BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PG/AB/AO-09/2012]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995 AND SECTION 23-I OF SECURITIES CONTRACTS (REGULATION) ACT, 1956 READ WITH RULE 5 OF SECURITIES CONTRACTS (REGULATION) (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 2005

In respect of

Mr Bharat Shantilal Thakkar

(PAN: AAZPT9542R)

In the matter of

Indo Pacific Software and Entertainment Ltd.

FACTS OF THE CASE IN BRIEF

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

an investigation into the dealing in the shares of IPSE during 2007.

2. The investigations revealed that 16 entities had entered into off market transactions in the shares of IPSE, during the period of investigation. It was observed that out of these 16 entities, ten entities had transferred / received shares in off market transactions. In all, 70,78,108 shares have been transacted off-market amongst the entities in question. Bharat Shantilal Thakkar ("BT/Noticee") was also one of the entities who had undertaken off market transfers in the shares of IPSE.

3. It is alleged that the Noticee entered into 11 off market transfers. The Noticee has claimed that all transactions were either in the nature of repayment of old loans, advancement of new loans or transactions between his own accounts.

4. Summons had been issued to the Noticee seeking details of his off market transactions and other information. The Noticee was issued summons dated January 8, 2010 and June 17, 2010. Reminders were also issued to the Noticee on July 2, 2010 and July 9, 2010.

5. It was alleged that the Noticee had not complied with the summons thereby violating sections 11C (2), (3) and (5) of Securities and Exchange Board of India Act, 1992 ("**SEBI Act"**) and was therefore liable for penalty under section 15 A (a) of SEBI Act. It was further alleged that the Noticee had entered into off market transactions whereby he had violated Sections 13 and 18 r/w Section 2(i) of Securities Contracts (Regulation)

Act, 1956 ("**SCR Act"**) and was liable for penalty under Section 23H of SCR Act.

APPOINTMENT OF ADJUDICATING OFFICER

6. The undersigned was appointed as the Adjudicating Officer vide order dated January 17, 2011 under Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as **'Rules'**) and Rule 3 of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005 (**SCR Rules**) to inquire into and adjudge under section 15 A (a) of SEBI Act and Sec. 23H of SCR Act, the alleged violations of the provisions of SEBI Act and SCR Act.

SHOW CAUSE NOTICE, HEARING AND REPLY

7. Show Cause Notice dated July 04, 2011 (**"SCN"**) was issued to the Noticee under Rule 4 of the Rules to show cause as to why an inquiry should not be held against the Noticee and penalty be not imposed under section 15 A (a) of SEBI Act and Section 23H of SCR Act for the alleged violations specified in the said SCN. No reply was received for the SCN within the stipulated time. The Noticee vide his letter dated August 4, 2011, which was received on August 17, 2011, filed the reply for the said SCN. The Noticee's main submissions in respect of the charges in the SCN are given as under :

- *No loss was caused to investors or the efficiency of securities market because of acts of the Noticee.*
- *The transfers executed by the Noticee were off market transfers and have in no way affected the price and volume of the scrip.*

- *The adjudicating officer has no jurisdiction for adjudging a case for violation of SCR Act as he has not been appointed under SCR Rules and hence the SCN is not valid.*
- *The investigation period of the matter is from February 5, 2007 to August 30, 2007 while the observations relating to off market transaction ranges beyond the investigation period. Thus, the investigation has been carried beyond the investigation period and would be void.*
- *Since the shares have been transferred in electronic mode, Sec. 2(i)(a) of the SCR Act is not applicable on the transaction.*
- *The Noticee had complied with summons dated January 8, 2010 by submitting all the requisite information by letter dated January 15, 2010*
- *The Summons dated June 17, 2010 was received by the Noticee asking him to appear before the Investigating Authority (IA) and he replied to said summons stating that some more time was required to compile all the data and documents.*
- *The summons dated June 17, 2010 and reminder dated July 09, 2010 asking the Noticee to appear before the IA were without any reason and was against the principles laid down by Code of Civil Procedure, 1908.*
- *The purpose of issuing summons has not been mentioned inspite of answering to all the possible queries as demanded in the first summon dated January 08, 2010. The summons dated June 17, 2010 and the reminders are vague as they fail to mention the purpose for which personal appearance was required.*

- *It has not been proved that how non submission of the information by Noticee has impacted investigation since SEBI could avail all information from intermediaries. The information sought from the Noticee could have been obtained from other intermediaries.*
- *No adjudication can be conducted for non compliance of summons under Sec. 11C as Sec. 11C(6) of the SEBI Act, 1992 prescribes penalty for non compliance of summons.*
- *The Noticee also sought copies of certain documents including the appointment order of adjudicating officer and the copy of complete investigation report.*

8. In the meantime, in the interest of natural justice and in order to conduct an inquiry as per rule 4(3) of the Rules, the Noticee was granted an opportunity of hearing on August 22, 2011 vide notice dated August 04, 2011. The Noticee, through his representatives, M/s Mindspright Consultants sought adjournment of hearing which was granted.

9. SEBI also issued a corrigendum to appointment order of the Adjudicating Officer whereby appointment under SCR Rules was to be read along with the Rules. The Noticee was informed about the corrigendum to the appointment order and a corrigendum to the SCN clarifying that the allegations against him are under Sec. 2(i) of the SCR Act was issued and he was also granted another opportunity of hearing on November 4, 2011 vide notice dated October 12, 2011. Mr Ankit Lohia, advocate along with Ms Pragati Shetty from Mindspright Consultants appeared on behalf of the Noticee and submitted that the SCN does not make out a case that how the

investigation was hampered due to the Noticee's non appearance.

10. The Noticee also submitted additional submissions dated November 11, 2011 reiterating the submissions made earlier. The Noticee also contended that there is no time period mentioned for the payment in Sec. 2(i)(b) of SCR Act and accordingly there is no violation of the SCR Act if the payment is not made within 24 hours. Further, the Noticee also wanted to know how non submission of information had hampered the investigation proceedings.

11. As all the necessary documents to decide the allegations raised in SCN had been provided to the Noticee, vide hearing Notice dated January 31, 2012, it was once again clarified to the Noticee that all relevant documents have been provided to him and he may appear for personal hearing or make submissions by February 10, 2012.

12. The Noticee vide his letter dated February 6, 2012 again sought copies of same documents and information and has stated that incase the documents are not relevant, a reasoned order may be passed in this regard.

CONSIDERATION OF ISSUES AND FINDINGS

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

a) Whether the Noticee had violated the provisions of Section 11C(2), (3) and (5) of SEBI Act?

b) Whether the Noticee had violated the provisions of Section 13 and 18 r/w Section 2(i) of the SCR Act?

c) Does the violation, if any, on the part of the Noticee attract monetary penalty under Section 15A (a) of SEBI Act and Sec. 23H of the SCR Act?

d) If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in Section 15J of SEBI Act and Sec. 23J of SCR Act?

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

SEBI Act

Investigation.

11C. (1)…….

(2) Without prejudice to the provisions of sections 235 to 241 of the Companies Act, 1956 (1 of 1956), it shall be the duty of every manager, managing director, officer and other employee of the company and every intermediary referred to in section 12 or every person associated with the securities market to preserve and to produce to the Investigating Authority or any person authorised by it in this behalf, all the books, registers, other documents and record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

(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 authorized 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.

…

(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.

SCR Act

Definitions

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

…

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

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

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

Contracts in notified areas illegal in certain circumstances

13. If the Central Government is satisfied, having regard to the nature or the volume of transactions in securities in any State or area, that it is necessary so to do, it may, by notification in the Official Gazette, declare this section to apply to such State or area, and thereupon every

contract in such State or area which is entered into after date of the notification otherwise than between members of a recognised stock exchange in such State or area or through or with such member shall be illegal.

…

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

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

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

Findings

Preliminary Objections

15. The Noticee has contended that the IA was at fault and the whole investigation report and adjudication proceedings are void as the IA has traveled beyond the investigation period and thus no adjudication can be conducted on the said findings. This contention of the Noticee cannot be accepted. This contention appears to imply that IA is not to take cognizance of any violation which comes to his notice merely because the initial appointment order did not cover that period. Even though the IA generally takes a particular period for investigation, he may still

notice and report to the Board irregularities/violations committed outside the said period. Considering the significance and relevance, he may include such observations in the investigation report. The investigation is basically a fact finding process and the investigation report is an outcome of such fact finding process. This report is submitted to the Board for its consideration alongwith the recommendation of the IA. Once the Board approves the investigation report, all the findings of the IA irrespective of the period stands approved. The Board may further decide on action, if any, to be taken on the report.

16. The Noticee has further sought certain documents and information on the pretext of natural justice. These documents include:

i. Complete copy of Investigation Report
ii. Copy of order Appointing Investigation Officer
iii. Copy of Order appointing Adjudication Officer
iv. Details of information which could not be furnished by the Noticee at the time of investigation
v. Details as to how investigations were hampered due to Noticee's non appearance.
vi. Details which the IA sought from Noticee when the Noticee failed to appear before the IA.

The Noticee was provided with a copy of the appointment order of adjudicating officer during the course of adjudication proceedings. The necessity to provide a copy of the complete investigation report to the Noticee was not there as all the relevant portions of Investigation report along with documents relied upon for issuing the SCN to the Noticee were provided to him with the SCN itself. Similarly, as the appointment order of investigation officer was not relevant in deciding any allegation against the Noticee, the same was not provided to him. If the

Noticee was keen enough to examine the appointment order of the IA, then he could have asked for the same during the investigation process. As discussed earlier, adjudication proceedings are initiated on the basis of an investigation report approved by the Board. Once the report is approved and adjudication proceedings have been initiated, then the issues pertaining to authorization / conduct of investigation cannot be raised in adjudication proceedings. As regards the other 'details' sought by the Noticee, the same are not 'documents' and are not available with the adjudicating officer. The Noticee has raised queries as to the documents not submitted by him. When a summons is issued to a person, the onus is on the person to submit appropriate documents to satisfy the queries raised through summons.

17. While on one hand, the Noticee has not provided the requisite documents to prove the nature of his transactions, on the other hand he has the temerity to ask that how his action had hampered the investigations. This attitude of the Noticee is not appreciated.

18. The Noticee in his submission has only raised queries which are irrelevant for determination of violation committed by him. The details sought by the Noticee can be gathered on a prima facie examination of the SCN and the annexures to SCN and his reply. The Noticee himself is aware that how vaguely he has replied to the Summons. The Noticee is raising these issues at this juncture only to derail the adjudication proceedings. The Noticee should have responded to the summons properly instead of raising unnecessary arguments which are devoid of any merit. The Noticee was clearly informed that all the necessary documents for deciding the allegations raised in the

SCN had already been provided to him. However, the Noticee chose not to submit any contention on merit. Rather, the Noticee has put forward only technical objections on the jurisdiction of the Adjudicating Officer and has put forward unacceptable stories in his defense. The fact that the Noticee has been unable to raise any credible defense is further substantiated as the Noticee has not even submitted proper documents in support of contentions raised in adjudication proceedings. The details of information not submitted by the Noticee and the possible damage caused due to non submission are discussed during the course of this order.

Non Compliance of Summons

19. Upon perusal of the documents available on record, oral and written submissions made by the Noticee, I find the following:

- The Summons dated January 8, 2010 was duly delivered to the Noticee.
- The Noticee submitted his reply dated January 15, 2010 in response to the summons.
- As the IA found the information submitted by the Noticee vague/incomplete, another summons dated June 17, 2010 was issued by the IA asking Noticee to submit further information and to appear personally before the IA. The said summons was duly delivered to the Noticee.
- The Noticee in response to the summons dated June 17, 2010 submitted a letter dated July 1, 2010 wherein he stated that he would need some more time to collect all the required documents.
- The IA vide letter dated July 9, 2010 granted an extension of 10 days to Noticee and asked him to appear personally before the IA on July 19, 2010.

- The Noticee vide letter dated July 17, 2010 replied to the said letter asking for 15 more days to submit the relevant documents.
- As per the records, the Noticee did not submit any further reply/documents.

20. The Noticee has submitted that he had replied to the summons dated January 08, 2010 vide his letter dated January 15, 2010. The said letter is available on record. The information sought and the exact response of the Noticee in this regard is tabulated below:

Summons dated January 08,2010	**Reply of the Noticee vide letter dated January 15, 2010**
Reasons for entering into such off-market transactions. Documentary evidences should also be furnished	*With regards to the off market transactions done by me in respect of Mr. Hemant Sheth 2,000 shares given and taken back as a temporary loan and there is no other transactions was made during the required period. Some of the transaction were took place with my own other demate account and transaction with Mr. Bhavesh Pabari is the repayments of shares taken on loan previously and towards shares due to him.*
Please explain your relationship, personal, financial, business or otherwise, with the counterparties appearing in the above off-market transactions.	*Not Replied. Vide his letter dated July 01, 2010, the Noitcee has stated that the counterparties were not his relatives and he has only business relationship with them.*
Details of payments made/received etc. with respect to the settlement of these off- market transactions.	*There are no bank transactions during the relevant period with the above said person as per close 1.*
Enclose a copy of your bank statement highlighting the details showing payments made/received with regard to these off-market transactions.	*Not Replied*
In case you have made these transactions for some other persons/clients, specify such details of the ultimate clients.	*Not Replied*
Confirm whether you have made any disclosure to IPSEL in compliance with the regulation 13 of SEBI (Prohibition of Insider Trading) Regulations 1992 and Regulation 6, 7 and 8 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 during the period July 2006 to December 2007. If yes submit the copy of such disclosure along with the documentary evidence.	*I have not made any disclosures to IPSEL company in compliance with the Regulation 13 of Insider Trading Regulations 1992 and Regulations 6, 7 and 8 of Takeover Regulations, 1997 since the same was not necessary to comply with in my case.*

21. It is seen that the IA had clearly asked the Noticee to provide reasons for entering into the off market transactions alongwith documentary evidences. The Noticee, in response, has merely stated that the transactions were in the nature of temporary loan with Mr. Hemant Sheth and repayment of old loans to Mr. Bhavesh Pabari. The Noticee has not submitted any documents supporting the loan transactions. The Noticee has merely mentioned the nature of transaction without providing any explanation for the same. Further the Noticee has not at all answered the query regarding his relationship with his counterparties. Vide letter dated July 01, 2010 in response to summons dated June 17, 2010 the Noticee has mentioned that the counterparties were not his relatives and his relationship is only in nature of business with the various entities with whom he has transacted off market. He has merely mentioned that he had no personal relationship with the parties. This is clearly a vague response to the query raised by the IA. The Noticee has failed to reply to the query raised by the IA and has not mentioned anything about the documents. Even if the transactions were in nature of repayment of old loans and temporary loans, there would have been some documentary evidence. This fact is further strengthened by the fact that the Noticee has submitted that he does not have personal relationship with the other entities. If the relationship was not of personal nature, then the Noticee would have created some documentation to secure the loans that he had advanced and to prove that he had repaid his old loans. He may have taken/given some security as well as received/given some consideration for the IPSE shares loan transactions which would be documented. Merely indicating that the off market transfers were entered for a particular purpose without any documentary evidence is not a satisfactory response to the query raised by IA. Thus, the Noticee's reply is

merely an eye wash exercise and he has not even attempted to answer the query of IA properly.

22. The Noticee has initially not answered the query of IA about his relationship with the counterparties. It is only after second summons were issued to him that he has submitted that he had only business relationship with the entities. While the IA had clearly asked the Noticee to explain his relationship with the various entities, the Noticee has merely mentioned that he was not having personal relationship with the entities, but he has failed to provide the nature of relationship and any explanation about the exact relationship he had with these entities. It is an accepted fact that off market transactions will take place only between known entities. The Noticee has stated that he had no personal relationship with the entities, but has not provided any details of his relationship with these entities. The query of the IA was about the nature of relationship does not appear to have been answered when asked vide summons dated January 8, 2010 and answered improperly in response to the summons dated June 17, 2010 by the Noticee.

23. The Noticee was also asked to provide details of payments made/received for settlement of these transactions. The Noticee has simply replied that there was no bank transaction with his counterparties. The Noticee was also asked for his bank statement highlighting the money transfers made on account of the off market transfers of the shares. The Noticee has only stated that there were no bank transactions with regard to the above share transactions. The Noticee has decided to respond to only certain queries, and that too in such a manner that it would be difficult for IA to make any sense out of the reply. The investigation pertained to huge off market transfers and trading

by group of connected entities and the Noticee was also one of them. His bank statement could have given crucial information to the IA and hence the Noticee decided not to answer the query itself. The summonses issued by IA have legal sanctity and the Noticee is not to decide as to which query he is supposed to answer and what documents he would provide and which he would not. The Noticee seems to believe that he has an option to provide/ not provide documents and information to the IA and later claim that he is innocent and the IA has proceeded with malafide intentions.

24. The Noticee has also failed to respond to the query of IA wherein it was asked if the transaction were done for somebody. It can be seen from the table above that the Noticee has answered only 4 queries out of 6 queries raised by IA. It is observed that the responses given by the Noticee to the IA were vague, incomplete and incorrect. However, the Noticee has claimed that he is in perfect compliance with the summons. The IA could not have made any conclusions from the vague replies of the Noticee and therefore issued a summons dated 17th June, 2010 for personal appearance and clarification on various incomplete/vague replies given by the Noticee. The Noticee at this stage also treated the process as if the compliance with summons were optional. He stated to the IA that he would need some more time to submit the documents. The Noticee chose only to answer some queries he had not answered earlier and sought an extension even though it was clear from summons dated January 8, 2010 that the Noticee was required to submit the documents. The Noticee, even after lapse of more than 5 months from January to June did not furnish any documents and when in June he was asked about the documents he responded

in a manner as if it this was the first time he was told to submit documents.

25. As requested by the Noticee vide letter dated July 1, 2010, the IA granted a reasonable extension for 10 days to the Noticee for personal appearance and submission of information. However, the Noticee again sought an extension of 15 days to locate the documents. The Noticee has not given any reason as to why he was seeking such a long extension. Further, the Noticee had already got an extension for more than a month in effect as the Summons were dated June 17, 2010 and after the extension the Noticee was required to submit documents by July 19, 2010, thereby granting him an effective extension of over a month.

26. The Noticee has continuously sought extension to comply with the summons, without providing any credible reason. In light of specific queries of IA, these requests for extensions signify that the Noticee was well aware that he had not complied with the requirement of the summonses.

27. The investigation pertained to trading and off market transfer of shares of IPSE and as the Noticee was involved in off market transfers, it was logical for the IA to ask about the details of such transfers and relationship with counterparties. The Noticee provided only limited information which was insufficient, incomplete and vague, defeating the very purpose of the summons. The Noticee knew that the bank details are important to analyze the money trail but as he wanted to conceal the information from IA and hamper the investigation proceedings, he did not respond properly to the query of IA. The reply of the Noticee to the summons is clearly aforethought so that at a later

stage he could plead innocence and show his cooperation without actually providing the required information. It is clear from the reply given by Noticee that he was trying to conceal information and was only trying to provide the bare minimum information. The Noticee knew that he had given incomplete information and therefore did not appear before the IA and repeatedly sought extensions. The Noticee and the people to whom the off market transfers were done have intentionally tried to conceal information from IA and derail the proceedings. It is a concerted effort of the Noticee and his counterparties not to provide information to the IA on the basis of one pretext or another.

28. One of the contentions that the Noticee has taken is that the information sought by IA was not available with him exclusively and that IA could have obtained the information from other sources. This contention is not acceptable as certain details such as information about bank account(s) that the Noticee had or the parties on whose behalf transaction was done was not available with the IA. Even if some information could have been obtained from intermediaries which is extremely difficult in case of off-market transfers and it would be cumbersome to get all the details such as bank account statements from different bank/s. Further, it cannot be a reason to absolve the Noticee from his responsibility to provide information to IA. It is the prerogative of IA to decide from whom to seek information. If merely availability of information with other intermediaries is taken to be a ground for absolving the Noticee from non cooperation with IA, then the entire purpose of Section 11C of SEBI Act is defeated.

29. The Noticee has claimed that the summonses were vague and thus he cannot be penalized. It can be seen from the above

discussion that the responses of the Noticee were vague and not the summonses. The replies to the summonses were made intentionally in such a manner so as to plead innocence and raise issue of malafide against the IA at a later stage. Any non compliance of the summons of the IA hampers the process of investigation. Even when IA asks a person to appear before him, the sole purpose is to collect information and it is mandatory for a person to appear before the IA and to answer the queries. The Hon'ble SAT has also recognized the importance of compliance of summons and personal appearance and in the matter of ***DKG Buildcon Pvt. Ltd. v. SEBI (Appeal No. 106 of 2006, Date of Decision: 07.01.2009),*** it has held:

"…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. In the result, the inescapable conclusion is that the appellants were adamant in not furnishing the information sought from them though vital to the investigations and that they stonewalled the investigations as commented by the adjudicating officer. It is of utmost importance that every person from whom information is sought should fully co-operate with the investigating officer and promptly produce all documents, records, information as may be necessary for the investigations. If persons are allowed to flout the summons issued to them during the course of the investigations, the Board as the watchdog of the securities market will not be able to perform its duties in protecting the interests of the investors and safeguarding the integrity of the securities market."

30. The Noticee has also raised a contention that the penalty for non-compliance of summons has been provided in Section 11C (6) and hence adjudication under Sec. 15A (a) cannot be

conducted. It would be pertinent to mention here that as per the SEBI Act, 1992 the Board can initiate various actions for violation of the SEBI Act or Rules or Regulations made there under. These various actions could be in form of adjudication under Section 15I, directions under Sec. 11B or 11(4), enquiry under Sec. 12, prosecution under Sec. 24 or other actions like action under Sec. 11C(6)of SEBI Act. In fact even the summons clearly mentioned the fact that in case the Noticee failed to furnish information he can be penalized under Sec. 15A or may even be prosecuted under Sec. 11C(6). All these proceedings are independent and it is the discretion of the Board to initiate proceedings. Thus the power to initiate adjudication is at discretion of the Board and in such case application of Sec. 15A (a) is appropriate. The applicability of Sec. 15A(a) for non compliance of summons has been examined by SAT in the case of ***DKG Buildcon*** (*Supra*) and it was held

"…It was then argued on behalf of DKG that section 15A(a) of the Act does not apply as the Act, Rules or Regulations made thereunder do not per se require the production of documents or furnishing of information and that it was only a direction of the Board contained in the summons that the appellant was required to comply with. The argument indeed is that non-compliance with the directions of the Board would not attract section 15A(a) and that the penalty could be levied under the residuary provision contained in section 15HB. The argument is being noticed only to be rejected."

31. Lastly, the Noticee has argued that no penalty can be imposed for failure to appear before the IA, under adjudication proceedings. I am unable to agree with the contention of the Noticee as it is a fallacious contention. Whenever the IA summons a person to appear, the purpose is to obtain information from the person. If the person fails to appear before

the IA, it is clear that the person is trying to avoid providing information to IA. The adjudication provisions indeed deal with cases where the person fails to provide information to the IA. The Noticee in this case had given incomplete information and when he was asked for further information and personal appearance he simply avoided any response to queries raised in the summons. As discussed earlier adjudication is one of the proceedings that can be initiated by the Board and merely because an offense has an alternative penalty prescribed, it will not impact the Board's power to initiate adjudication. The Hon'ble SAT in the matter of ***DKG Buildcon*** (*Supra*) has held that:

"Section 11C of the Act was introduced with effect from 29.10.2002 and sub-section (3) thereof provides that the investigating authority may require any person associated with the securities market "to furnish such information, or produce such books, or registers, or other documents, or record before him…". The power to require a person to furnish any information or record or documents includes the power to require such person to make a statement and give clarifications with regard to the information and documents produced by him. In the absence of such a power the purpose of the legislature in introducing section 11C would be frustrated and the Board will not be able to investigate properly the market irregularities and offences. In order to advance the object of Parliament the language used in sub-section (3) of section 11C has to be given a wider meaning. We are, therefore, of the considered opinion that section 11C (3) gives the power to the investigating authority to call upon any person to make a statement while furnishing any information, document or record."

Thus, it is clear that if a person fails to appear before the IA he is liable for penalty under Sec. 15A (a) of SEBI Act.

32. It is well established that timely submission of information is very important for the purpose of effective investigation proceedings and non-cooperation by an entity can be detrimental to the interest of investors and securities market on account of delay or hindrance in the investigation. In view of the above, I find the Noticee guilty of violation of Section 11C(2), 11C(3) and 11C(5) of SEBI Act and his failure to comply with the summons attract penalty under section 15A (a) of the SEBI Act. The Hon'ble SAT in ***Mayfair Paper & Board Pvt. Ltd., Vs SEBI (Appeal No. 95 of 2004, Date of Decision: 09.08.2004)*** has held that failure to furnish information to the Investigating Authority of SEBI shall attract the penalty prescribed under Section 15A of the SEBI Act.

33. In view of the above, the further issue for consideration is as to what would be the monetary penalty that can be imposed on the Noticee for violation of Sec. 11C (2), 11C (3) and 11C (5) of the SEBI Act.

Violation of SCR Act

34. It is observed that Noticee was a party to 11 off market transfers of which 4 transfers were from one account of Noticee to other. Apart from these 4 transactions, the Noticee has entered into 7 other off market transfers with 2 different entities. The Noticee has claimed that these transactions were in the nature of loans and hence there was no requirement of money transfer. However, no evidences have been submitted to the IA in response to the summons to prove that these transactions were actually in the nature of loan. If the transaction was a loan, there would have been a reverse transaction with same entity sometime in the past/future. Details of both transactions were

required to be provided by Noticee to prove his contention. In absence of any proof to support the contention of the Noticee, it cannot be said that the said transactions were in the nature of loan and it would be appropriate to consider them as a sale/purchase of securities.. The details of such transactions are annexed as **'Annexure I'**.

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

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

contract(s). In other words, every contract in securities in notified areas must be executed through the stock exchange mechanism unless it is a spot delivery contract.

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

38. One of the main contentions of the Noticee is that Sec. 2(i)(b) of the SCR Act deals with transfers made through electronic mode, i.e. through depository and this provision does not state any time limit for the payment for such transaction. As per Noticee Sec. 2(i)(b) has to be read as a standalone provision and it should not be read in conjunction with any other provision. If the Noticee's submission is considered than all the transactions done through depository mechanism would fall under the definition of spot contract and thus, would be exempt under various sections of SCR Act. Therefore the main controversy revolves around the interpretation of Sec. 2(i)(b) of the SCR Act.

39. As stated above, the said Section 2(i)(b) of SCRA was introduced in the statute book with effect from September 20, 1995 pursuant to the Depositories Act, 1996. The said provision deals only with transfer of securities and does not specify anything relating to payment of consideration for such securities. A contract in securities market is said to be complete only if delivery/transfer of securities and payment therefor have been executed properly. As a matter of common parlance it is clear that if a transaction in securities has been executed through the

depository system, the same has to satisfy the provisions of section 2(i)(b) – for transfer of securities – and section 2(i)(a) – for payment therefor. In other words, the provisions of sections 2(i) (a) and 2(i) (b) have to be read in conjunction and not in isolation to arrive at a meaningful conclusion.

40. The basis of the principle of harmonious construction is that the legislature never intends to contradict itself by providing two repugnant provisions in the same statute. The Act has to be read as a whole and its provisions have to be harmonized giving effect to all of them.[1] The rule of harmonious construction says that when two or more provisions of the same statute are repugnant, the court tries to construe these provisions in such a manner, if possible, so as to give effect to both by harmonizing them with each other. The court may do so either by holding two or more apparently conflicting provisions as dealing with separate situations or by holding that one provision merely provides for an exception of the general rule contained therein. Although it may be very difficult to determine whether separate provisions of the same statute are overlapping or are mutually exclusive but the court tries to harmoniously construe them. An effort should be made to give effect to all the provisions of statute and for that any provisions of the statute should be construed with reference to the other provisions so as to make it workable. A particular provision cannot be interpreted to defeat another provision made in that behalf under the statute.[2] Harmonious construction should be applied to statutory rules and courts should avoid absurd or unintended results.[3] It should

[1] *East India Hotels Ltd. v Union of India*, (2001) 1 SCC 284 : AIR 2001 SC 231 : (2001) 121 STC 46
[2] *British Airways Plc. v. Union of India*, (2002) 2 SCC 95 : AIR 2002 SC 391 : (2002) 139 ELT 6
[3] *Keshav Chandra Joshi v. Union of India*, 1992 Supp. (1) SCC 272, 278.

be resorted to making the provision meaningful in the context.[4] It should be in consonance with the intention of Rule-makers.[5]

41. Where there appears to be inconsistency in two sections of the same act, the principle of harmonious construction should be followed in avoiding a head on clash. It should not be lightly assumed that what the parliament has given with one hand, it took away with the other. The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to reconcile the same.[6] Apparently conflicting statutory provisions should be harmoniously construed for avoiding interpretation which may render any one of them ineffective or otiose[7] or surplusage.[8] An interpretation giving rise to incongruous results must be avoided. [9] *{Source: Introduction to Interpretation of Statutes by Dr. Avtar Singh – Reprint Edition 2006 – Pages 46 and 47}.*

42. The above mentioned rules of interpretation have been followed by various judicial forums and in the light of the foregoing, it would be pertinent to refer to the observations and decision of the Hon'ble Securities Appellate Tribunal in a recent decision in the case of *Mrs. Bhanuben Jaisukhlal Shal v. SEBI* (Appeal No. 271 decided on March 5, 2010) in which the above mentioned

[4] *M.J. Exports Ltd. v. CEGAT*, 1993 Supp. (1) SCC 169:AIR 1992 SC 2014; (1992) 60 ELT 161
[5] *Union of India v Harnam Singh*, (1993) 2 SCC 162; 1993 SCC (L& S) 375; (1993) 24 ATC 92; AIR 1993 SC 1367; (1193) 1 LLN 1012; 1993 Lab IC 1010 ; (1993) 2 SLR 42 : (1993) 2 CLR 193.
[6] *Krishna Kumar v. State of Rajasthan*, (1991) 4 SCC 258, 267.
[7] *State of Rajasthan v. Gopi Kishan Sen*, 1993 supp. (1) SCC 522; AIR 1992 SC 1754; 1992 Las IC 1798; IAAI V. Grand Slam International, (1995) 3 SCC 151; (1995) 77 ELT 753
[8] *Rajender Prasad Yadav v. State of M.P.*, (1997) 6 SCC 678.
[9] *Indian Banks' Assn. v. Devkala Consultancy Service*, (2004) 11 SCC 1: AIR 2004 SC 2615: (2004) 267 ITR 179: (2004) 120 Comp Cas 612.

issue has been elaborately dealt with and the SAT has stated as follows:

"A spot delivery contract has been defined in section 2(i) of the Act the provisions of which, before and after the amendment, have been reproduced hereinabove. Since all the securities prior to the coming into force of the Depositories Act were held in the physical form, spot delivery contract was defined to mean a contract which provided for the actual delivery of the securities and the payment of price therefor either on the same day as the date of the contract or on the next day. In other words, a spot delivery contract is a contract between two persons buying and selling securities off-market where the delivery and payment is effected either on the same day or on the next day. As already observed, such contracts are permissible being exempt from the provisions of section 13 of the Act. When the securities are held in the physical form, it is possible for the seller to physically deliver the same to the purchaser at the time of effecting the sale but this was not possible with effect from September 20, 1995 in respect of the securities that are held with the depositories in dematerialised form. The Parliament then inserted clause (b) in Section 2(i) of the Act. This clause did not bring about any change in the definition of spot delivery contract. Clause (a) of the amended definition remains the same as the definition prior to the amendment. Clause (b) was inserted only to explain what "actual delivery" would mean in respect of the securities held in dematerialised form. According to clause (b), when securities are transferred from one beneficial account to another, it would be treated as "actual delivery" of securities within the meaning of clause (a). It is, thus, clear that clause (b) is not an independent clause but only an explanation to the words "actual delivery" as used in clause (a). We cannot, therefore, accept the argument of the appellant that clause (b) is

an independent clause and that the spot delivery contract is complete with the mere transfer of securities from the account of one beneficial owner to that of another without reference to the payment of consideration. This could never be. If that were so, the contract itself would become void being without consideration. Clause (b) cannot be picked up and interpreted in a manner which defeats the very purpose for which it was enacted. While interpreting the provisions of Section 2(i) of the Act, we have to keep in mind the consequences which are likely to flow from the intended interpretation. We cannot but hold that clause (b) in Section 2(i) was not meant to stand on its own and it has to be read in conjunction with clause (a)."

43. If the facts of the present case are tested with the touchstone of the observations/decisions including the decision of the SAT in the above matter and on the need for harmonious construction or interpretation of the provisions of the statute, as mentioned above, it would follow that the transfer of shares did not comply with the requirements of provisions of either sections 13 or 2(i) of SCRA. In absence of any specific proof regarding these transactions being loan transactions coupled with the fact that Noticee had no personal relationships, it is logical to consider these as sales/purchase transactions entered into with 3rd parties. Thus, it is very clear that the transactions done by the Noticee are not in compliance with the requirements laid down for spot delivery contracts under Sec. 2(i) of the SCR Act. Therefore, it can be said that the transactions were illegal and consequently, in violation of provisions of sections 13 and 18 read with Section 2(i) of SCR Act.

44. The Hon'ble Supreme Court of India in the matter of ***SEBI v. Shri Ram Mutual Fund*** **[2006] 68 SCL 216(SC)** *inter alia* held:

"once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established then the penalty is to follow."

45. The provisions of section 15 A(a) of SEBI Act and Sec. 23H of SCR Act as prevailing at the relevant time are reproduced hereunder:

"Penalty for failure to furnish information, return, etc.

15A. *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".

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

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

46. While imposing monetary penalty it is important to consider the factors stipulated in Section 15J of SEBI Act and Section 23J of SCR 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."

"23J - Factors to be taken into account by the adjudicating officer:
While adjudging quantum of penalty under section 23-I, the adjudicating officer shall have due regard to the following factors, namely:-
(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
(b) the amount of loss caused to an investor or group of investors as a result of the default;
(c) the repetitive nature of the default."

47. In the instant matter it is not possible to quantify the gains made by the Noticee or the loss caused to investors as a result of the failure on its part to honour the summons. However, Noticee failed to furnish the information and also failed to appear before the IA twice and therefore, can be considered as repetitive in nature. However, it is beyond doubt that the Noticee's failure to furnish required information reflects the Noticee's disregard for the investigation process of SEBI and the same needs to be viewed seriously. What makes the non compliance by the Noticee even more serious is the fact that huge off market transfers were done by the Noticee without providing any credible reason. The fact of such high volume off market transfer by the Noticee and his counterparties signifies a deep rooted conspiracy. The Noticee could have been part of the conspiracy but by not submitting the requisite information the Noticee has stonewalled the investigation and has increased the difficulties

of IA. Such conduct by the Noticee warrants a strict action, so that such activities can be curtailed. It is also observed that the Noticee has been levied penalty of Rs. 4 Lakhs in the matter of Gemstone Investments Ltd. Thus, it is clear that the Noticee has been a repetitive violator of the securities laws.

Order

48. Considering all the facts and circumstances of the case, it is established that the Noticee had failed to comply with the summons issued by the IA of SEBI. Therefore, in exercise of the powers conferred upon me under Section 15I (2) of the SEBI Act read with Rule 5 of the Adjudication Rules, I hereby impose a penalty of ₹ 3,50,000/- (Rupees Three lakh fifty thousand only) under Section 15A(a) for violation of Section 11C(2),(3) and (5) of the SEBI Act on the Noticee. Further, in exercise of the powers conferred upon me under Section 23I (2) of the SCR Act read with Rule 5 of the SCR Rules, I hereby impose a penalty of ₹ 1,50,000/- (Rupees One lakh fifty thousand only) under Section 23H for violation of Section 13 and 18 r/w Section 2(i) of the SCR Act on the Noticee. The total penalty thus levied on the Noticee viz. Shri Bharat Shantilal Thakkar is ₹ 5,00,000/- (Rupees Five lakh only). I am of the view that the said penalty is commensurate with the violations committed by the Noticee.

49. The Noticee shall pay the said amount of penalty by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to, the Division Chief, Investigation Department, ID-9, Securities and Exchange Board of India, SEBI Bhavan, Plot No. C – 4 A,

"G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

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

Date: February 29 , 2012 **Piyoosh Gupta**
Place: **Mumbai** **Adjudicating Officer**

ANNEXURE I : Off Market transactions of Bharat Shantilal Thakkar with Other entities

Date	Quantity	SOURCE BOID	SOURCE_Name	TARGET_BOID	TARGET_Name
6-Sep-06	44087	1202550000006295	BHARAT SHANTILAL THAKKAR	IN301330 19471989	BHAVESH PRAKASH PABARI
16-Oct-06	22500	1202550000006295	BHARAT SHANTILAL THAKKAR	IN301330 19471989	BHAVESH PRAKASH PABARI
30-May-07	16000	1202550000006295	BHARAT SHANTILAL THAKKAR	IN301330 19471989	BHAVESH PRAKASH PABARI
1-Jun-07	10000	1202550000006295	BHARAT SHANTILAL THAKKAR	1202850000008579	BHAVESH PRAKASH PABARI
1-Jun-07	10000	1202850000008579	BHAVESH PRAKASH PABARI	1202550000006295	BHARAT SHANTILAL THAKKAR
14-Jun-07	2000	1202550000006295	BHARAT SHANTILAL THAKKAR	1202850000008583	HEMANT MADHUSUDAN SHETH
14-Jun-07	2000	1202850000008583	HEMANT MADHUSUDAN SHETH	1202550000006295	BHARAT SHANTILAL THAKKAR
25-Jun-07	2001	1202550000006295	BHARAT SHANTILAL THAKKAR	1203320000666600	BHARAT SHANTILAL THAKKAR
25-Jun-07	2001	1203320000666600	BHARAT SHANTILAL THAKKAR	1202550000006295	BHARAT SHANTILAL THAKKAR
25-Jun-07	2001	1202550000006295	BHARAT SHANTILAL THAKKAR	1203320000666600	BHARAT SHANTILAL THAKKAR
25-Jun-07	2001	1203320000666600	BHARAT SHANTILAL THAKKAR	1202550000006295	BHARAT SHANTILAL THAKKAR