WTM/AB/IVD/ID-8/06/2020-21

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under Section 15I (3) read with Section 19 of the Securities and Exchange Board of India, 1992 – In respect of Adjudication order dated February 26, 2020 passed against Shri Ashok Kumar Damani (PAN: ACXPD6089R) in the matter of Illiquid Stock Options at BSE.

---

1. Present proceedings have emanated from a show cause notice dated April 09, 2020 (hereinafter referred to as "**SCN**") issued by Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") under Section 15-I(3) of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act, 1992**") to Shri Ashok Kumar Damani (hereinafter referred to as "**the Noticee**") calling upon him to show cause as to why the quantum of penalty imposed in terms of Section 15HA of the SEBI Act, 1992, should not be enhanced.

2. Prior to the SCN, an Adjudication Order dated February 26, 2020 (hereinafter referred to as "**AO Order")** under Section 15-I of the SEBI Act, 1992 read with Rule 5 of the SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995, was passed by the adjudicating officer against the Noticee, wherein the Noticee was found to be engaged in synchronized trading in the illiquid stock options at BSE in violation of Regulations 3(a), (b), (c), (d), 4(1) and 4(2)(a) of the SEBI (Prohibition of Fraudulent and Unfair Trading Practices related to Securities Markets) Regulations, 2003 (hereinafter be referred to as, the "**PFUTP Regulations, 2003**") and therefore, a penalty of Rs. 3,00,000/- (Rupees Three Lakh Only) was imposed upon the Noticee under Section 15HA of the SEBI Act, 1992.

3. SEBI after examining the records of the adjudication proceedings, was of the opinion that the AO Order is erroneous and is not in the interest of the securities market, as the penalty imposed is less than the minimum penalty of Rs. 5,00,000/- provided under Section 15HA of the SEBI Act, 1992 vide the Securities Laws (Amendment) Act, 2014, for such violations. Accordingly, the SCN, as mentioned in para 1 above, has been issued to the Noticee under Section 15I(3) of the SEBI Act, 1992.

Reply and Hearing:

4. The Noticee, vide his email dated April 20, 2020, filed reply to the SCN and requested for an opportunity of personal hearing. An opportunity of personal hearing was granted to the Noticee on June 01, 2020. The Noticee vide his email dated May 19, 2020, requested that the hearing scheduled for June 01, 2020 be adjourned due to the continued lockdown. Following the principles of natural justice, another opportunity of personal hearing was granted to the Noticee on August 07, 2020. On August 07, 2020, the Noticee availed the personal hearing via video conferencing and made submissions.

5. The brief of the various submissions made by the Noticee in his reply dated April 20, 2020 and during the hearing, is summarized as under:

    a. *In the present SCN, I have been show caused as to why the quantum of penalty imposed in terms of section 15HA of SEBI Act, should not be enhanced. In this regards, I humbly submit that it has not been spelt out in the SCN as to how the order of the Ld. AO is erroneous and / or how it is not in the interest of securities market. The SCN is vague on both the count. Exercise of jurisdiction u/s 15-I(3) of the SEBI Act is sought based on the fact that the penalty imposed is less than the minimum penalty of Rs.5,00,000/- u/s 15HA of SEBI Act.*

    b. *The Ld. AO has passed the order in exercise of his power u/s 15I of the SEBI Act by taking into consideration all the facts and circumstances of*

the case including the aforesaid 15J factors and the period of debarment of almost 3 years already undergone by me. The said order, in my humble opinion, does not suffer from any legal infirmity and cannot be termed erroneous. The Levy of penalty below the minimum stipulated amount is legally permissible and within the jurisdiction of the Ld. AO. Secondly the present SCN do not spell out any details as to how the order of the Ld. AO is not in the interest of securities market.

c. *For the purpose of invoking jurisdiction under the aforesaid section, two principles tests needs to be satisfied. Firstly, the order of the Adjudicating Officer should be "erroneous". Secondly, the order of the Adjudicating Officer ought not to be in the interest of the securities market. It is submitted that the test required to be satisfied is cumulative in nature and therefore, both the requirements ought to be satisfied before jurisdiction under section 15-I (3) of SEBI Act can be exercised.*

d. *It is submitted that a similar provision is found under section 263 of the Income Tax Act, 1961.*

e. *The Hon'ble Supreme Court as well as various High Courts & Tribunals has, in respect of the provisions of Section 263 of the Income Tax Act, consistently held that the twin tests as laid down in Section 263 are required to be satisfied before jurisdiction under Section 263 can be exercised. Jurisdiction by the Commissioner can be exercised only on satisfying of twin condition i.e Order of the Assessing Officer must be "erroneous"* ***and*** *it must also be "prejudicial to the interest of the revenue". Thus, recourse to Section 263(1) cannot be taken if the impugned order is erroneous but not prejudicial to the interest of the revenue; or if it is prejudicial to the interest of the revenue but not erroneous. In our humble opinion, the following Pre-conditions are mandatory for invoking the provision of Section 15-I(3) of the SEBI Act, which is similarly worded as Section 263 of the Income Tax Act.*

f. *An Order is said to be Erroneous - only when it is not in accordance with the law. There can be no dispute that an order can be considered erroneous only & only when it is not in accordance with the law of the land, established by the judiciary/statutory enactment.*

g. *Based on the ratio laid down by the Hon'ble Supreme Court in Bhavesh Pabari case, I humbly submit that sections 15A(a) to 15HA have to be harmoniously read along with section 15J in such a manner as to avoid any inconsistency; the provision of one section cannot nullify the other unless it is impossible to reconcile the two. Hon'ble Bench had agreed with the observation made in the reference order of Siddharth Chaturvedi and further observed that the insertion of an 'explanation' in section 15J would reflect that the legislative intent was not to curtail the discretion of AO by prescribing the minimum mandatory penalty in section 15A(a). Most importantly, it has been categorically held by the Hon'ble Supreme Court in the judgment that normally the expression 'whichever is less' would connote the absence of discretion by minimum mandatory penalty, however the intention of the legislature was not to prescribe the minimum penalty of one lakh rupees per day during which the default and failure had continued under section 15A(a), as the same is read along with the explanation in section 15J of the Act. Moreover, it has been held that the three factors stated in section 15J are not exhaustive in nature and the AO has discretion to consider any other factor in deciding the quantum of penalty.*

h. *This judgment in Bhavesh Pabari has clarified that the AO had the power to levy lesser penalty than the prescribed minimum mandatory penalty under the penalty provisions of SEBI Act for technical defaults of smaller amounts. The interpretation of section 15J as supplied by the Supreme Court can result in levying lesser penalty than the minimum mandatory penalty as prescribed in the penalty provisions of SEBI Act. For instance, section 15G of the Act prescribes the penalty for insider trading and states that the penalty for the same shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the*

amount of profits made out of insider trading, whichever is higher. It is pertinent to note here that despite the term 'shall' used in the provision, in the light of the recent judgment, the AO will have the discretion to impose a penalty of an amount less than ten lakh rupees considering the mitigating circumstances as stated in section 15J and other mitigating factors as well. Hence, it can be said that the minimum mandatory penalty as prescribed under sections 15A to 15HA are no more mandatory as the same has to be read with section 15J of the SEBI Act. Theoretically it is possible for AO to impose of penalty of just one rupee even though the provision mandates the minimum mandatory penalty of ten lakh rupees.

i. *Hon'ble Supreme Court then pointed out that the law had been amended in 2014 and it was clarified that discretion was available to the Adjudicating Officer to consider the specified factors before levying a penalty. The Hon'ble Supreme Court held that this clarification put beyond doubt that discretion was always available with the Adjudicating Officer to consider various factors and was not bound by the provisions providing for minimum and mandatory penalty.*

j. *Hon'ble Supreme Court observed, "The explanation to Section 15-J of the SEBI Act added by Act No.7 of 2017, has clarified and vested in the Adjudicating Officer a discretion under Section 15-J on the quantum of penalty to be imposed while adjudicating defaults under Sections 15-A to 15-HA. Explanation to Section 15-J was introduced/added in 2017 for the removal of doubts created as a result of pronouncement in M/s. Roofit Industries Ltd. case ([2016] 12 SCC 125)." (emphasis supplied). Hence the court reaffirmed that the earlier decision in Roofit's case was erroneous.*

k. *Thus, the Order passed by the Ld. AO dated February 26, 2020 is in accordance with the law of the land, established by the judiciary / statutory enactment in Bhavesh Pabari case. Since, the penalty levied*

by the Ld. AO is based on all relevant facts & circumstances relevant to my case, and based on judicial principles as laid down by the Hon'ble Supreme Court the order cannot be termed "erroneous" nor can it be said to be "not in the interest of securities market". The Order passed does not suffer from any legal infirmity. The powers under Section 15-I (3) of the SEBI Act would necessarily have to be exercised based on principles analogues to the provisions of the Section 263 of the Income Tax Act. Once the Adjudicating Officer has arrived at a reasoned conclusion based on the explanation furnished by him, the powers under section 15-I (3) ought not to be invoked.

l. *Further to the above, the SCN does not satisfy the test laid down under section 15-I(3) of the SEBI Act, is as much as the test provided therein relates to any purported error in "the Order", which makes "the Order" an order which is not in the interest of the securities market. If this test is not being satisfied the jurisdiction and under section 15-I(3) of SEBI Act cannot and ought not be invoked.*

m. *Based on my submission above, I humbly pray with folded hands, to kindly drop / withdraw the present SCN. I assure SEBI that I undertake to pay the penalty as imposed by the Ld. AO on hearing further in the matter so that the matter attain finality and I get peace of mind & am not haunted by unwarranted litigation.*

Consideration of submissions and findings:

6. I have perused the AO Order, the SCN, the reply filed by the Noticee and submissions made during the course of personal hearing. Before, dealing with the contentions raised by the Noticee, it would be appropriate to refer to the provisions of law involved in the matter, which are reproduced as hereunder:

Relevant extract of provisions of SEBI Act, 1992:

> ***"Penalty for fraudulent and unfair trade practices.***
> ***15HA.*** *If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.*
>
> ***Power to adjudicate.***
> ***15-I.*** *(1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA and 15HB, the Board may appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.*
> *(2) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in subsection (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.*
> *(3) The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify:*
> *Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter:*
> *Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer or disposal of the appeal under section 15T, whichever is earlier……"*

7. I note that in the AO Order, the Noticee was found to be engaged in synchronized trading in the illiquid stock options at BSE in violation of Regulations 3(a), (b), (c), (d), 4(1) and 4(2)(a) of the PFUTP Regulations, 2003 and therefore, a penalty of Rs. 3,00,000/- (Rupees Three Lakh Only) was imposed upon the Noticee under Section 15HA of the SEBI Act, 1992. Present SCN in the matter was issued to the Noticee, as SEBI after examining the records of the case found that Section 15HA under which penalty was imposed on the Noticee provides for minimum penalty of Rs. five lakh whereas in the AO Order, a penalty of only Rs. three lakh has been imposed which is less than the minimum penalty prescribed under Section 15HA of the SEBI Act, 1992. In view of this, SCN alleges that AO Order is erroneous and not in the interest of the

securities market as it imposes a penalty less than the minimum penalty prescribed and thus, calls upon the Noticee to explain why the penalty should not be enhanced.

8. Before dealing with the various contentions raised by the Noticee, it is pertinent to note that findings on facts to the effect that the Noticee was engaged in synchronized trading in the illiquid stock options at BSE and has thus violated Regulations 3(a), (b), (c), (d), 4(1) and 4(2)(a) of the PFUTP Regulations, 2003, are undisputed. Moreover, as submitted by the Noticee, he has also paid the penalty of Rs. three lakh, as imposed vide the AO Order, on August 03, 2020.

9. The Noticee has contended that for invoking jurisdiction under Section 15I(3) of the SEBI Act, 1992, SCN must satisfy the twin test, i.e. the order passed by the adjudicating officer is erroneous; and it is not in the interest of the securities market. The Noticee has contended that SCN does not satisfy these two tests as it does not spell out how the AO Order is erroneous and how it is not in the interest of the securities market. In this regard, I note that SCN alleges that the AO Order is erroneous as the penalty imposed under it is less than the minimum penalty prescribed under Section 15HA of the SEBI Act, 1992. The minimum penalty prescribed under Section 15HA is Rs. five lakh whereas the AO Order imposes a penalty of Rs. three lakh, therefore, *prima facie,* the AO Order is erroneous being not in accordance with the provisions of the law i.e. Section 15HA of the SEBI Act, 1992. The Noticee in his reply also accepts the legal position that an order which is not in accordance with law is an erroneous order. Thus, the first test, as contended by the Noticee, for invoking the jurisdiction under Section 15I (3) is satisfied in the present case and has been clearly spelt out in the SCN. Further, I note that SEBI Act, 1992 has been enacted by the Parliament with the objectives to protect the interest of the investors in securities and for the development of the securities market. Therefore, all the provisions including Section 15HA, contained in the SEBI Act, 1992, seek to achieve these objectives. Section 15HA seeks to prohibit fraudulent and unfair trade practices and provides for a minimum penalty of Rs. five lakhs for indulging in such practices, the purpose of which is to maintain confidence and integrity of the securities market and protect the interest of the investors. Thus

if a person is found guilty of violating this section and the minimum penalty of Rs. five lakh is not imposed, the same may not be in the interest of the investors and the securities market. Therefore, I find that the SCN issued in the present matter complies with both the tests as contended by the Noticee and clearly spell out as to how these tests are met in the present case. Therefore, the contentions raised by the Noticee, in this regard, are not tenable.

10. Another contention raised by the Noticee is that the AO Order has been passed in exercise of power under Section 15-I of the SEBI Act by taking into consideration all the facts and circumstances of the case including the factors in Section 15J and the period of debarment of almost 3 years already undergone by him and hence, the AO Order does not suffer from any legal infirmity and cannot be termed erroneous. The Noticee has placed heavy reliance on judgement of the Hon'ble Supreme Court in the matter of *Adjudicating Officer, SEBI vs. Bhavesh Pabari (2019) 5 SCC 90*, to contend that adjudicating officer, having regard to the factors enumerated in Section 15J and other factors also, has discretion to impose a penalty lesser the minimum prescribed and therefore, the AO Order is not erroneous, as required for invoking jurisdiction under Section 15I(3) of the SEBI Act, 1992.

11. Before dealing with the said contentions of the Noticee, it would be appropriate to refer to the relevant portion of the AO Order which is extracted hereunder:

> *"……..27. In view of the aforesaid facts and circumstances, it cannot be ignored that synchronization of trades in pre-determined manner as found in this case had an adverse impact on the fairness, integrity and transparency in the securities market. In view of the above, I find that the allegation of violation of regulations 3(a), (b), (c), (d), 4(1) and 4(2)(a) of PFUTP Regulations by the Noticee stands established. Thus, I hold that the Noticee liable for penalty under Section 15HA of the SEBI Act which reads as under:-*
>
> > *"15HA. If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty -five crore rupees or three times the amount of profits made out of such practices, whichever is higher."*

28. While determining the quantum of penalty, it is important to consider the factors stipulated in Section 15J of the SEBI Act which reads as follows: -

> *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."*
>
> *Explanation. —For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section;*

29. Having regard to the factors listed in section 15J, it is noted that it is not possible to determine the consequent loss caused to investors as a result of the default as found in this case. It is worth considering that generally, there is NIL or negligible participation of the public in the trading in such illiquid Stock Option contracts. When the impact of artificial volume created by the two counterparties is seen as a whole, it is not possible from the material on record to quantify the amount of disproportionate gain or unfair advantage resulting from the artificial trades between the counter parties or the consequent loss caused to investors as a result of the default. However, considering the fact that the trades of the Noticee in 9 Stock Option contracts which resulted into artificial volume in range of 17% to 100%, generated out of the 194 non-genuine trades of the Noticee, I am of the view that such trades had created a misleading appearance of trading in the scrip. In these circumstance I am of the view that for the market abuse and fraudulent practices by the Noticee monetary penalty needs to be imposed under section 15HA of the SEBI Act.

30. Taking into consideration all the facts and circumstances of the case including the aforesaid 15J factors and the period of debarment of almost 3 years already undergone and exercising the powers conferred upon me under section 15I of the SEBI Act read with Rule 5 of the Adjudication Rules, I hereby impose, a monetary penalty of Rs. 3,00,000/-(Rupees Three Lakh Only) on the Noticee

section 15HA of the SEBI Act. In my view, the said penalty is commensurate with the violations committed by the Noticee in this case……..”

12. A perusal of the AO Order, as extracted above, shows that in the AO Order, penalty has been imposed on considering the factors mentioned in Section 15J of the SEBI Act, 1992, the period of debarment of almost 3 years already undergone by the Noticee at the time of passing of the AO Order and in exercise of the powers conferred under Section 15I of the SEBI Act, 1992. I note that Sections 15J enumerates the factors which shall be given due regard by the adjudicating officer while imposing the monetary penalty. Hon’ble Supreme Court in the Bhavesh Pabari case (*supra*) has held that factors enumerated in Section 15J are only illustrative and adjudicating officer may take into consideration any other relevant factor. In the present case also, adjudicating officers has considered the other relevant factor that the Noticee has undergone a debarment of almost three years. I further note that Section 15I (2) of the SEBI Act, 1992 provides that adjudicating officer may impose such penalty as he thinks fit in accordance with the penalty provisions. However, the question to be determined in present proceedings is whether in exercising his discretion under Section 15I(2) and 15J of the SEBI Act, 1992, adjudicating officer can impose a penalty which is less than the minimum penalty prescribed under the penalty provisions. As per the contention of the Noticee, adjudicating officer can do so, in view of the order passed by the Hon’ble Supreme Court in the Bhavesh Pabari case (*supra*). I have perused the said judgment. Firstly, I find that Bhavesh Pabari matter dealt with the applicability of Section 15J of the SEBI Act, 1992 to the penalty provisions, as existed before the amendments made in the penalty provisions in the year 2014. However, Hon’ble Court also made following observations regarding penalty provisions as amended in the year 2014, as follows:

“7…….We would prefer read and interpret Section 15-A(a) as it was between 25th October, 2002 and 7th September, 2014 in line with the Amendment Act 27 of 2014 as giving discretion to the Adjudicating Officer to impose minimum penalty of Rs.1 lakh subject to maximum penalty of Rs.1 crore, keeping in view the period of default as well as aggravating and mitigating circumstances including those specified in Section 15-J of the SEBI Act……..”

It is important to note here that in the Bhavesh Pabari case (*supra*) a bench of three Hon'ble Judges of the Hon'ble Supreme Court was dealing with a reference made by a bench of two Hon'ble judges of Supreme Court in the matter of *Siddharth Chaturvedi vs SEBI (2016) 12 SCC 119* regarding the correctness of the judgment of a bench of two Hon'ble Judges in the matter of *Chairman, SEBI vs Roofit Industries Ltd. (2016) 12 SCC 125* wherein it was held that Section 15J was not available to the adjudicating officer during the period from 2002 (when the penalty provisions were first amended) to 2014 (when the penalty provisions were again amended) and the adjudicating officer is bound to impose monetary penalty as provided under the respective penalty provisions. In this context, the judgment in Bhavesh Pabari case (*supra*), after taking into account *inter alia* insertion of Explanation in Section 15J by the Finance Act, 2017, held that adjudicating officer can exercise its discretion between the minimum penalty and maximum penalty taking into consideration Section 15J while imposing penalty under the provisions, as amended by the amendments made in the year, 2002. Secondly, I find that Bhavesh Pabari's judgment was rendered on the penalty provisions as they existed after amendments made in the year 2002. Subsequently, these penalty provisions were again amended in the year 2014 and in the present case Section 15HA, as amended by the amendments made in the year 2014, is applicable. I note that there is remarkable difference in the penalty provisions, as they existed after the amendments made in the year 2002 and as they exist after the amendments made in the year 2014. Penalty provisions after the amendments made in the year 2014 introduces minimum penalties that too with the use of the words "……. *shall be liable to penalty which shall not be less than…..*" which *per se* indicates the legislative intent that the provisions are mandatory. The penalty provisions, as amended by the 2014 amendments, were not under consideration before Hon'ble Supreme Court in the Bhavesh Pabari case (*supra*). Thus, interpretation of the penalty provisions, as amended in the year 2014, as sought to be canvassed by the Noticee on the basis of the Bhavesh Pabari case (*supra*) is not correct.

13. Now the question arises is whether imposition of minimum penalty is mandatory. In this regard, as observed above, penalty provisions after the amendments made in the year 2014 use the words "……. *shall be liable to penalty which shall not be less than…..*" which *per se* indicates the legislative intent that the provisions are mandatory. In this regard, it would be apposite to refer to the judgment of Hon'ble Supreme Court in *Union of India & Others Vs. A. K. Pandey (2009) 10 SCC 552* wherein it was held as under:

> *"……..22. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequences that may follow from non-observance thereof. If the context does not show nor demands otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command. When the word "shall" is followed by prohibitive or negative words, the legislative intention of making the provision absolute, peremptory and imperative becomes loud and clear and ordinarily has to be inferred as such……."*

14. I note that as per Statement of Objects and Reasons of SEBI (Amendment) Bill, 2002 amendments to penalty provisions in the year 2002 were made as penalties existing before the amendment were too low and did not serve as effective deterrent. Therefore, intention of the amendments made in the year 2002 was not to introduce the minimum penalties but to introduce stricter/enhanced penalties. Subsequently, Expert Group constituted by SEBI under the Chairmanship of Justice Kania, recommended that in Sections 15A to 15H of SEBI Act, 1992, the words "one lac rupees for each day during which such failure continues or one crore rupees, whichever is less" may be replaced by the words "not exceeding one lac rupees for each day during which such failure continues subject to a maximum of one crore rupees" to bring clarity in the provisions regarding availability of the exercise of discretion available under Section 15J by the adjudicating officer while imposing penalty under these sections. SEBI Board in its meeting held on June 18, 2009, *inter alia*, approved the proposal for amendment to securities laws relating to penalties, as recommended by the Group and also approved proposal for enhancement of penalties by doubling the amount of the maximum penalties provided. These

proposals were then sent to the Central Government for taking appropriate steps in this regard. Thereafter, by the Securities Laws (Amendment) Act, 2014, the penalty provisions were amended not by enhancing the penalties but by introducing the minimum penalties which was not there under penalty provisions as amended in the year 2002. Regarding the amendments made to penalty provisions, as amended by Securities Laws (Amendment) Act, 2014, the Statement of Objects and Reasons of Securities Laws (Amendment) Bill, 2014 provides that amendments to these provisions have been made to provide that while imposing monetary penalties, the adjudicating officers have discretion to impose minimum penalties, which shall not be less than one lakh rupees, for contravention of the provisions of the said Act. Thus, legislative intention behind the amendments made to the penalty provisions in the year 2014 is also to introduce minimum penalties and no other interpretation of these penalty provisions is called for. In this regard reference may also be made to the observations made by the Hon'ble Supreme Court in the A. K. Pandey case (*supra*) which squarely applies to the interpretation of the penalty provisions which use the words "……*shall be liable to penalty which shall not be less than…..*" and the minimum penalty provided thereunder becomes mandatory. Therefore, I find that penalty provisions, as amended by 2014 amendments, provides for minimum penalties which are mandatory in nature.

15. The Noticee has also raised another contention on the basis of the following observation in the Bhavesh Pabari case (*supra*):

> *"……..Sections 15-A(a) to 15-HA have to be read along with Section 15-J in a manner to avoid any inconsistency or repugnancy. We must avoid conflict and head-on-clash and construe the said provisions harmoniously. Provision of one section cannot be used to nullify and obtrude another unless it is impossible to reconcile the two provisions……."*

On the basis of the aforesaid observations, the Noticee has sought to canvass that if minimum penalty is imposed without having regard to Section 15J, it would render the Section 15J otiose. In my view, Section 15J is available to adjudicating officer even after the amendment made in the penalty provisions in the year 2014. However, discretion available under Section 15J can be

exercised between the minimum and maximum penalty provided under the respective Sections. In the present case also, adjudicating officer could have exercised his discretion between the minimum penalty i.e. Rs. five lakh and maximum penalty i.e. Rs. one crore. Thus, Section 15J is not rendered otiose. Therefore, the contention of the Noticee in this regard, is misplaced and hence, untenable.

16. The Noticee by relying on judgment of Hon'ble Supreme Court in Hindustan Steel Ltd. vs. State of Orissa (1969) 2 SCC 627, has contended that even if minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when 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. In other words, the Noticee is contending that as per said judgment competent authority by looking at the state of mind of the violator, may decide to impose no penalty at all. In this regard, I note that Hon'ble Bombay High Court in SEBI Vs. Cabot International Capital Ltd. (2004) 2 CompLJ 363 (Bom) dealt with the applicability of Hindustan Steel case (*supra*) to the penalties provisions under the SEBI Act, 1992 and held as under:

> *"……This was a case under the Sales Tax Act, 1947 and penalty provision was in addition to the failure to register itself as a dealer. The observations of the Supreme Court that penalty for failure to carry out a statutory obligation would not be, ordinarily, imposed unless the delinquent party acted deliberately or was guilty of contumacious conduct or dishonest or in conscious disregard of its obligation is based on the proceeding being quasi-criminal proceeding. Obviously the said conservations shall not be applicable as it is, if the imposition of the penalty is for the breach of civil obligation. Moreover, the Supreme Court has held that imposition of the penalty is a matter of discretion of the authority to be exercised judiciously and on a consideration of all the relevant facts……"*

17. The aforesaid judgment in Cabot International case (supra) was quoted with approval by the Hon'ble Supreme Court in Chariman, SEBI Vs. Sriram Mutual Funds (2006) 5 SCC 361 wherein Hon'ble Supreme Court held as under:

> *"……..The Tribunal has erroneously relied on the judgment in the case of Hindustan Steel Ltd. Vs. State of Orissa, AIR 1970 SC 253 which pertained to criminal/quasi-criminal proceeding. That Section 25 of the Orissa Sales Tax Act which was in question in the said case imposed a punishment of imprisonment up to six months and fine for the offences under the Act. The said case has no application in the present case which relates to imposition of civil liabilities under the SEBI Act and Regulations and is not a criminal/quasi-criminal proceeding……"*

It is worth to mention here that the judgment of two Hon'ble Judges in Sriram Mutual Funds case (*supra*) has been held to be laying down the correct law with regard to requirement of *mens rea* for imposition of monetary penalties for breach of civil obligations, by a bench of three Hon'ble Judges in Union of India & Ors. Vs. Dharmendra Textile Processors & Ors. (2008) 13 SCC 369. In view of the above, I find that contention of the Noticee based on judgment in Hindustan Steel case (*supra*) is misplaced and untenable.

18. In view of the aforesaid discussions, I find that Section 15HA, as amended by the amendments made in the year 2014, provides mandatory minimum penalty of Rs. five lakh. Since, in the present case, AO Order imposes a penalty of Rs. three lakh which is less than the minimum penalty provided under Section 15HA of SEBI Act, 1992, therefore, the AO Order is erroneous, as it is not in accordance with the provisions of Section 15HA and consequently, it is also not in the interest of the securities market.

DIRECTIONS:

19. In view of the foregoing, I, in exercise of the powers conferred upon me in terms of Section 15-I(3) read with of Section 19 of the SEBI Act, 1992, I hereby enhance the penalty imposed upon the Noticee by the AO Order, from Rs. three lakh to Rs. five lakh. The enhanced penalty amount of Rs. two lakh shall be paid by the Noticee within a period of forty-five (45) days from the date of coming into force of this direction by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai.

20. The Demand Draft shall be sent to "The Division Chief, Investigation Department (ID-8), Securities and Exchange Board of India, SEBI Bhavan -II, Plot no. C- 7, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051".

21. The Order comes into force with immediate effect. However, having regard to extraordinary situations arisen due to COVID-19 pandemic and consequential lockdown imposed till August 31, 2020, the direction given in para 19 above, shall come into force on September 01, 2020 or at the end of the lockdown, if it is extended beyond August 31, 2020.

Sd/

Place: Mumbai **ANANTA BARUA**

Date: August 18, 2020 **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA