

ORDER

**UNDER RULE 5(1) OF THE SEBI (PROCEDURE FOR HOLDING ENQUIRY
AND IMPOSING PENALTY BY THE ADJUDICATING OFFICER) RULES, 1995**

AGAINST

1.	KAPIL PURI
2.	KAVITA PURI
3.	RAJESH CHHABRIA
4.	MAHENDRA SHAH
5.	SUDHANSHU TIWARI
6.	NARESH BAHRI
7.	KISHORE SAIGAL
8.	SANJEEV CHAINANI AND
9.	NEHA EQUIRESEARCH PVT LTD

**IN THE MATTER OF THE ACQUISITION OF THE SHARES OF M/s
SPANCO TELESYSTEMS AND SOLUTIONS LIMITED.**

1. The issue relating to the non compliance of the provisions of the SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 1997 (Takeover Regulations) stands out to be the subject matter of the case under consideration.
2. Adjudicating proceedings were earlier initiated under Section 15A(a) of the SEBI Act, 1992 (Act) against Kapil Puri, Mrs Kavita Puri, Mr Rajesh Chhabria, Mr Mahendra V. Chabria, Mr Sudhanshu Tiwari, Mr Naresh Bahri, Mr Kishore Saigal, Mr Sanjeev Chainani and M/s Neha Equiresearch Pvt Ltd, (collectively referred to as the “acquirers”) who are also parties to the present proceedings) for the alleged violation of Regulation 3(4) of the Takeover Regulations in the matter of the non disclosure of the acquisition of 21,30,000 shares of M/s. Spanco

Telesystems and Solutions Limited (hereinafter referred to as STSL) through a preferential allotment.

3. After a detailed analysis of the facts of the case, an order dated February 11, 2005 was passed. In the said order it was inter-alia observed that since the acquirers had acquired shares pursuant to a preferential allotment, which taken together with the shares already held by them, entitled them to exercise 51% of the voting rights in STSL, they were required to comply with the then provisions of Regulations 3(1)(c) of the Takeover Regulations in order to claim the benefit of exemption from the applicability of Regulation 11(2) of the Takeover Regulations, in terms of making a public announcement under the said Regulations, which they had failed to do and hence the provisions of Regulation 3(4) of the Takeover Regulations was inapplicable to them and consequently the penalty in terms of Section 15A(a) of the Act could also not be levied against them.
4. In view thereof, the present proceedings were ordered on March 16, 2006, against the acquirers under Section 15H (ii) of the Act for the violation of Regulations 3(1)(c)(ii) read with 11 (2) of the Takeover Regulations (as it existed at the relevant time).
5. In connection thereof, a notice dated May 29, 2006 in terms of Rule 4 of the SEBI (Procedure for holding enquiry and imposing penalty by the Adjudicating Officer) Rules, 1995 (Rules) was sent to the acquirers advising them to show cause as to why these proceedings should not be held against them for the alleged violation of the specified

provisions of the Takeover Regulations and why the penalty prescribed under the Act should not be levied upon them. The acquirers were also advised to make their submissions, if any, along with supporting documents that they wished to rely upon, within 14 days from the date of the receipt of the notice, and indicate whether they were desirous of a personal hearing.

6. In reply to the notice, the company secretary of STSL vide letter dated June 16, 2006, stating to be duly authorized by the acquirers in this regard inter alia made the following submissions :
 - i. STSL had made three preferential allotments to certain entities stated to be the promoters, their friends, relatives and associates in accordance with the SEBI Guidelines for disclosure and Investor Protection – Preferential Issues dated August 4, 1994.
 - ii. The said allotments were made on January, 17, 2000, 24, February, 2000 and 25 August, 2001 respectively.
 - iii. In the case of the first preferential allotment made on January 17, 2000, a report under Regulation 3(4) of the Takeover Regulations was filed by STSL with SEBI, since the said allotment had resulted in a change in the management/ directors business, shareholding pattern, voting rights etc. of STSL.
 - iv. Such a report was also filed by STSL in the case of the third preferential allotment that took place on August 25, 2001 since the said allotment had resulted in a change in the management/ directors business, shareholding pattern, voting

rights etc. of STSL. A copy of the said report was also filed with the BSE.

- v. However the requisite report for the second preferential allotment was not filed by STSL with SEBI since there was no change in management/ directors, business, shareholding pattern, voting rights etc of STSL, consequent to the said allotment.
 - vi. The said default was not a deliberate intentional act and at best could be termed as an error of interpretation/judgment/opinion and merely a procedural lapse in as much as the report for the first and the third preferential allotments had been duly filed by STSL on behalf of the acquirers.
 - vii. The acquirers had complied with all the SEBI/ stock exchange regulations and had always followed the standards of corporate governance.
7. In view of the request seeking a personal hearing, a notice of hearing dated June 20, 2006 was sent to the company secretary of STSL under Rule 5(1) of the Rules with an advise to appear for the hearing on July 04, 2006 along with the necessary authorization letters from the acquirers. The necessary letters were sent vide letter dated July 11, 2006. Accordingly the case was rescheduled for hearing on August 2, 2006. On the scheduled date of hearing, the authorized representative of STSL, while reiterating the contentions advanced earlier, further requested that time upto August 21, 2006 be granted to make additional submissions. Thereafter, vide letter dated August 18, 2006, STSL interalia emphasized the fact that their non compliance with the provisions of the Takeover Regulations was a technical and procedural error that was of a bonafide nature and that

as the error occurred in the year 2000, the relevant provisions of Sections 15H, I and J of the Act be applied, on the basis of the principles laid down by the Tribunal in Appeal No. 151/04.

APPRECIATION OF EVIDENCE AND ISSUES

8. I have considered the submissions advanced on behalf of STSL including the oral and documentary evidence on record as also the uncontroverted sequence of events and factual aspects relating to the impugned preferential allotment which are as follows:-
9. On January 21, 2000, the Board of Directors of STSL, inter alia considered the issuance of 22,50,000 equity shares of STSL by way of a preferential allotment to the acquirers, most of whom constitute the promoter group of STSL and included the same as one of the business items to be transacted at the Extraordinary General Meeting scheduled to be held on February 16, 2000. A copy of the said notice of the EGM held on February 16, 2000 containing the resolution for preferential allotment was sent to the Stock Exchange, Mumbai vide letter dated February 18, 2000 in order to place the information in the public domain. Thereupon the preferential allotment of 22,50,000 equity shares of STSL was made to the acquirers and other persons acting in concert on February 24, 2000. The extent of the shareholding of only the acquirers, pre and post the preferential allotment is reproduced below:

Name	Share holding pattern			
	before 24.02.00		after 24.02.00	
	Shares	%	Shares	%
Kapil Puri	240,000	13.83%	1,040,000	26.09%
Kavita Puri	244,837	14.11%	499,837	12.54%
Rajesh Chhabria	150,000	8.65%	380,000	9.54%
Mahendra G. Shah	200,000	11.53%	400,000	10.04%
Sanjiv Chainani	75,000	4.32%	250,000	6.27%
Kishore Saigal	40,163	2.31%	100,163	2.51%
Neha Equisearch (P) Ltd.	-	0.00%	375,000	9.41%
Sudhanshu Tiwari	50,000	2.88%	70,000	1.75%
Naresh Bahri	-	-	15,000	0.38%
Total	10,00,000	57.64%	31,30,000	78.52%

10. From the table given above, it is evident that prior to the said allotment, the acquirers were collectively holding 10,00,000 equity shares of STSL constituting 57.63% of the equity capital of STSL. Post the said allotment, the post issue holding of the acquirers increased to 31,30,000 shares constituting 78.52% of the equity capital of STSL. It is also noted

that 18% of the shareholding of STSL continues to remain with the public.

11. The provisions of Regulation 11(2) of the Takeover Regulations read as under:

“No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise more than 51% of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations”

12. The Takeover Regulations, however, contemplated any such acquisition to be exempted from the applicability, of inter alia Regulation 11(2) of the Regulations, only in cases where the acquirers send the Board Resolution in respect of the proposed preferential allotment to all the Stock Exchanges on which the shares of the company are listed for being notified on the Notice Board and also make the necessary disclosures in the notice of the General Meeting called for the purpose of consideration of the preferential allotment in terms of Regulation 3(1)(c)(ii) of the Takeover Regulations.

13. The disclosures specified in Regulation 3(1)(c)(ii) pertain to

i) the identity of the class of proposed allottees and

ii. if any of the proposed allottee is to be allotted any shares that would increase his holding to over 5% of the post issue capital, then in such cases, the price at which the allotment is proposed, the identity of such persons, the purpose of and the reason of such allotment, consequential changes in the Board and in voting rights,

the shareholding pattern of the company and whether such allotment would result in control etc.

14. Since the acquirers had acquired 21,30,000 shares of STSL, which taken together with the shares already held by them, entitled them to exercise more than 51% of the voting rights in STSL, and as the preferential allotment of shares as demonstrated earlier, did result in an increase of holding of most of the acquirers to 5% or more of the post issued capital of STSL, they were required to comply with the provisions of Regulation 3(1)(c) of the Takeover Regulations, in order to claim the benefit of the exemption from the applicability of Regulation 11(2) of the Takeover Regulations, in terms of making a public announcement under the said Regulations.
15. It is not in dispute that in terms of Regulation 3(1)(c)(i) of the Takeover Regulations, the copy of the Board resolution passed by STSL in respect of the proposed preferential allotment was sent to the Stock Exchange, Mumbai, i.e. where the shares of STSL are listed.
16. The disclosures made in the notice of the EGM dated January 21, 2000, in terms of Regulation 3(1)(c)(ii) of the Takeover Regulations are also on record and have not been disputed by STSL. Admittedly the notice only mentioned the allotment being made to the promoters, their friends, relatives, associates and others but contained no disclosures about the fact that shares were being offered on a preferential basis to persons, who earlier had no stake in STSL. No details were also provided about the identity of the proposed allottees, consequential changes in the voting rights, shareholding pattern of the company and whether such allotment would result in any change over the company.

17. The said disclosures were not mentioned even in the Explanatory Statement annexed to the said Notice. In fact, Item No 5 contained in the Explanatory Statement annexed to the said Notice, only stated as follows:

Item No 5.

“As the Members are aware, your company is engaged in activities of telecom systems and telecom related software services. As these are capital intensive industries, the same shall involve deployment of substantial amount of funds. With a view to augment necessary financial resources for the proposed business, the company plans to make preferential allotments of 22,50,000 equity shares of Rs.10/- each for cash at a premium of Rs.5/- per share aggregating Rs.3,37,50,000/- to the promoters, group promoters, their relatives, friends, associates and others.

In accordance with the provisions of the SEBI’s guidelines for preferential allotments, it is necessary for the company to obtain the prior approval of its members pursuant to Section 81(a) of the Companies Act, 1956 for making the preferential allotment of the shares.

The Board, therefore, commends the above resolution for your approval.

The Directors of the company may be deemed to be concerned/ interested in the resolution to the extent of the shares offered, applied for and allotted to them or the bodies corporate in which they are Directors/Shareholders.”

18. Although the acquirers had in their reply earlier discussed, contended that the said preferential allotment did not result in any change in management, directors, business, shareholding pattern, voting rights etc. of STSL, during the course of the personal hearing, it was agreed that the preferential allotment of shares made on February 24, 2000 had resulted in an increase of holding of most of the acquirers to 5% or more of the post issued capital and that being the case, the Notice

of the EGM and the explanatory statement annexed thereto ought to have contained the necessary disclosures in compliance of the provisions contained in Regulation 3(1)(c)(ii) of the Regulations i.e. the identity of the proposed allottees, consequential changes in the voting rights, shareholding pattern of the company and whether such allotment would result in any change over the company. As the complete disclosures were not found to have been made by them, the said acquirers would be ineligible for being exempted from the provisions of Regulation 11(2) of the Takeover Regulations in the first place.

19. The acquirers have thus agreed to the stated violations including their failure to have made the open offer under the Takeover Regulations but have pleaded exoneration of their liability purely on the ground that the contravention of the provisions of the Takeover Regulations was technical and procedural in nature and that there was no willful intention whist committing the violation.
20. This contention raised on behalf of the acquirer is totally misconceived in that they acquired shares beyond the stipulated limit without making the mandatory public announcement resulting in the violations of the said Regulations.
21. All regulatory provisions have a specific purpose behind their enactment. The very purpose of enacting any legislation is due adherence to the procedures laid down there under to ensure the sound and smooth functioning of the capital market. If no cognizance were to be taken of any breach of these provisions and no liability fixed there upon, the entire purpose of incorporating the provisions in the said enactments would become redundant.

22. On a cumulative analysis of the facts as brought out above, it would seem that the failure to adhere to the provisions of the Regulations was largely on account of a lack of due diligence on the part of the acquirers who are now trying to unsuccessfully and unjustifiably raise the plea of technicality, to make out a case of getting out of them making the mandatory public announcement, pursuant to them acquiring shares, through a preferential allotment. This is against the very spirit and letter of the Takeover Regulation and against its objectives, foremost of which is the protection of the rights of the investors.
23. As regard, the issue of mens rea, the same stands determined by the Hon'ble Supreme Court in their order dated May 23, 2006 passed in C.A Nos 9523-9524/ 2003 @ The Chairman, SEBI vs. Shriram Mutual Fund & Anr in which they inter alia observed that *".....unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not...."*.
24. The principle as regards the issue of lack of intention or mens rea in civil violations was also earlier stressed upon by the Supreme Court in the case of Swedish Match AB and Anr. Vs. SEBI & Anr., (2004) 11 SCC 641 wherein the Supreme Court was pleased to hold that only in the criminal proceedings initiated against the appellants, existence of mens rea on the part of the appellants would come up for consideration.
25. In view of the discussion above, it is clear that the acquirers acquired shares in excess of 51% of the voting rights of STSL without making the mandatory public announcement as stipulated in the then provisions of Regulation 11(2) of the Takeover Regulations. It thus

stands to reason that once the contravention is established, penalty is to follow since 'mens rea' is not a condition precedent for imposition of penalty for contravention of the provisions of a civil nature.

26. Consequently the acquirers would be liable for monetary penalty under Section 15H (ii) of the Act, which, as on the date of the commission of the offence, read as follows:-

15H - Penalty for non disclosures 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) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or*
- (ii) make a public announcement to acquire shares at a minimum price, he shall be liable to a penalty not exceeding five lakhs rupees.*

Pursuant to the amendment of the SEBI Act, 1992, on October 29, 2002, Section 15H of SEBI Act, 1992 read as under :-

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*
 - (iii)*
 - (iv),*
- he shall be liable to a penalty of Rs.25 crores or 3 times the amount of profits made out of such failure, whichever is higher.*

In this aspect it is also pertinent to refer to the order of the Securities Appellate Tribunal in Appeal No.151/2004 dated 7.2.2005 in the case

of Man Industries, wherein the Hon'ble Tribunal inter-alia held that for irregularities that were committed prior to the amendment of the SEBI Act, 1992 on 29.10.2002, penalty as existing at the relevant period only is to be imposed and not the new penalties under the amended Act. The Hon'ble Tribunal further held as under:

“Penalties unless specifically made retrospective must inevitably be only with effect from the date of amendment. Accordingly, we hold that at the relevant time, the maximum penalty was Rs.5.00 lakhs”.

27. Without prejudice to the above, certain factors are also required to be taken into account by the adjudicating officer, before imposing a penalty as is evident from the provisions of Section 15J of the Act which also find mention in Rule 5(2) of the Rules, i.e. the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; the amount of loss caused to an investor or group of investors as a result of the default and the repetitive nature of the default.
28. The provisions of Section 15J of the Act, thus makes it clear that the adjudicating officer should have due regard to the factors stated in the section. The same is a direction and not an option, which is however to be exercised with due regard to his/her discretion, to be exercised judiciously, depending upon the facts and circumstances of each case as well as after analysing all the relevant material available on record especially in the case of failure to perform statutory obligations.
29. In order to compute the disproportionate gain or unfair advantage enjoyed by the acquirers, I have perused the records and have noted that there are no quantifiable figures available on that count. There are also no figures or data on record to quantify the amount of loss caused to the investors and the shareholders of STSL as a result of

the default. However, the fact remains that had the acquirers made a public announcement to acquire 20% of the shares of STSL, the shareholders of STSL would have got an opportunity/option to tender their shares pursuant to such an open offer and exit from the company at a beneficial price, to be determined under the Takeover Regulations. This opportunity /option was denied to them. Further, such an announcement if made would have also impacted the price movement of the shares in the stock exchange. Thus, the exit opportunity available to the shareholders via the secondary market would have been in addition to the open offer which the acquirers ought to have made under the Regulations, which they have not made till dated.

30. Considering that there was a substantial acquisition of shares by the acquirers which necessitated an open offer to be made in terms of Regulation 11(2) of the Takeover Regulations which however was not made, and keeping the facts earlier discussed in mind, on a judicious exercise of the discretion conferred upon me, considering the offence in its entirety and also bearing in mind the factors enumerated in Section 15J of the Act, I am inclined to hold that the maximum penalty as prescribed under Section 15 H (ii) of SEBI Act, 1992 ought to be levied upon the acquirers.

PENALTY

31. Accordingly, I, in exercise of the powers conferred upon me under Rule 5 of the SEBI (Procedure for Holding Enquiry and Imposing Penalty by the Adjudicating Officer) Rules, 1995, think it appropriate to levy a consolidated penalty of Rs.5.00 lakhs (Rupees Five Lakhs only) in terms of Section 15 H (ii) of SEBI Act, 1992 on Kapil Puri, Kavita Puri, Rajesh Chhabria, Mahendra Shah, Sudhanshu Tiwari,

Naresh Bahri, Kishore Saigal, Sanjeev Chainani and Neha Equiresearch Pvt Ltd. who are cumulatively directed to pay the said amount for their failure to make a public announcement in accordance with the provisions of Regulation 11(2) of the SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 1997 in the matter of acquisition of 21,30,000 shares of M/s. Spanco Telesystems and Solutions Limited.

32. These entities are jointly and severally liable payable to pay the penalty amount within a period of 45 days from the date of receipt of this order through a cross demand draft drawn in favour of "SEBI-Penalties remittable to the Government of India' and payable at Mumbai which may be sent to Shri P.K. Bindlish, General Manager, Securities and Exchange Board of India, Mittal Court, B Wing, 224 Nariman Point, Mumbai – 400021.

PLACE: MUMBAI

DATE : AUGUST 21, 2006

G. BABITA RAYUDU

ADJUDICATING OFFICER

