BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. VSS/AO-59/2009]

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

In respect of

M/S TRICON BUSINESS PVT. LTD.

(PAN.AAACT9466E)

FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) conducted investigation in the trading in the scrip of M/s Nageshwar Investment Ltd. (hereinafter referred to as '**NAG / Company**') whose shares witnessed a price rise from Rs.12.70 to Rs.42.95 during the period from April 2005 to November 2005 at the Calcutta Stock Exchange (hereinafter referred to as **"CSE"**).

2. The findings of the investigation led to the allegation that M/s Tricon Business Pvt. Ltd. (hereinafter referred to as **"TRICON/Noticee"**) had not complied with the summonses issued by SEBI under sections 11C (3) and 11C (5) Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**') and

consequently, liable for monetary penalty under section 15A of the SEBI Act.

APPOINTMENT OF ADJUDICATING OFFICER

3. Mr. Piyoosh Gupta was appointed as Adjudicating Officer vide order dated January 04, 2007 under section 15 I of the SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the **'Rules'**) to inquire into and adjudge under section 15A of the SEBI Act.

4. Consequent upon the transfer of Mr. Piyoosh Gupta, the undersigned was appointed as the Adjudicating Officer vide order dated November 19, 2007.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. Show Cause Notice No. EAD-5/VSS/SS/119797/2008 dated March 10, 2008 (hereinafter referred to as "**SCN**") was issued to the Noticee under rule 4 of the Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed under section 15A of SEBI Act for failure to comply with the provisions of sections 11C (3) and 11C (5) of SEBI Act.

6. The said SCN was affixed on the premises at 46 C, Rafi Ahmed Kidwai Road, 5th Floor, Kolkata- 700 016. The Noticee replied to the aforesaid SCN vide letter dated October 16, 2008 and requested for extension of seven days time to file the reply. However, no further reply was received from the Noticee.

7. In the interest of natural justice and in order to conduct an inquiry in terms of rule 4(3) of the Rules, the Noticee was granted an opportunity of personal hearing on March 17, 2009, vide notice dated February 17, 2009. Mr. Anshul Vyas, Authorised Representative of the Noticee (hereinafter referred to as **"AR"**) appeared on behalf of the Noticee and made submissions. He also submitted a letter dated March 16, 2009 of the Noticee along with documents. The AR admitted the fact that the Noticee neither appeared in person before the Investigating Authority (hereinafter referred to as '**IA**') nor furnished the information sought by the IA through the summons. However, he contended that the said non-compliance was due to the following :

(a) The annexure to the summonses dated August 24, 2006 and September 07, 2006 was not received.
(b) The availability of time to compile the information sought through the summons dated August 24, 2006, September 07, 2006 and September 15, 2006 was inadequate.
(c) Information sought through the aforesaid summonses was available not only with the Noticee but also with the stock exchange and the broker from whom SEBI could have obtained the information without waiting for the response from the Noticee.
(d) The failure on the part of the Noticee to comply with the summonses did not hamper the investigation.
(e) The summonses issued to the Noticee were ambiguous as it is not clear whether the summons were issued to Shri Naba Kumar Pal, in his individual capacity or in any other capacity. Similarly, it was also not clear whether the summonses were issued against the TRICON as the summons were addressed to an individual by name 'Shri Naba Kumar Pal'.
(f) The summonses were not in accordance with Rule 5 Order XVI of Civil Procedure Code.
(g) The factors under 15J of SEBI Act have not been attracted in the present case and therefore, no penalty is warranted.

(h) Case laws have been cited in support of the aforesaid points.

Further to the inquiry/hearing held on March 17, 2009, the Noticee has made written submissions reiterating the aforesaid and citing further case laws vide its letter dated March 22, 2009.

CONSIDERATION OF ISSUES AND FINDINGS

8. The issues that arise for consideration in the present case are :

a. Whether the Noticee had complied or not with the provisions of sections 11C (3) and 11C (5) of SEBI Act?

b. Does the non-compliance, if any, attract monetary penalty under section 15A of SEBI Act?

c. If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of SEBI Act?

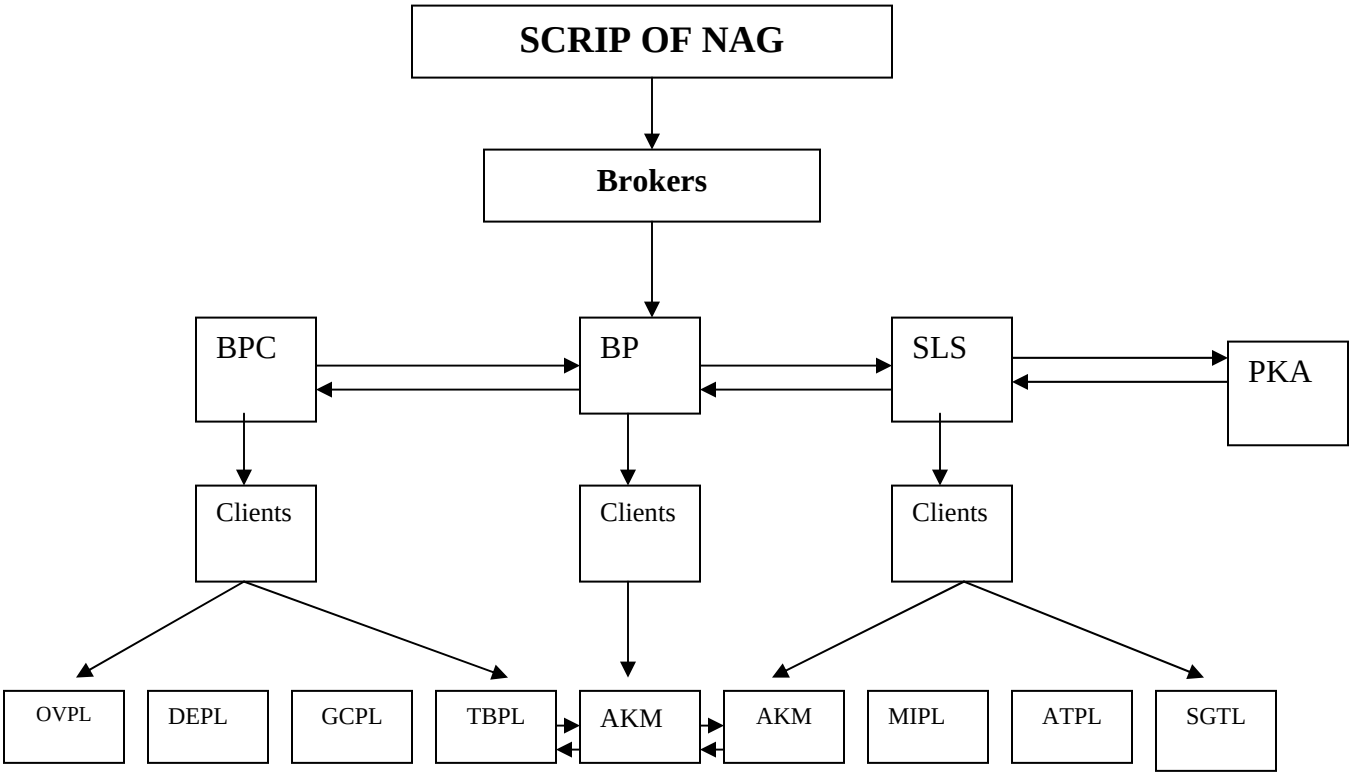
9. Before moving forward, it is pertinent to refer to the provisions of regulations 11C(3) and 11C(5) of SEBI Act, which reads as under:-

11C (3) The Investigating Authority may require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before him or any person authorised by it in this behalf as it may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of its investigation.

11C(5) Any person, directed to make an investigation under sub-section (1), may examine on oath, any manager, managing director, officer and other employee of any intermediary or any person associated with securities market in any manner, in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before it personally.

10. In view of the unusual movement in volume and price in the scrip of NAG at CSE, SEBI conducted investigation into the dealing in the shares of NAG. The investigation revealed that certain clients and

their brokers had traded in large volumes during the period of investigation and one of them was the Noticee. The entities found to be involved in the alleged manipulation and against whom action has been initiated are as under :



Sl No.	ABBREVIATION	NAME OF THE ENTITIES
1.	NAG	M/s Nageshwar Investment Limited
2.	BPC	M/s Basant Periwal & Co.
3.	BP	M/s Binoy Poddar
4.	SLS	M/s Shyam Lal Sultania
5.	PKA	M/s P.K.Agarwal & Co.
6.	OVPL	M/s Oriental Veneer Products Ltd.
7.	DEPL	M/s Delton Exim(P) Ltd.
8.	GCPL	M/s Gateway Computer (P) Ltd.
9.	TBPL	M/s Tricon Business (P) Ltd.
10.	AKM	M/s Ashwani Kumar Mehra
11.	MIPL	M/s Millenium Insurance Agent (P) Ltd.
12.	ATPL	M/s Anushree Tradelink (P) Ltd.
13.	SGTL	M/s Swarn Ganga trading (P) Ltd.
14.	RCS	Ram Chandra Singh, Director, DEPL and GCPL

15.	NKP	Naba Kumar Pal, Director, TBPL

11. In order to examine the role of the Noticee in the alleged manipulation and fraudulent trade practice in the trading in the scrip of NAG, summonses was issued to the Noticee by IA. The details of summonses issued vis-à-vis status of its compliance by the Noticee are as under:

Date of Summons	**Mode of Delivery**	**Proof of delivery of summons**	**Status of compliance**
24.08.2006	Through broker BPC	Received stamped and acknowledged by the Noticee.	Not submitted documents and not appeared in person
07.09.2006	Through broker BPC	Received stamped acknowledged by the Noticee.	Not submitted documents and not appeared in person
15.09.2006	Through broker BPC	Received stamped and acknowledged by the Noticee.	Not submitted documents and not appeared in person

From the above table, I find that:

(a) The first summons dated August 24, 2006 along with annexure was issued by the IA to the Noticee through Broker M/s Basant Periwal & Company (hereinafter referred to as "**BPC"**), directing the Noticee to appear in person on August 31, 2006 at 3.30 p.m. before him along with details as given in the annexure to the said summons. The summons was received, stamped and acknowledged by the Noticee. The Noticee had neither appeared in person before the IA at the specified date, time and place nor furnished the details sought by the IA.

(b) The second summons dated September 07, 2006 along with the annexure was issued by the IA to the Noticee through BPC, directing the Noticee to appear in person on September 15, 2006 at 2.00 p.m. before him along with the details as given in the annexure to the said summons. The

summons was received, stamped and acknowledged by the Noticee. The Noticee had neither appeared in person before the IA at the specified date, time and place nor furnished the details sought by the IA.

(c) The summons dated September 15, 2006 along with the annexure was issued by IA to the Noticee through BPC directing the Noticee to appear in person on September 22, 2006 at 2.00 p.m. before him along with the details as given in the annexure to the said summons. The summons was received, stamped and acknowledged by the Noticee. The Noticee had neither appeared in person before the IA at the specified date, time and place nor furnished the details sought by the IA.

12. I have noted the submissions of the Noticee that it could not comply with the said summonses due to the reasons cited by it during the present proceedings. I now proceed to deal with the reasons cited by the Noticee for the said non-compliance.

13. The first reason cited by the Noticee is the non-receipt of annexure to the summonses dated August 24, 2006 and September 07, 2006.

14. I find from the material available on the record that the Noticee has cited this reason for the first time that too during the present proceedings. If it had not received the annexure to the said summonses, it could have brought the same to the knowledge of the IA. There is nothing on record to show that the Noticee had made any attempt to bring the same to the knowledge of the IA.

15. Be that as it may, it is pertinent to point out that the requirements of the two summonses referred to above are two fold, i.e., (a) to appear in person and (b) to furnish details as given in the annexure. For argument sake, assuming but not accepting the contention of the Noticee that the annexure to the said summonses was not received by it, the Noticee could have appeared in person on the specified date, time and place before the IA and submitted the fact of non-receipt of the annexure to the summonses. I find that the Noticee and the IA are located in the same city, i.e., Kolkata, and the Noticee could have complied with the requirement of appearing in person. The Noticee had failed to do so. It has not submitted any reason for its failure.

16. The second reason cited by the Noticee is lack of adequate time to collate, collect and prepare the information sought by IA. I have noted the specific submission made by the Noticee in its reply dated March 22, 2009 wherein it has stated that the clear working days available to it was only 2-3 days.

17. On perusal of the annexure to the summonses issued by the IA, I find that the data sought from the Noticee include details, such as, address, PAN, copy of demat statements, trade related details (both on and off market), directorship, promoters, etc. By its own admission, the Noticee had received the summonses and had more than 2 working days to compile and furnish the information to the IA. I find that the information sought from the Noticee, more particularly, the demat statements and trade related details pertain to the period of investigation, i.e., April 2005 to November 2005. They are not too old for the Noticee to compile from its records. Further, details, such as, address of the Noticee, promoters and directors of the Noticee, copy of contract notes, copy of bank

statements, etc., would have been available readily with the Noticee and it had to merely furnish copies of such documents. There is nothing for the Noticee to prepare or compile these data from any outside agencies. Therefore, the contention of lack of availability of time was not acceptable. Moreover, it is pertinent to point out that the requirements of the summonses are two fold, i.e., (a) to appear in person and (b) to furnish details as given in the annexure. For argument sake, assuming but not accepting the contention of the Notice that the availability of time for compiling the requisite information was inadequate as contended, the Noticee could have appeared in person on the specified date, time and place before the IA and explained the same and sought time, as may be necessary for the Noticee to furnish the information. I find that the Noticee and the IA are located in the same city, i.e., Kolkata, and the Noticee could have appeared in person and requested for time. There is nothing on record to show that the Noticee had even attempted to do so. The Noticee has failed to do so. It has not submitted any reason for its failure.

18. The third reason cited by the Noticee is that the information [except the demat statement] sought through the annexure to the aforesaid summonses was available not only with it but also with other agencies, such as, the broker, CSE, etc.

19. I find that the IA through the annexure to the said summonses had sought the following:

I. Address.
II. PAN NO.
III. Demat Account Details.
IV. Names, addresses, PAN of all promoters and directors of company.

V. Details of directorships in other companies of all promoters and directors of company (details such as name and address of registered office address of the other companies). Please also state whether the promoters and directors of company have any other business interest related to securities market such as sole proprietary firm etc. if yes the name and address of the same should be provided.

VI. Details of directorships in companies/ other business interest such as sole proprietary firm related to securities market etc. of the relatives of the promoters and directors of company.

VII. Details of transactions in the scrip of Nageshwar investment Ltd. in the following format during the period from April 2005 to November 2005:

Sr, No.	Date	Quantity	Rate	Buy/ Sell

With respect to the transactions at point no. 7 above to submit the reverse transaction details (i.e. if shares have been bought, provide the sell data and vice versa).

VIII. Copies of the Contract Notes issued by the broker for transactions in the scrip for the period April 2005 to November 2005.

IX. Copies of the relevant statement of accounts issued by the broker for transactions in the scrip during the period April 2005 to November 2005 duly highlighting the transactions.

X. Statement of deliveries made to the broker and received from the broker for transactions in the scrip during the period April 2005 to November 2005 in the following format:

S.No	Tran. Date	Qty	Bought / Sold	Date of del. recd, from/ made to	Qty. recd./ deliv

XI. To furnish the details of relevant bank transactions, evidencing the receipts and payments from/to the broker for transactions pertaining to the scrip in the following format:

S.No	Iran. Date	Qty	Bought / Sold	Date of Pay-in made to/pay-in reed. From broker	Amount

XII. Details of all off market transactions, if any in the scrip during the period from April 2005 to November 2005.

XIII. Details of relationship with the promoters/ directors of the company Nageshwar Investment Ltd., if any.

XIV. Details of relationship with the brokers dealing in the scrip, if any.

XV. Reasons for trading in the scrip.

20. I find that all the details stated in the annexure were not available with other agencies, as contended by the Noticee. For example, PAN was not mandatory for trading in the securities market during the years 2005 and 2006. Therefore, this information could have been provided by the Noticee alone. As far as bank transactions are concerned, the information was very significant so as to match the fund flow with the corresponding securities flow, which is inherent and one of the most vital part of the whole investigative process. There is no way for the IA to know the number of bank accounts maintained by the Noticee unless the same is furnished by it. This information was also not available in the public domain and was available only with the Noticee. Though the trading details of the Noticee, payments/delivery made/received, etc, might have been available with CSE and the IA could have obtained the same from CSE, in order to validate and cross check such information, it would be necessary for the IA to obtain such information from the Noticee as well. In case of any discrepancy in the information, the IA had to seek clarification and only after satisfying himself with the authenticity and correctness of the information, he could proceed further with the investigation. Therefore, it is imminent on the part of the Noticee to have furnished the information to the IA within the

specified time. It is not the case that the information sought by the IA was not available with the Noticee. I have perused the order dated November 02, 2004 passed by the Learned Adjudicating Officer in the matter of Raptakos Brett and Co. Ltd. relied upon by the Noticee in support of its contentions. In view of my aforesaid findings in this regard, the aforesaid order has no application in the instant case and I also find that the submissions of the Noticee in this regard are devoid of merit.

21. The fourth reason cited by the Noticee is that the failure on the part of the Noticee to comply with the summonses did not hamper the investigation.

22. The Noticee has not disputed the fact of its non-compliance with the summonses issued by the IA. It had neither appeared in person before the IA nor furnished the details sought by the IA. I find that the Noticee, along with its reply dated March 16, 2009 has furnished certain details which it claims to be the information as per the annexure to the summonses. However, I am of the view that the said information is 'stale'. Such practice of furnishing information to the Adjudicating Officer instead of to the IA should not be encouraged as otherwise this may snowball into an appalling strategy in the hands of some unscrupulous elements, like the Noticee, to thwart the investigation by SEBI. Moreover, submission and acceptance of such information at the stage of adjudication do not serve anyone's cause as examination of such information is not a subject matter of the present proceedings. It is like supplying of oxygen to a person who has already been declared dead by a doctor.

23. Be that as it may, in order to examine whether the information on the trade details of the Noticee collected by SEBI from CSE and other sources based on which the investigation was conducted was adequate, the same was compared with the information submitted by the Noticee along with its reply dated March 16, 2009. The investigation has revealed that (a) the Noticee traded through BPC and (b) had sold 40,000 shares of NAG during the investigation period. Whereas, as per the information submitted by it, it had traded through BPC and P.K.Agarwal & Company and its total transactions in the scrip of NAG during the investigation period was 2,95,000 shares (buy) and 2,33,601 shares (sell). I find that these trade details as well as the trading through the other broker were not available with the IA. Had the Noticee complied with the summonses and provided the factual information at the appropriate time, the IA would have been benefited and in a better position to examine the role of not only the Noticee but also the other entities through and with whom the Noticee had traded. It is amply clear that the information sought by the IA was crucial and central to the investigation and failure on the part of the Noticee to comply with the summonses had indeed hampered the investigation. Moreover, the presence of the Noticee along with the necessary documents was also essential, among other things, to examine the extent of its involvement in the trades of NAG. I find that the Noticee was under an obligation to provide the information as sought by IA. The decision to call for such information and the judgment as to its relevancy is completely at the discretion of the IA and is in furtherance of the discharge of his official duties. The Noticee under the summonses is only obliged to co-operate with the IA and furnish the required information, since the same was very much available with it. In case of any evasion of the regulatory requirements, which are enforced in the interests of the investors,

due cognizance should be taken and liability should be fixed thereon. Thus, as the Noticee did not provide the information, the same thwarted the attempts of SEBI to effectively gather vital evidence for the timely conclusion of the investigation proceedings.

24. The fifth reason cited by the Noticee is that summonses were ambiguous as they were addressed in such a manner that it was not clear whether the summonses were issued against Shri Naba Kumar Pal, in his individual capacity or in any other capacity. Similarly, it was also not clear whether the summonses were issued against TRICON as the summonses were addressed to an individual by name 'Shri Naba Kumar Pal'. It has claimed that because of the aforesaid ambiguity, it was not sure as to who will respond to the summonses.

25. I think it will be appropriate to highlight some of the contextual facts of this case. I find that the first summons dated August 24, 2006 and second summons dated September 07, 2006 were received and acknowledged by the Noticee. It has not disputed this fact. As far as the summons dated September 15, 2006 is concerned, I find that on the one hand, the Noticee has claimed that it could not furnish the requisite information due to lack of time and on the other hand, the Noticee has claimed that it could not furnish the requisite information because of the aforesaid ambiguity. On perusal of the summonses, I find that the same were addressed to "Shri Naba Kumar Pal, Tricon Business Pvt. Ltd., 46C, Rafi Ahmed Kidwai Road, 5th Floor, Kolkata- 700 016." Shri Naba Kumar Pal was and is one of the directors of Tricon Business Pvt. Ltd. This fact has not been disputed by the Noticee. While Tricon Business Pvt. Ltd. had traded in the scrip of NAG, Shri Naba Kumar Pal had not traded in the scrip of NAG. This fact has also not been disputed by the

Noticee. If the contents of the summonses and the annexure to the said summonses are tested with the aforesaid indisputable facts, it would follow that the summonses were meant for Tricon Business Pvt. Ltd. Further, since Shri Naba Kumar Pal being a director on the board of TRICON, it would also follow that the summonses were also meant for him in his capacity as a director as well. Therefore, I am of the view that the summonses are unambiguous, clear and specific in all respects. If the contention of the Noticee is appropriate, it is not clear as to how and from where it got the clarity to furnish the information during these proceedings. On perusal of the material available on record, I do not see any correspondence exchanged between SEBI and the Noticee offering any clarification on the so called 'confusion' in the mind of the Noticee. Thus, I am of the view that raising this objection of ambiguity at this stage is an afterthought.

26. Be that as it may, at the cost of repetition, I find that the requirements of the summonses were two fold, i.e., (a) to appear in person and (b) to furnish details as given in the annexure. For argument sake, assuming but not accepting the contention of the Notice that the summonses were ambiguous as contended, the Noticee could have appeared in person on the specified date, time and place before the IA and sought necessary clarifications. I find that the Noticee and the IA are located in the same city, i.e., Kolkata, and the Noticee could have appeared in person and sought necessary clarifications. There is nothing on record to show that the Noticee had even attempted to do so. The Noticee had failed to do so. It has not submitted any reason for its failure. Thus, I find that the submissions of the Noticee are not only unsatisfactory but also contradicting and incorrect.

27. The sixth reason cited by the Noticee is on the applicability of the provisions Code of Civil Procedure (hereinafter referred to as **"CPC"**) and that the summonses were not in accordance with Rule 5 Order XVI of CPC.

28. Upon careful examination of the provisions of the SEBI Act, I find that section 11(3) grants SEBI, the powers of a Civil Court as enshrined in the CPC. Thus, if SEBI issues a summons u/s 11(3), it is a natural corollary that the rules of summons as codified in CPC would be applicable to such summons. On the other hand, section 11C(3) of the SEBI Act empowers the IA to seek information from an intermediary or a person associated with the securities market in any manner. Similarly, section 11C (5) of the SEBI Act empowers the IA to require the personal appearance of such person. However, the IA while exercising powers u/s 11C of the SEBI Act enjoys flexibility and is not bound by any strict codified procedure, as the provisions of section 11C do not prescribe any format or manner in which the information or personal appearance can be sought. Thus, if the information and personal appearance are required by the IA u/s 11C(3) and 11C(5) of the SEBI Act, provisions of CPC can not be said to be applicable and consequently, the question of compliance with the same does not arise. In the instant case, I find that the IA had issued summonses to the Noticee u/s 11C(3) and 11C(5) of the SEBI Act. Therefore, the contention of the Noticee that the summonses issued by IA were not in conformity with the provisions of CPC is devoid of merit. However, even though compliance with the requirements of CPC is not mandatory, the principles of natural justice prescribe that the instructions of IA while seeking information and/or personal appearance ought to be clear and unambiguous.

29. Be that as it may, in order to examine whether the summonses issued by the IA are clear and unambiguous, it would be pertinent to compare the contents of the said summonses with the provisions of Rule 5 Order XVI of CPC. The provisions of Rule 5 Order XVI of CPC read as under:

> ***5. Time, place and purpose of attendance to be specified in summons.***
> *Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.*

I find from Rule 5, Order XVI of CPC that, it requires that every summons for the attendance of the person to give evidence or to produce a document shall specify, inter alia,

(i) Time and place of attendance

(ii) Whether attendance is required for the purpose of giving evidence or to produce document or for both purposes

(iii) Reasonably accurate description of any document to be produced

30. On perusal of the summonses, I find that the following details are specified therein:

S.No.	Details	Summons - 1	Summons - 2	Summons - 3
1.	Date of issue	August 24, 2006	September 07, 2006	September 15, 2006
2.	Issued under	Sec.11C(3) & (5) of SEBI Act, 1992	Sec.11C(3) & (5) of SEBI Act, 1992	Sec.11C(3) & (5) of SEBI Act, 1992
3.	Time of attendance	3.30 P.M.	2.00 P.M.	2.00 P.M.
4.	Date of attendance	August 31, 2006	September 15, 2006	September 22, 2006
5.	Place of attendance	SEBI, Unit 301, L & T	SEBI, Unit 301, L & T	SEBI, Unit 301, L & T

		Chambers, 3rd floor, 16, Camac Street, Kolkta- 700 017	Chambers, 3rd floor, 16, Camac Street, Kolkta- 700 017	Chambers, 3rd floor, 16, Camac Street, Kolkta- 700 017
6.	Requirement of Attendance	Yes, in person	Yes, in person	Yes, in person
7.	Production of documents	Yes, documents relating to investments in NAG	Yes, documents relating to investments in NAG	Yes, documents relating to investments in NAG
8.	Production of any particular document	Yes, as per details given in the Annexure	Yes, as per details given in the Annexure	Yes, as per details given in the Annexure
9.	Purpose	In connection with the investigation instituted by SEBI in the case of NAG	In connection with the investigation instituted by SEBI in the case of NAG	In connection with the investigation instituted by SEBI in the case of NAG
10.	Issuing Authority	Jayanta Jash, DGM	Jayanta Jash, DGM	Jayanta Jash, DGM
11.	To whom it is addressed	Shri Naba Kumar Pal, Tricon Business Pvt. Ltd., 46C, Rafi Ahmed Kidwai Road, 5th Floor, Kolkata- 700 016	Shri Naba Kumar Pal, Tricon Business Pvt. Ltd., 46C, Rafi Ahmed Kidwai Road, 5th Floor, Kolkata- 700 016	Shri Naba Kumar Pal, Tricon Business Pvt. Ltd., 46C, Rafi Ahmed Kidwai Road, 5th Floor, Kolkata- 700 016

I have perused the case of *Barium Chemicals Ltd. v. A.J. Rana, (1972) 1 SCC 240* relied upon by the Noticee in this regard. I find that the Hon'ble Supreme Court of India in the said case has held, inter-alia, that:

"14. *The words "considers it necessary" postulate that the authority concerned has thought over the matter deliberately and with care and it has been found necessary as a result of such thinking to pass the order. The dictionary meaning of the word "consider" is "to view attentively, to survey, examine, inspect (arch), to look attentively, to contemplate*

mentally, to think over, meditate on, give heed to, take note of, to think deliberately, bethink oneself, to reflect" (vide Shorter Oxford Dictionary). According to Words and Phrases – Permanent Edition Vol. 8-A "to consider" means to think with care. It is also mentioned that to "consider" is to fix the mind upon with a view to careful examination; to ponder; study; meditate upon, think or reflect with care. It is therefore, manifest that careful thinking or due application of the mind regarding the necessity to obtain and examine the documents in question is sine qua non for the making of the order. If the impugned order were to show that there has been no careful thinking or proper application of the mind as to the necessity of obtaining and examining the documents specified in the order, the essential requisite to the making of the order would be held to be non-existent.

15. *A necessary corollary of what has been observed above is that mind has to be applied with regard to the necessity to obtain and examine all the documents mentioned in the order. An application of the mind with regard to the necessity to obtain and examine only a few of the many documents mentioned in the order, while there has been no such application of mind in respect of the remaining documents, would not be sufficient compliance with the requirements of the statute. If, however, there has been consideration of the matter regarding the necessity to obtain and examine all the documents and an order is passed thereafter, the Court would stay its hand in the matter and would not substitute its own opinion for that of the authority concerned regarding the necessity to obtain the documents in question.*

16. *The language of Section 19(2) of the Act points to the conclusion while an order under it may be made with respect to "any information; book or other document", it is essential that such information, book or other document should be specified in the order. This is apparent from the concluding part of the said sub-section wherein there is reference to "such information, book or other document". The word "such" points to the*

necessity of specifying the information, book or other document in the order. It is, no doubt, true that the order can relate to a large number of books, documents or informations, it is all the same imperative that the same should be particularised in the order. According to sub-section (1-A) of Section 23 of the Act, if any person contravenes any of the provisions of this Act or of any rule, direction or order made thereunder, for the contravention of which no penalty is expressly provided, he shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both. The fact that penal consequences follow from non-compliance with an order made under sub-section (2) of Section 19 also highlights the importance of specifying the information, book or other document in the order.

17. *The order under the above provision of law is addressed to the person who is either in possession of requisite information, book or other document or is, in the opinion of the authority concerned, able to obtain and furnish such information, book or other document. For compliance with such an order, it is imperative that the person against whom the order is directed should be left in no doubt with regard to the precise information, book or other document which is required to be furnished by him. It, therefore, becomes essential that the requisite information, books or other document should be specified in the order."*

If the contents of the summonses as detailed above are tested with the aforesaid observations of the Honorable Supreme Court of India and the requirements of provisions of Rule 5 Order XVI of CPC, I find that all the three summonses are unambiguous, clear and in conformity with the provisions of law. Thus, I do not find any merit in the contention of the Noticee that the summonses were ambiguous and bad in law.

31. The total transaction of 5,28,601 shares of NAG by the Noticee, the reluctance of the Noticee to provide the information regarding its source of funds, shares and details of bank account, etc., raises serious doubts about its intent and involvement in the alleged manipulation in the trading in the shares of NAG. I note that the information sought by the IA was within the realm of the Noticee and could have been provided easily. However, the Noticee chose not to do so. Under the circumstances, the details sought by the IA were absolutely vital for SEBI to carry out its solemn objective of investor protection and regulation of the securities market. The timely submission of the information as sought through the summonses from the Noticee would have possibly helped the IA to complete the investigation and to establish the manipulation and fraudulent trade practice in the trading in the shares of NAG. I also find that as the Noticee failed to appear in person before the IA, its statement could not be recorded. The furnishing of the information as sought through the summonses to the Adjudicating Officer is an afterthought and cannot be deemed to be compliance of the summonses issued by the IA. Further, I find that the Noticee was given adequate opportunity by the IA to comply with the summonses. I am also of the view that it is the duty, responsibility and obligation of every person (all the more who is associated with the securities market and traded in the particular security which has been investigated by SEBI) from whom information was sought to fully co-operate with IA and promptly produce all documents, records, information, etc., to the IA. If persons are allowed to flout the summonses issued to them during the course of the investigation, SEBI, as the watchdog of the securities market, will not be able to discharge its statutory obligations in protecting the interests of the investors and safeguarding the integrity of the securities market. Had Noticee co-operated with the IA, it might

have come clean and at the same time the real culprits could have been identified and dealt with as per law by SEBI. Therefore, I do not find merit in submissions of the Noticee but hold that it had failed to comply with the summonses knowingly with intent to hamper the proper conduct of the investigation by SEBI. Thus, the allegation of the violation of the provisions of sections 11C (3) and 11C (5) of SEBI Act by the Noticee stands established.

32. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund* [2006] 68 SCL 216(SC) held that *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant…"*.

33. The Honorable Securities Appellate Tribunal (hereinafter referred to as **"SAT"**) in Appeal No.95/04 in Mayfair Paper & Board Pvt.Ltd. V SEBI held that *"failure to furnish information to the Investigating Authority of SEBI shall attract the penalty prescribed under section 15A of the SEBI Act"*.

34. Thus, the aforesaid violation by the Noticee makes it liable for penalty under Section 15A (a) of SEBI Act, 1992 which read as follows:

15A. Penalty for failure to furnish information, return, etc.- *If any person, who is required under this Act or any rules or regulations made thereunder,-*

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;

35. While determining the quantum of penalty under section 15A (a), it is important to consider the factors stipulated in section 15J of 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."*

36. I have perused the case laws cited by the Noticee in this regard and one of them being "Hindustan Steel Limited V State of Orissa". I find from the Judgement of the Honourable Supreme Court of India in the matter of "Chairman, SEBI V Shriram Mutual Fund and Another" decided in civil Appeals Nos. 9523-24 of 2003 decided on May 23, 2006 had dealt with this line of argument. In the said case, the Honourable Supreme Court had held that

" 34. The Tribunal has erroneously relied on the judgment Hindustan Steel Ltd. V State of Orissa which pertained to criminal / quasi –criminal proceedings. That section 25 of the Orissa Sales 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 the Regulations and is not a criminal/quasi-criminal proceeding".

Thus, in the light of the aforesaid decision of the Honourable Supreme Court of India, I do not find any merit in the contention of the Noticee in this regard.

37. I have noted the submissions of the Noticee that in view of the reasons cited by it for its non compliance with the summonses, the factors of section 15J of SEBI Act have not been attracted and therefore, no penalty is warranted.

38. However, I find from the material available on record that the Noticee had executed substantial trades in the scrip of NAG through many brokers. The failure on the part of the Noticee to comply with the summonses has to be viewed in this context. It is not possible to quantify the exact gains made by the Noticee or the loss caused to the investors as a result of the failure on its part to comply with the summonses. The Honourable SAT had the occasion to consider a similar factual situation in *Appeal No: 114 of 2005 Nokia Finance International Pvt. Ltd.Vs SEBI*. In the said appeal, the Honorable SAT examined the failure on the part of the appellant to provide necessary information to the IA of SEBI. In the said matter, while upholding the penalty imposed by the Adjudicating Officer, the SAT observed that the appellant could have availed the opportunity to submit the required information, however, he failed to do so and the penalty has been imposed in terms of the provisions of law. The order passed by SAT is relied upon in this case for guidance. Considering the aforesaid observations of SAT, the failure on the part of the Noticee to comply with the summonses has to be viewed seriously.

39. Further, I have also perused the order dated January 07, 2009 of SAT in Appeal No. 106 of 2006 DKG Buildcon Pvt. Ltd. V SEBI, the SAT has stated inter-alia, that*" By not responding to the summons, the representative(s) of the appellant did not appear before the investigating*

officer as a result whereof their statements could not be recorded. This obviously, hampered the investigations…."

40. With regard to the repetitive nature of the default, I find that the IA had issued three summonses to the Noticee and the Noticee failed to comply with all the three. This repeated failure indicates that the default is of repetitive in nature.

ORDER

41. After taking into consideration all the facts and circumstances of the case, I hereby impose a monetary penalty of Rs.15,00,000/- (Rupees fifteen lakhs only) on the Noticee which will be commensurate with the violation committed by it.

42. 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 Mr.Jayanta Jash, General Manager, Securities and Exchange Board of India, Eastern Regional Office (ERO), L&T Chambers, 3rd Floor, 16, Camac Street, Kolkata- 700 017.

43. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to the Securities and Exchange Board of India.

Date: **April 22 , 2009**
Place: **MUMBAI**

V.S.SUNDARESAN
ADJUDICATING OFFICER