

SECURITIES AND EXCHANGE BOARD OF INDIA
ORDER

Under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 and regulations 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with regulation 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 in respect of YOGESH K KAJI (PAN-AACPK1999C) in the matter of Classic Diamonds (India) Ltd.

1. Securities and Exchange Board of India (SEBI) passed an order dated September 22, 2017 wherein it was found that ‘promoters and promoter group entities’ of Classic Diamonds (India) Limited (CDL), namely, Kumar Chandrakant Bhansali, Mayank Ramniklal Mehta, Rita Kumar Bhansali, Bhavana K Bhansali, Baiju K Bhansali, Nirav K Bhansali, Rupen Bhansali, Sona Bhansali, Ankur Bhansali, Gopi K Bhansali, Chandrakant Manilal Bhansali (deceased), Urmila C Bhansali (deceased), Kaushik Bhansali (deceased), Yogesh K Kaji, Diamax Investment & Finance Pvt Ltd, AaroHi Diamonds Pvt Ltd. and Hiren Shah, were together holding 55% or more but less than 75% shares or voting rights in CDL during the quarters September 30, 2005 to December 31, 2009 and they had acquired additional shares or voting rights in the company on several occasions during the quarters ended on December 31, 2005, June 30, 2007, September 30, 2007, December 31, 2007, March 31, 2008, September 30, 2008 and December 31, 2009, without making a public announcement to acquire shares/voting rights in terms of regulation 11(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (since repealed). In view of the contravention of regulation 11(2) of the SAST Regulations, 1997 by the promoter and promoter group entities of CDL and considering the fact that the winding up proceedings against CDL had commenced before the Hon’ble Bombay High Court, the promoter and promoter group entities of CDL (excluding the deceased promoters) were restrained from accessing the securities market and further prohibited from buying, selling or

dealing in securities, either directly or indirectly or being associated with the securities market in any manner whatsoever, for a period of one year from the date of the order, i.e. September 22, 2017.

2. Yogesh K Kaji filed an appeal before the Securities Appellate Tribunal (Appeal No. 318 of 2017) challenging the aforesaid SEBI order on the ground that the order was passed without giving him an opportunity of hearing. Hon'ble SAT, vide order dated November 15, 2017, set aside the SEBI order qua the appellant. Subsequently, a show cause notice dated May 31, 2016 issued in the matter to promoter and promoter group entities was served upon Yogesh K Kaji on November 22, 2017. The notice alleged that he along with other promoter group entities had acquired shares in CDL without making a public announcement for open offer in terms of the provisions of regulation 11(2) of the Takeover Regulations, 1997. The entity replied to the notice vide letter dated December 13, 2017. He was granted an opportunity of personal hearing on December 15, 2017. Advocate Advait M Sethna, Advocate R Ihakke, Advocate Parekh Tejas Ramnik and Yogesh Kaji appeared for hearing. Written submission dated December 22, 2017 has also been filed. The summary of the reply and the submissions are as under:

- He has been wrongly arraigned as a co-noticee as he is neither a 'promoter' nor a 'promoter group' entity as defined under regulation 2(1)(h) of the SAST Regulations, 1997. It has been submitted that the proviso to regulation 2(1)(h)(b) of SAST Regulations, 1997 (as amended vide SEBI (SAST) Amendment Regulations, 2006 on May 26, 2006) specifically carved out an exception that a director or officer of a target company or any other person shall not be a promoter, if he is acting as such merely in his official capacity.
- It has been stated that CDL was incorporated in 1986. His association with CDL started with his appointment as a non-executive independent director on December 31, 2003. He acted as non-executive independent director of the company since then and has discharged his duties in his professional capacity only. In this connection, copies of annual reports of CDL for the years 2005-06 to 2008-09 have been furnished, where in the section on report on corporate governance Yogesh K Kaji has been shown as non-executive independent director of CDL. It has been submitted that he could not have

held two distinct hats of promoter and independent director simultaneously. Therefore, no liability can be fastened on him. He resigned from the post of independent director of CDL on May 10, 2012.

- With regard to reason for his appointment as director in CDL, it has been stated that he is associated with diamond industry since 1974 and was personally known to Late Kaushik Bhansali and Mr. Kumar Bhansali (promoter/directors of CDL). CDL was in need of an independent director and as he fulfilled the requirements, he was approached by Bhansalis to act as an independent director of CDL. His shareholding in CDL never crossed the threshold of 2% prescribed under clause 49 of the Equity Listing Agreement.
- He acquired 1000 shares of CDL on October 21, 2005 and thereafter, 1600 shares in 2006, 2800 shares in 2007, 13,189 shares in 2008 and 43,420 shares in 2009. The shares were acquired from the market. He purchased a total of 62,009 shares of CDL and has sold none.
- He has been erroneously disclosed as a person belonging to the category of promoter and promoter group entities in the quarterly shareholding pattern of CDL filed with the Bombay Stock Exchange for the quarters ending September 30, 2005 to December 31, 2009. In this connection, copy of letter dated September 26, 2017 issued by the managing director of CDL, namely, Kumar C Bhansali, declaring that Yogesh Kaji was an independent director of the company and that he was never a promoter or part of promoter group has been furnished. The letter also states that he was never part of day to day management of the company or any audit committee.
- It has been also submitted that he is not a 'person acting in concert' in terms of regulation 2(1)(e) of the SAST Regulations, 1997 as he was not having any common objective or purpose of acquisition of shares of CDL with other promoters/acquirers. In this regard, reliance has been placed on the case of *Daiichi Sankyo Company Ltd. vs. Jayaram Chigurupati & Ors.* (2010) 7 SCC 449.

- It has been also stated that in the absence of any allegation against him that he has acted in concert with the acquirers he cannot be held liable for alleged violation as the SCN is ex-facie bad in law. In this regard, reliance has been placed upon the case of *Purushattam Budhwani vs. SEBI* (SAT Appeal No. 53 of 2013 order dated January 1, 2015).
- The demat account No. 12023000008463335 belongs to his wife as his wife is the first holder of the account and he is the second holder of the account. It has been submitted that as his wife is not a noticee, no restriction to operate this demat account may be imposed.

3. I have considered the allegations in the show cause notice, reply and submissions made by the Noticees. On the basis of the quarterly shareholding of promoters disclosed by CDL to the BSE, it has been alleged that Yogesh Kaji was part of the promoter group entities and the shareholding of the promoters increased many times during September 2005 to December 2009 triggering requirement to make open offer under regulation 11(2) of the SAST Regulations, 1997. Mr. Yogesh Kaji has not disputed the fact that the other promoters and promoter group entities were together holding between 63% and 72% shares/voting rights (approximately) in CDL during the quarters ended on September 30, 2005 to December 31, 2009 and they had acquired additional shares/voting rights in CDL several times. He has also stated that he had acquired 1,000 shares of CDL on October 21, 2005 and thereafter, 1,600 shares in 2006, 2,800 shares in 2007, 13,189 shares in 2008 and 43,420 shares in 2009 from the market. However, it has been contended that he was erroneously disclosed as promoter group entity of CDL and that he cannot be clubbed with promoters as during the relevant time he was a non-executive independent director of CSL and was discharging his duties in the professional capacity. It has been also contended that he has not acted in concert with the promoter and promoter group entities, therefore he was not liable to make any public announcement for open offer.

4. With regard to contention of the entity that he cannot be clubbed with promoter and promoter group entities as he was independent director of the company, it is necessary to refer

to the definition of 'promoter' given under regulation 2(1)(h) of the SAST Regulations, 1997.
The definition as it existed before May 26, 2006 is as under.

"Promoter", unless otherwise provided elsewhere, means

- (i) any person who is directly or indirectly in control of the company; or*
- (ii) any person named as promoter in any document for offer of securities to the public or existing shareholders or in the shareholding pattern disclosed by the company under the provisions of the Listing Agreement, whichever is later; or*
- (iii) any person named as person acting in concert with the promoter in any disclosure made in terms of the Listing Agreement with the stock exchange or any other regulations or guidelines made or issued by the Board under the Act.*

and includes,

(a) where such person is an individual,

...; ...;

(b) where such person is a body corporate,

...; ...; ...;

Explanation I:

Explanation II:"

5. The aforesaid definition was substituted by the below mentioned definition of "promoter" by SEBI (SAST) Amendment Regulations, 2006 with effect from May 26, 2006. The substituted provisions read as follows: -

"promoter" means-

(a) Any person who is in control of the target company;

(b) Any person named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the Listing Agreement, whichever is later;

And includes any person belonging to the promoter group as mentioned in Explanation I:

Provided that a director or officer of the target company or any other person shall not be a promoter, if he is acting as such merely in his professional capacity.

Explanation I: For the purpose of this clause, promoter group' shall include:

(a) In case promoter is a body corporate-

... ..; and,

(b) in case promoter is an individual –

...; ...; ...;

Explanation II "

6. In terms of regulation 2(1)(h), as the provision existed before May 26, 2006, any person who is directly or indirectly in control of the company or any person who is named as promoter in the offer document or disclosed as promoter in the shareholding pattern filed by the target company with the stock exchanges pursuant to Listing Agreement is a 'promoter' of the company for the purposes of the Takeover Regulations, 1997. Further, any person disclosed to stock exchange as person acting in concert with the promoter also falls within the definition of promoter. Thus, naming a person as a promoter in the disclosures to the stock exchange makes the person a part of the promoter entities of the company. The definition of promoter was substituted by another definition with effect from May 26, 2006. The substituted provision also provided that persons who are in control of a company or who are disclosed as promoter in any offer document or in any disclosures as per listing agreement are promoters of the company. However, the amendment also added a proviso to regulation 2(1)(h) which provides that a director or officer of the target company shall not be a promoter, if he is acting as such merely in his professional capacity.

7. In the present case, there is no dispute that the name of Yogesh Kaji was disclosed by the target company to the stock exchange in the category of persons belonging to promoter or promoter group in the quarterly shareholding filings during the quarters September 30, 2005 to December 31, 2009. The noticee has submitted that his name was erroneously included in the category of promoters in the quarterly shareholding filings by CDL. In this connection, a letter dated September 26, 2017 signed by the managing director of CDL declaring that Yogesh Kaji was never part of the promoter group has been furnished. It is noted that this letter has been issued by the company after passing of the order dated September 22, 2017 in the matter by SEBI restraining the promoters and promoter group entities from accessing the securities market and trading in the securities market for a period of one year. It is also noted from the letter that it mentions that Yogesh K Kaji was never part of the audit committee or any other committee of the company. However, the annual report of the company for the year 2008-09 mentions that Yogesh K Kaji was member of the audit committee and had attended all the four meetings of the committee. Apart from this, it is also noted that during the examination in the matter, SEBI vide letter dated August 28, 2015 had advised CDL to furnish details of increase in the shareholding of promoters of CDL. In response, Kumar C Bhansali, the managing director of CDL, wrote a letter to SEBI on September 4, 2015. The letter mentions the name of Yogesh K

Kaji in the category of promoters and also provides the details of his acquisition. Therefore, the contents of the letter dated September 26, 2017 does not appear to be reliable. Further, Yogesh K Kaji was being continuously disclosed as a person belonging to the promoter group for a period of around four years and the information was available in public domain. It is observed that though he claimed that he was associated as director of the company, the Noticee never raised any objection to the disclosure of his being part of the promoters. If the disclosure was wrong or without his consent he could have taken appropriate steps for rectification before SEBI's enforcement action was initiated. Similarly, there is nothing on record to show that the other promoter group entities raised any objection to inclusion of his name in the category of promoters. Thus, it appears that the plea raised by the entity that he was erroneously disclosed as a promoter in the quarterly filings of the company is an afterthought.

8. The noticee has raised a contention that subsequent to the amendment of the definition of 'promoter' on May 26, 2006 and introduction of proviso to regulation 2(1)(h) of the SAST Regulations, 1997, he will fall under the proviso as he was acting as an independent director of the company in his professional capacity and therefore may not be treated as promoter. It is relevant to take note of the fact that admittedly Yogesh K Kaji was disclosed as part of the promoters prior to the amendment. It has been submitted that he was an independent director of the company and his role demanded from him not to be connected or associated with persons in control of the company in order to safeguard the interests of members of the company who are in minority or those who individually cannot look after their own interest. I am of the view that having claimed to be a professional director, it was for him to have realised the consequence of such categorisation and get his name removed from the promoter category. However, this was not done. With regard to the submission that he could not have been part of the promoter group and an independent director at the same time, it is noted that this raises a question on his independence while acting as an independent director and does not nullify the fact that he remained as a part of the promoter group of CDL and he was disclosed as such to the public for a considerably long time.

9. Another contention of the entity is that he cannot be termed as ‘person acting in concert’ with other promoters/acquirers in terms of the definition of the term provided in regulation 2(1)(e) of the SAST Regulations, 1997. In this connection, the counsel for the Noticees has cited the decision of Hon’ble Supreme Court in the matter of Daiichi Sankyo Company Ltd. vs. Jayaram Chigurupate and Others (2010) 7 SCC 449.

10. In this connection, it has been already observed that Yogesh K Kaji was disclosed as part of the promoter group entities. The details of acquisition of shares by him show that most of the shares acquired by him were during the same quarters when other promoter group entities were also acquiring shares of the target company. In the facts of the present case, it is pertinent to refer to the observations made by Hon’ble SAT in *Rajesh Toshniwal vs. SEBI & Others* (Appeal No. 139 of 2011 decided on 01.06.2012).

“13. The next issue to be considered is whether the entire promoter group has to be considered as a homogenous unit and, therefore, acting in concert in the acquisition of shares. It is the basic principle of corporate law that promoter group is a homogenous class. It is the normal practice to club the entire promoter group into one class unless otherwise proved by the acquirer. The acquirers have always filed their shareholding as belonging to the promoter group. In the disclosures made to the stock exchanges and the Board, the promoters’ shareholding consisted of the group as a whole. Even though there is a mention in the offer document that the acquirers by themselves are responsible to the offer to the exclusion of other promoter group the conduct of the promoters as a whole suggests that their behaviour was always united. The promoters, as a rule, belong to a homogenous group unless otherwise proved by attendant circumstances to be otherwise. In the present case, except the statement contained in the public announcement no circumstance is pointed out which would prove that a set of promoters are a class apart. It is a matter of record that the shareholding of the entire promoter group was always disclosed as a group holding to the regulators. ...”

11. The above decision was recently relied upon by Hon’ble SAT in *Ram Piari and Others vs. SEBI* (Appeal No.484 and 485 of 2015 decided on November 20, 2017) wherein SAT had an occasion to review all the case laws prevailing on the point of how the entities forming part of the promoter group were ‘persons acting in concert’ in respect of acquisition of shares despite the absence of an agreement/understanding or a common intention on the side of the acquirers being established by SEBI. The relevant observations of SAT in para 34 are as under:

“34. It is, thus, pertinent to note that an “Acquirer” defined under Section 2(1)(b) includes a person acting in concert with the acquirer where the acquirer is a promoter and person acting in concert with him are also promoters. There is a presumption in law that they are all acting in concert with each other unless the contrary is proved and this was held by this Tribunal in its order in Rajesh Toshniwal’s case after considering the judgement of Hon’ble Supreme Court in Daiichi and K.K. Modi case.”

12. Thus, the onus of proving the contrary is on the Noticee, in the light of the presumption. I note that the Noticee has not brought out any fact which would prove that he was not acting in concert with rest of the promoters. In the present case, Yogesh K Kaji and other promoter group entities have filed their shareholding as belonging to the promoter group in the disclosures made to the stock exchanges. The Noticee has acquired shares of the target company along with other promoter group entities during the quarters December 2005, December 2007, September 2008 and December 2009. Thus, he was acting in concert with other promoters against whom order dated September 22, 2017 has already been passed wherein it has been found that they have failed to make any public announcement in terms of regulation 11(2) of Takeover Regulations, 1997 pursuant to their acquisition of shares of CDL in various quarters during the period December 2005 to December 2009.

13. It is also pertinent to mention here that in the light of the fact that winding up proceedings had commenced against CDL and in view of the provisions of section 536(2) of the Companies Act, 1956 (corresponding provision in the Companies Act, 2013 is section 334(2)), the order dated September 22, 2017 has observed that this is not a fit case to direct an open offer at this point of time. Accordingly, a direction debarring the entities from accessing and dealing in securities market for a period of one year was passed in the order.

14. The entity has also urged that no restriction to operate the demat account No. 12023000008463335 be imposed as for this account his wife is the first holder and he is the second holder. In this connection it is observed that no evidence has been furnished to show

that their investments and trading are separate. In the absence of such evidence, allowing the entity to operate another account would nullify the effect of contemplated direction.

Directions

15. In view of the above, in exercise of powers conferred upon me under sections 11, 11B of the Securities and Exchange Board of India Act, 1992 and regulation 44 of Takeover Regulations, 1997 read with regulation 35 of the Takeover Regulations, 2011, I hereby direct that Yogesh K Kaji be restrained from accessing the securities market and further prohibited from buying, selling or dealing in securities, either directly or indirectly or being associated with the securities market in any manner whatsoever, for a period of one year from the date of this Order.

16. Copy of this order shall also be served upon the stock exchanges and depositories for ensuring compliance with the above direction.

Date: May 15, 2018
Place: Mumbai

G. MAHALINGAM
WHOLE TIME MEMBER