such conduct by the Noticee warrants a strict action, so

that such activities can be curtailed. The Noticee has not committed repetitive violations, as per the data available on record.

Order

23. Considering all the facts and circumstances of the case, it is established that the Noticee had failed to comply with the provisions of SCR Act. Therefore, in exercise of the powers conferred upon me under Section 23I (2) of the SCR Act read with Rule 5 of the SCR Rules, I hereby impose a penalty of ₹ 1,00,000/- (Rupees One lakh only) under Section 23H for violation of Section 13 and 18 r/w Section 2(i) of the SCR Act on the Noticee viz. Shri Dilip Hanmant Jambhale. I am of the view that the said penalty is commensurate with the violation committed by the Noticee.

24. The Noticee shall pay the said amount of penalty by way of demand draft 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 should be forwarded to, the Division Chief, Investigation Department, ID-9, Securities and Exchange Board of India, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

25. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to SEBI.

Date: **March 30, 2012** **Piyoosh Gupta**
Place: **Mumbai** **Adjudicating Officer**