BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO.EAD-5/SVKM/DS/AO/47/2015-16]

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

Against:

Sunciti Financial Services Pvt. Ltd.

PAN No. AABCS4046C
Plot No. R-802 TTC, Industrial Area,
Thane Belapur Road, MHAPE
Navi Mumbai 400 701

In the matter of M/s Maharashtra Polybutenes Limited

FACTS

1. Securities and Exchange Board of India (hereinafter referred to as **'**SEBI**'**) conducted investigation into the alleged irregularities in the trading in the shares of Maharashtra Polybutenes Ltd. (hereinafter referred to as **'**MPL**'**) from February, 2009 to July, 2009 (hereinafter referred to as 'relevant period') and into the possible violation of the provisions of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act, 1992') and Regulations made thereunder. MPL

had incurred losses till the financial year 2006-07 and made a meagre profit of ₹ 2.87 crore and ₹2.91 crore for the financial years 2007-08 and 2008-09 respectively. MPL shares were infrequently traded earlier but during the relevant period a total of 53,51,932 shares were traded and the price increased from₹ 53.35 to ₹ 79.95,an increase of 49.85% in a span of 5 months without there being any change in the economic fundamentals of the company.

2. It is alleged that Sunciti Financial Services Pvt. Ltd. (hereinafter referred to as 'Noticee'), one of the promoters of MPL, did not make any disclosures regarding change in its shareholding during the relevant period to the MPL. It was,therefore, alleged that Noticeehad violated provisions of Regulation 13(3) read with 13(5) of SEBI (Prohibition of Insider Trading Regulations, 1992 (hereinafter referred to as 'PIT Regulations, 1992').

APPOINTMENT OF ADJUDICATING OFFICER

3. Vide order dated July 22, 2013, SEBI appointed Shri Piyoosh Gupta as the Adjudicating Officer. Consequent to the transfer of Shri Piyoosh Gupta, Shri A. Sunil Kumar was appointed as Adjudicating Officer vide order dated November 08, 2013. Pursuant to the transfer of Shri A. Sunil Kumar, the undersigned has been appointed as Adjudicating Officer vide order dated June 22, 2015 to inquire and adjudge under Section15A(b) of the SEBI Act, 1992 the violations specified in the SCN.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. Show Cause Notice no. ASK/RGA/25487/2014 dated August 28, 2014 (hereinafter referred to as 'SCN') was issued to the Noticeein terms of Rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 read with Section 15I of SEBI Act, 1992 for the violations as specified

in the SCN. Vide notice dated January 02, 2015, an opportunity of personal hearing was also granted to the Noticee on January 28, 2015. The Authorized Representative of the Noticeeappeared and sought time for filing reply to the SCN. Noticee did not submit any reply to the SCN. Vide notice dated March 09, 2015, another opportunity of hearing was scheduled on March 25, 2015. Vide letter dated March 11, 2015, Noticee filed its reply to the SCN. On March 25, 2015, the Authorized Representative of the Noticee appeared for the personal hearing and sought time for filing additional submissions. Further, subsequent to the transfer of erstwhile Adjudicating Officer, another opportunity of hearing was also provided to the Noticee on June 29, 2015 vide notice dated June 22, 2015. The Noticee requested for rescheduling the hearing. Accordingly, the hearing was rescheduled to July 06, 2015. The Authorized Representative of the Noticee appeared for the hearing andreiterated the submissions made vide letter dated March 11, 2015. In the hearing dated July 06, 2015,Noticee submitted the following:

a) With regard to the charge of non-disclosure of change in shareholding pattern it was admitted that the disclosure was incomplete in terms of the prescribed Regulations to the company. However, it was contended that disclosure to the Stock Exchange was made and supporting documents will be filed by July 10, 2015.

5. The salient submissions of the Noticee vide its letter dated March 13, 2015, July 06, 2015, July 09, 2015 and in the course of personal hearing are as under:

- During the investigation period, until May 25, 2009, the company was under the purview of Hon'ble BIFR and section 22(1) of SICA was applicable. Therefore, SEBI must have obtained consent of BIFR before carrying out any such investigation for the period.

- Since no commercial bank was willing to finance the company, because of the BIFR background of the company, the promoters of MPL had to arrange funds for the working capital as well as for long term requirement by pledging their equity shares in MPL.

- It was agreed and understood between the financiers and the promoters that transfer of shares for raising loans is merely a transaction of pledge by way of transfer and such transfer of shares will not be treated as sale of shares.
- Sunciti pledged by way of transfer of equity shares of MPL held by it, ten lakh each, in favour of Sikhar Merchandise Private Limited and Aryavart Overseas Private ltd. Sunciti was liable to inform MPL about such transactions.
- In point no. 6 of the SCN, it has been alleged that the Company had not disclosed the change in the shareholding pattern to MPL. The fact is that the company has informed MPL in Form D. The submission of Form D with MPL and/or BSE Ltd. was inadvertent, unintentional, minor and venial wrong reporting under Regulation 13(6) of the PIT Regulations, 1992. Most of the information required in Form C has been reported in Form D. An omission of reporting of PAN number of a promoter can hardly affect an investor's ability to take an informed decision particularly when most of the information required in Form D and Form C are common and have been reported by the company and/ or to the stock exchange.
- In the entire transaction made during the investigation period there are no complaints of investors, there are no aggrieved parties, there is no alleged profit or gain made out of such transaction, there is no malicious intention on the part of the company or the promoters and there is no attempt to hide information or give false information.
- It is, therefore, submitted that Sunciti has not violated any provisions of Regulation 13(3) read with 13(5) of PIT Regulations, 1992 or any other regulation.

CONSIDERATION OF ISSUES AND FINDINGS

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

a. Whether Noticee violated the provisions ofRegulation 13(3) read with 13(5) of PIT Regulations, 1992?

b. Does the violation, if any, attract monetary penalty under Section15A(b) of SEBI Act, 1992?

7. It would be appropriate here to refer to the aforesaid provisions of the PIT Regulations, 1992 which reads as under:

PIT Regulations, 1992

Regulation 13

(1)……………………………………

(2)……………………………………

Continual disclosure.
(3) Any person who holds more than 5% shares for voting rights in any listed company shall disclose to the company in Form C the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company.
(4) ....
(4A)..
(5) The disclosure mentioned in sub-regulations (3), (4) shall be made within two working days of:
(a) the receipts of intimation of allotment of shares, or
(b) the acquisition or sale of shares or voting rights, as the case may be.

Findings

8. The issues for examination in this case and the findings thereon are as follows:

(a)Whether Noticee violated the provisions of regulation 13(3) read with 13(5) of PIT Regulations, 1992?

9. From the material available on record, it is observed that MPL had reported various corporate announcements to BSE including the disclosure pertaining to "pledge" of

shares by the Noticee, Sunciti Financial Services Pvt Ltd, New Era Advisors Pvt Ltd. and. Brijmohan -HUF (hereinafter referred to as 'promoter group entities'). It is seen from the de-mat statement that pledge was not created in terms of Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 (hereinafter referred to as 'DP Regulations, 1996')but the shares were transferred to various entities by the Noticeeas under:

SUNCITY FINANCIAL SERVICES PRIVATE LIMITED (Noticee)

Total no. of company shares								1,55,90,457
Transaction date	Transferred From	Transferred To	Opening balance	**Transferred shares**	Balance shares	Opening balance %	Transferred shares %	Balance shares %
17-Feb-09	Suncity Financial	SHIKHAR MERCHANDISE PVT	65,85,000	**10,00,000**	55,85,000	42.24	6.41	35.82
17-Aug-09	Suncity Financial	ARYAVART OVERSEAS PVT LTD	55,85,000	10,00,000	45,85,000	35.82	6.41	29.41

10. It is not disputed that Noticee was holding more than 5% shares in MPL. It is observed that before February 17, 2009, Noticee was holding 65,85,000 shares constituting 42.24% of the share capital of MPL. However, as a result of transfer of 10,00,000 shares constituting 6.41% of the share capital of MPL on February 17, 2009, shareholding of the Noticeereduced to 55,85,000 shares constituting 35.82% of the share capital of MPL. There was a change exceeding 2% in the shareholding.

11. It is further observed that before August 17, 2009, Noticee was holding 55,85,000 shares constituting 35.82% of the share capital of MPL. However, as a result of transfer of 10,00,000 shares constituting 6.41% of the share capital of MPL on August 17, 2009, shareholding of the Noticeefurther reduced to 45,85,000 shares constituting 29.41% of the share capital of MPL. Hence, there was a change exceeding 2% in the shareholding.

12. I am of the view that had the Noticee created pledge of aforesaid shares in accordance with the provisions of Depositories Act, 1996, DP Regulations, 1996

and Bye-laws of Depositories, the same would have been reflected in the books of the depository by marking a lien and in the demat statement of the Noticee.

13. I note that in terms of section 10 of the Depositories Act, 1996, the beneficial owner is the person whose name is recorded as such with a depository and is entitled to all the rights and benefits and also subjected to all liabilities in respect of its securities held by a depository. As per section 41(3) of the Companies Act, 1956, every person holding shares of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company. Further, as per section 152A of the Companies Act, 1956, the register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996 shall be deemed to be an index of members and register and index of debenture holders, as the case may be. Therefore, an electronic credit entry in a depository account is a sine qua non for any individual/entity to declare that he is a beneficial owner of shares in a company. Further, any transfer of securities from the beneficial owner account to another beneficiary account would result in change of ownership.*Therefore, it is not open for the Noticee to transfer his shares to various entities and still claim that such transfer is not a sale but only a pledge and declare his holdings to the stock exchange as if there is no change in the holdings held by the promoter group. Infact the figures received from the R&TA were fudged so as not to reflect the share transfers made by promoters in favour of third parties and showed them as pledge.*

14. The Noticee also contended that the share transfer transactions were legitimate pledge transactionsas loan amount was received. In support of his contention, Noticee had submitted copy of a loan agreement dated September 01, 2006 of MPL with Sikhar Merchandise Pvt Ltd. Noticee has contended that it was because the lender insisted on transfer of shares as security, the shares were transferred. However, the Noticee has admitted that there was no pledge created in terms of the Regulations. It is noted that the said loan agreement was valid for two years from

September 01, 2006 to August 31, 2008. But the transactions in question relate to subsequent period i.e. from February, 2009 onwards. Noticee has also submitted a renewal agreement with the same lender. On perusal of the renewal agreement, it is noted that the said agreement was not stamped, dated or notarised. It is also noted that no sanction letter for the loan granted by the NBFC was submitted. The so called agreement does not contain important details like terms and conditions of loan, period of loan, rate of interest and repayment schedule. These are important covenants to be found in any normal commercial loan transaction which are missing in the present case. Thus, the evidence produced by the Noticeedoes not inspire confidence. The Noticee has attempted to create a facade of pledgewhere none exists by producing fabricated copy of loan agreement. Hence, the so called loan agreement as such cannot be admitted to be case of pledge when infact the title in the shares has already passed on. In such a case, it can no longer be called as pledge and has to be treated as sale. As per Regulation 58 of DP Regulations, 1996 the shares pledged have to be identified separately as 'pledged' shares. However, no such pledge can be seen in the demat statement of the Noticee. In this regard, I also refer to the observations made by Securities Appellate Tribunal (SAT) in Appeal No. 83 of 2010 in Liquid Holdings Pvt Ltd. v. SEBI decided on 11.03.2011- *"........................The law also prescribes a mode for the creation and revocation of a pledge. The parties cannot agree to create a pledge contrary to the provisions of Regulation 58....................In the case of shares held in demat form, the Depositories Act and the Regulations framed there under provide the manner in which the pledge is to be created and invoked.........".*Thus, the contention of the Noticee that the share transfer transactions was pledge cannot be accepted. In this context, I would like to rely on observation of Hon'ble Securities Appellate Tribunal (SAT) in *Premchand Shah and Others*v. *SEBI* dated February 21, 2011, wherein it was held that "…….*When a law prescribes a manner in which a thing is to be done, it must be done only in that manner……".*

15. Noticee has contended that during part of the investigation period, i.e. until May 25, 2009, the company was still under the purview of BIFR and section 22(1) of SICA was applicable. Therefore, SEBI must have obtained consent of BIFR before carrying out any such investigation for the period. The relevant provision to refer to is Section 22(1) of SICA which reads as under:-

> *"**Suspension of legal proceedings, contracts, etc.** – (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."*

16. A reading of the aforesaid provision makes it clear that where an enquiry is pending under section 16 of the SICA before the Board (read BIFR) or any scheme referred to in section 17 of the SICA is under preparation or consideration or a sanctioned scheme is under implementation relating to an industrial company, or an appeal is pending under Section 25 of the SICA Act, then no proceedings would lie against it for its winding up or for execution, distress or the like against any of its properties except with the consent of the Board. Hence,only those proceedings would be

barred which are in the nature of winding up or for recovery of monies or are for the enforcement of any security against the sick company.

17. In this context, reliance is placed on judgment of Hon'ble Supreme Court in the matter of KSL & Industries Ltd. v. M/s Arihant Threads Ltd. &Ors. Civil Appeal No. 5225 of 2008 dated October 27, 2014 wherein it was observed that "..................*the purpose of laying down that no proceedings for execution and distraint or the like or a suit for recovery shall not lie, is to protect the properties of the sick industrial company and the company itself from being proceeded against by its creditors who may wish to seek the winding up of the company or levy execution or distress against its properties. But as is apparent, the immunity is not absolute. Such proceeding which a creditor may wish to institute, may be instituted or continued with the consent of the Board or the Appellate Authority."*Initiation of adjudication proceedings by the statutory Regulations in respect of misconduct relating to wrong disclosure of shareholding to the stock exchange by the promoters is not barred by the said provision. Moreover, as admitted by the Noticee, vide order dated May 25, 2009, of BIFR, MPL has ceased to be a sick industrial company. Thus, the contention of the Noticee is devoid of any merit.

18. As per Regulation 13(3) of PIT Regulations, 1992any person who holds more than 5% shares or voting rights in any listed company is required to disclose to the company, the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company. Change in Noticee's shareholding exceeded the benchmark limit of 2% as specified under Regulation 13(3) of PIT Regulations, 1992, in the 2 instances indicated in the above table at para 9.Noticee was required to disclose its change in shareholding to the company i.e. MPL within two days from the date of the change in shareholding of the Noticeeunder Regulation 13(3) read with Regulation 13(5) of PIT Regulations, 1992. Noticee had

wrongly made the disclosure in Form D but not in Form C as prescribed under Regulation 13(3) of PIT Regulations, 1992. The disclosure did not contain necessary details such as PAN No., Shareholding prior to acquisition/sale as required in Form C. Thus, the disclosure by the Noticee sans the important information as required under Form C was not in compliance with Regulation 13(3) of PIT Regulations, 1992 and can be considered as no disclosure in the eye of the law. It misses out on important parameters.Noticee has admitted that the disclosure was not in terms of the prescribed Regulations. Hence, it has to be treated as a case of 'no disclosure' for the aforesaid reasons. Thus,Noticee has violated Regulation 13(3) read with Regulation 13(5) of PIT Regulations, 1992.

19. Thus, the aforesaid violations by the Noticee make him liable for penalty under Section 15A(b) of SEBI Act, 1992 which read as follows:

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

***15A**. If any person, who is required under this Act or any rules or regulations made there under,-*

(a) …………………………..

(b) to file any return or furnish any information, books or other documents within the time specified therefore in the regulations, fails to file return or furnish the same within the time specified therefore in the regulations, 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.

(c) …………………………..

20. To begin our analysis of the penalty to be imposed, it will be appropriate to refer to the judgment of the Hon’ble Supreme Court of India in the matter of Civil Appeal No.1364 -1365 of 2005 in ***SEBI vs. Roofit Industries Limited***dated November 26, 2015 wherein while interpreting Section 15A of SEBI Act, 1992, it observed as under:

"5. It would be apposite for us to begin our analysis of the penalty to be imposed by laying out Section 15A(a) as it stood subsequent to the 2002 amendment, for the facility of reference:

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; In*

In the connected appeals before us, <u>the Appellant has imposed a penalty of Rs. 75lakhs despite the failure having continued for substantially more than 75 days</u>. Learned Senior Counsel for the Appellant has contended that the Appellant has discretion to impose a penalty below the number of days of default regardless of the words whichever is less. He has argued that there would be no purpose to Section 15J if the Adjudicating Officers discretion to fix the quantum of penalty did not exist, and that such an interpretation would render certain Sections of the SEBI Act as expropriatory legislation due to the crippling penalties they would impose. We do not agree with these submissions. <u>The clear intention of the amendment is to impose harsher penalties for certain offences, and we find no reason to water them down. The wording of the statute clarifies that the penalty to be imposed in case the offence continued for over one hundred days is restricted to Rs. 1 crore. No scope has been given for discretion.</u> Prior to the amendment, the Section provided for a penalty not exceeding one lakh fifty thousand rupees for each such failure, thus giving the Appellant the discretion to decide the appropriate amount of penalty. <u>In this context, the change to language which does not repose any discretion is even more significant, as it indicates a legislative intent to recall and remove the previously provided discretion. Additionally, Section 15J existed prior to the amendment and was relevant at that time for adjudging quantum of penalty. Once this discretionary power of the adjudicating</u>

officer was withdrawn, the scope of Section 15J was drastically reduced, and it became relevant only to the Sections where the Adjudicating Officer retained his prior discretion, such as in Section 15F(a) and Section 15HB. *This ought to have been reflected in the language of Section 15I, but was clearly overlooked. Section 15J has become relevant once again, subsequent to the Securities Laws (Amendment) Act, 2014, which changed Section 15A(a), with effect from 8.9.2014, to 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 which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees;

The purpose of amendment was clearly to re-introduce the discretion of the Adjudicating Officer which was taken away by the SEBI (Amendment) Act, 2002. Had the failure of the Respondent taken place between 29.10.2002 and 8.9.2014, the penalty ought to have been Rs. 1 crore, without the possibility of any discretion for reduction." (*Emphasis supplied*)

21. In the instant case also, the failure under Section 15A(b) has occurred in the on February 19, 2009 and August 19, 2009, which is between October 29, 2002 and August 08, 2014 amendments to the SEBI Act, 1992. As the default is for more than 100 days on each of the occasion, the penalty is restricted to ₹1 crore @ ₹ 1 lakh per day for each default in terms of Section 15 A(b) of SEBI Act 1992 as it existed then and having regard to the aforesaid judgment of the Hon'ble Supreme Court in Roofit case discussed above in detail.

22. Continuous wrong disclosures to the company regarding shares held by the Noticee which belongs to the promoter group is a matter to be viewed seriously. Here, the steep reduction of the shareholding of the promoter group was withheld from the public. The shareholding of the Noticee which belongs to the promoter group was

reduced from 42.24% on February 16, 2009 to 35.82% on February 17, 2009 and further reduced to 29.41% on August 17, 2009. By failure to make disclosures, the investors were deprived of the correct information at the relevant point of time. The default by the Noticee is repetitive in nature as it is on two occasions.

ORDER

23. After taking into consideration the nature and gravity of the charges established, the order of Hon'ble Supreme Court in the matter of SEBI v. Roofit Industries Ltd. (cited supra) and in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of the Rules, I hereby impose a penalty of ₹2,00,00,000 /- (Rupees Two Crores only) on the Noticee in terms of Section 15A(b) of the SEBI Act.

24. I am of the view that the penalty imposed is commensurate with the violations committed by the Noticee.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, Enforcement Department-EFD-DRA-III, SEBIBhavan, Plot No. C – 4 A, "G" Block, BandraKurla Complex, Bandra (E), Mumbai – 400 051.

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

Place: Mumbai **S V KRISHNAMOHAN**

DATE: 30.12.2015 **CHIEF GENERAL MANAGER &**

ADJUDICATING OFFICER