

ORDER UNDER REGULATION 13(4) OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING ENQUIRY BY ENQUIRY OFFICER AND IMPOSING PENALTY) REGULATIONS, 2002 AGAINST MERCHANT BANKER IMPERIAL CORPORATE FINANCE & SERVICES PVT. LTD.

CO/ /2003/PMD/(Merchant Banker)

1.0 M/s. Imperial Corporate Finance & Services Pvt. Ltd. is registered with SEBI as a Merchant Banker. M/s. Imperial Corporate Finance & Services Pvt. Ltd. (hereinafter referred to as the Merchant Banker) has acted as Lead Manager in the rights issue of M/s. Gammon (I) Ltd. (hereinafter called as the issuer company) for 63,20,572 equity shares of Rs.10/- each at a premium of Rs.20/- per share aggregating to Rs.18,96,17,160/-. The issue was opened for subscription on 15.10.01 and closed on 15.11.01. It was alleged that certain material disclosures were not made in the Letter of Offer of the rights issue concerning a criminal case against Shri Abhijeet Rajan, Chairman and Managing Director of the issuer company. SEBI received a complaint dated October 17, 2001 from Prashant Glass Works Pvt. Ltd. stating that a criminal complaint was filed before the IVth Additional Chief Judicial Magistrate, Varanasi on 15.10.1996 against Shri Abhijeet Rajan for the offence of forgery etc. and that he was on bail since 1998. Further that the matter concerning the criminal case was not disclosed in the Letter of Offer and thereby the Merchant Banker had not exercised due diligence and skill for ensuring true and fair disclosures in the Letter of Offer and was issued negligently without verification of the statements concerning the issue.

2.0 An Enquiry was instituted vide SEBI's order dated 4.5.02 under Regulation 39(1) of SEBI (Merchant Bankers) Regulations, 1992 (hereinafter referred to as the said regulations) to enquire into the alleged contravention of Regulation 13 of the said regulations read with Clauses 2, 5(b), 7(a) & 9 of the Code of Conduct of the said Regulations.

3.0 The Enquiry Officer issued a notice dated 22.7.2002 to the Merchant Banker under Regulation 39(2) of the said Regulations. The Merchant Banker submitted its reply vide letter dated August 21, 2002 denying the charges. Shri V.K.Naik, Director of the Merchant Banker had attended the Enquiry proceedings and made submissions before the Enquiry Officer. The Enquiry Officer submitted his report dated September 30, 2002 finding that the Merchant Banker failed to exercise due diligence and recommending that the certificate of registration granted to the Merchant Banker be suspended for a period of 3 months.

4.0 Subsequently, a show cause notice dated December 5, 2002 was issued to the Merchant Banker calling upon to show cause as to why the penalty of 3 months suspension recommended by the Enquiry Officer should not be imposed. An opportunity of personal hearing was also granted on 28.12.02 at 2.00 pm. The Merchant banker replied to the show cause notice vide its letter dated 23.12.02. In the aforesaid reply, the Merchant Banker made the following submissions :

4.1 That the conclusion reached by the Enquiry Officer in report dated 30.9.02 is not supported by or substantiated in any manner by the facts and circumstances of the case or by any evidence produced before him and hence the same is not legally valid and deserves to be rejected.

4.2 That the Enquiry Officer after narrating the events abruptly concluded that the Merchant Banker was guilty of violating Regulation 13 in Clauses 2, 5(b), 7(a) and 9 of the Code of Conduct. The Enquiry Officer failed to analyse the provisions of the Regulations in the Code of Conduct with reference to the allegations and facts established before him. Therefore, he did not apply his mind to the facts of the case and failed to properly appreciate the evidence placed before him.

4.3 That the only charge leveled against the Merchant Banker is that the Letter of Offer issued on behalf of issuer company for their rights issue, did not disclose the pendency of a criminal case against CMD of the company, Mr. Abhijeet Rajan in the IVth Additional Chief Judicial Magistrate Court at Varanasi. It was established before the Enquiry Officer that the above fact was not revealed to the Merchant Banker during their due diligence exercise undertaken prior to the issue of the letter of offer. The fact that the Managing Director himself admitted by his letter dated 10th November, 2001 addressed to their Company of not having disclosed the above proceedings during the due diligence, as he did not consider the same to have any direct financial bearing or implications whatsoever on the Company. This was not contravorted or disputed before the Enquiry Officer. Therefore, it should be taken that it is an admitted fact and circumstance of the case that the fact relating to the pendency of the criminal case against the CMD was not at all within the knowledge of the Merchant Banker. Further, the various declarations/certificates issued by the Managing Director and other officials of the Merchant Banker also corroborate that the above fact was not revealed to their complaint lodged against the Letter of Offer in question (vide letters dated 19th October, 2001 and 29th October, 2001 addressed to Gammon India Ltd.)

4.4 That it was also established before the Enquiry Officer that the above facts and circumstances relating pendency of the criminal case remained unconfirmed by the Merchant Banker until 10th November, 2001 when the CMD himself wrote to its director Mr. V.K. Nayak by letter of above date confirming about the pendency of the criminal case against him in his individual capacity before the IV Additional Chief Judicial Magistrate at Varanasi. By that time, the letter of Offer was already issued based upon the merchant bankers earlier due diligence exercise, on 24th September, 2001 i.e. prior to the lodging of the complaint by the Varanasi Company. It was not established before the Enquiry Officer that on or before 10th November, 2001 and in any event at the time of issue of the offer document any information was available with the Merchant Banker (Managers to the Issue) that any criminal case was filed against the Chairman and Managing Director of the Issuer Company was

pending. It is, therefore, submitted that the conclusion of the Enquiry officer that there was any negligence or dereliction of duty on the part of the Merchant Banker and or that there was failure to exercise due diligence, ensure proper care and or exercise individual professional judgement is neither based on facts nor is it sustained on any evidence or material on record with the Enquiry Officer or otherwise whatsoever. The Enquiry Officer's reliance on the statement in our letter dated 12th November, 2001 is misplaced and apparently understood out of context. The oral confirmation referred to therein was from the Chairman of the Company few days before issue of his letter dated 10th November 2001. This can be seen from the Chairman's letter dated 10th November, 2001 wherein he confirms that he was out of station on Company's work and that during his absence none of his colleagues could clarify on the matter. The Chairman's letter aforesaid also confirms that he could not respond to our letters dated 19th October 2001 and 29th October, 2001 as he was preoccupied on Company's outstation work. As such, the Enquiry Officer's conclusion that the Merchant Banker was aware of the pendency of the criminal case immediately on receipt of SEBI's letter forwarding the complaint on 19-10-2001 is not correct.

4.5 That the Enquiry officers report does not show how the Merchant Banker was not prompt or efficient or cost effective in its professional dealings. The Enquiry Officer observed that there was a delay of 25 days from the date the Merchant Banker received the complaint till the date when it actually got it verified and confirmed the same to SEBI on 12.11.2001.

4.6 That the Clause 5(b) of the Code of Conduct has no relevance, whatsoever in so far as the matter relating to obtaining confirmation about pending litigation in as much as there cannot be any professional dealings in compliance of any orders or directions given by SEBI to the Merchant Banker. This is because Clause 5(b) quoted herein above refers only to the professional dealings with the clients and the Enquiry Officer has gravely erred in concluding that the Merchant Banker has violated Clause 5(b) of the Code of Conduct in as much as this Code of Conduct has nothing to do whatsoever with the compliance of SEBI's directions. Assuming while denying that there was failure on the part of the Merchant Banker to act promptly and efficiently and in cost effective manner in their professional dealings, even this allegation is not supported by the facts of the case. The facts are that the Merchant Banker received the letter of SEBI on 19.10.2001 and immediately on 19.10.2001 itself they sought clarification from Gammon (I) Ltd. in respect of the complaint/allegation mentioned in SEBI's letter dated 18.10.2001. The Merchant Banker submitted that inspite of the fact they had immediately taken prompt action required in the matter. The Enquiry Officer has gravely erred in coming to a totally wrong conclusion there was lack of promptness or efficiency on their part.

4.7 That the Merchant Banker explained to the Enquiry Officer that the complaint lodged by M/s. Prashant Glassworks Pvt. Ltd., Varanasi was received by them only on 19th October, 2001 without any documents or certified copies of proceedings before the Court. Hence, it was necessary for them to get it confirmed by the CMD himself. Further that one of their officers had actually gone down to the office of the company and enquired with the Director, Mr. C.C.Dayal and also the Company Secretary, who were actively associated with the issue and none of them were aware of the said criminal complaint and could not furnish the information. The fact that the Merchant Banker could not get the information since the CMD of the company was not available during that time at Bombay cannot justify the conclusion that they had not taken prompt action or taken follow up action on the information provided by SEBI in its letter dated 18th October, 2001.

4.8 That there was no other way of obtaining information from any other person would expose them to unnecessary and avoidable litigation against them. It was also not possible for them under any law to obtain any certified copies of such complaint from any public office, nor do the provisions of the criminal procedure code give any right to them to obtain any certified copy of the proceedings filed before the court. In the absence of any remedy available to them, to obtain any information, there is no other course of action except to write to the CMD, the accused in the alleged proceedings, to ascertain the particulars of the complaint. They tried to contact him in Bombay and were advised by his Secretary that the CMD was not in India and since he was traveling from one person to another, the Secretary was not able to provide any definite information as to how to contact him. Assuming that the CMD would have any information, in this regard, unless he provides that information to them, it would be highly unjust to accuse that they have not procured the information promptly and efficiently.

4.9 That the Merchant Banker wrote to Gammon (I) Ltd. on 19.10.01 and also reminded on 29.10.01 for their comments on the complaints. The clarification relating to the complaint reached them only on 10.11.01 when Mr. Abhijeet Rajan himself gave his written comments on the pending case. The fact that the Merchant Banker received the information only on 10.11.2001 cannot by itself form the basis for EO to reach to a conclusion that there was delay on their part in as much as they received the information on 10.11.2001 when the CMD returned to India, and therefore, the allegation that there was delay from 19.10.01 to 10.11.01 is least to say without appreciating the facts of the case. Lapse of 25 days cannot on the facts of the case be considered as any delay on their part and providing the information on the parties concerned. The delay was beyond their control and the delay purely and wholly arose on account of non availability of Mr. Abhijeet Rajan, CMD of the company as the facts

about the complaint were exclusively within his personal knowledge and none else in the company were aware.

4.10 That the EO did not point out as to which regulation was violated by the Merchant Banker. In the absence of a specific reference to the rule or a regulation which has been violated by them, the charge completely falls in as much as it is not supported by the facts and circumstances of the case and the allegation is without any basis and hence the same should be withdrawn.

5.0 An opportunity of personal hearing was given to the Merchant Banker on 6.1.2003. Mr. R. Kannan, MD, Mr. V.K. Nayak, Director alongwith their Counsels, Mr. Pravin Sundaram and Mr. Girish Dave appeared on behalf of the Merchant Banker. During the proceedings, the Merchant Banker while reiterating his submissions, made vide its letter dated 23.12.02 submitted that on receiving the letter from SEBI on 19.10.01, immediately on the same day sought clarification from the company in respect of the complaint/allegation mentioned in SEBI's letter dated 18.10.01. Further, they have also reminded the company on 29.10.01 for their comments on the complaint. The clarification relating to the complaint reached them only on 10.11.01, when Mr. Abhijeet Rajan himself gave them his written comments on the pending case. The same was received by them on 12.11.01 and wrote to SEBI on the same day. The Merchant Banker stated that clarification dated 6.12.02 on the Letter of Offer Document was posted to the applicants informing them about the pending criminal case No.553/96 before the Additional Chief Judiciary Magistrate, Varanasi. Further, the Merchant Banker has stated that after the clarification on Letter of Offer Document, out of 3,511 only 9 applicants have withdrawn from the issue. Therefore, adequate disclosures were made and there was no loss to any investor. In support of their submissions, the Merchant Banker has quoted matter of Shadi Lal Batra AIR 68 Del 283; Pandurang Dattatraya Khandekar vs Bar Council of Maharashtra, Bombay AIR 84 SC110; Tri-Sure India Ltd. vs.A.F.Ferguson and Co. & Others in the Bombay High Court 1987 (Vol.61) C.C.548.

6.0 I have carefully examined the facts and circumstances of the case. I have also carefully considered the submissions made by the merchant banker during the hearing and vide their letters dated 21.8.02 and 23.12.02 respectively. As is clear from the records, the Merchant Banker acted as Lead Manager in the rights issue of M/s. Gammon (I) Ltd. for 63,20,572 equity shares of Rs.10/- each at a premium of Rs.20/- per share aggregating to Rs.18,96,17,160/-. The issue was opened for subscription on 15.10.01 and closed on 15.11.01. During the period when the issue was open, SEBI received a complaint dated October 17, 2001 from Prashant Glass Works Pvt. Ltd. stating that a criminal complaint has been filed before the IVth Additional Chief Judicial Magistrate, Varanasi on 15.10.1996 against Shri Abhijeet Rajan, Chairman & Managing Director of the issuer company, for the offence of forgery etc. and that he was on bail since 1998. Further, it was complained that the matter concerning the criminal case was not disclosed in the Letter of Offer and thereby the Merchant Banker had not exercised due diligence and skill for ensuring true and fair disclosures in the Letter of Offer and was issued negligently without verification of the statements concerning the issue.

6.1 The above complaint of M/s. Prashant Glass Works Pvt. Ltd was received by SEBI, a copy of the same was marked to the merchant banker also. The merchant banker has stated that the letter of SEBI was received by them on 19.10.01 and immediately sought clarification from the issuer company in respect of the complaint / allegation mentioned in the SEBI's letter dated 18th October, 2001.

6.2 The Merchant Banker submitted that it wrote to Gammon (I) Ltd. on 19.10.01 and also reminded them on 29.10.01 for their comments on the complaints. The clarification relating to the complaint reached them only on 10.11.01 when Mr. Abhijeet Rajan himself gave his written comments on the pending case which was received by the merchant banker on 12.10.01. Further that one of the officers of the merchant bankers had actually gone down to the office of the company and enquired with the Director, Mr. C.C.Dayal and also the Company Secretary, who were actively associated with the issue and none of them were aware of the said criminal complaint and could not furnish the information.

6.3 The Merchant Banker submitted that subsequently, the merchant banker under the direction of SEBI dispatched a clarification letter dated 6.12.01 to all the applicants of the issue giving an option to withdraw the application for allotment of equity shares applied for in the said rights issue. Further, it has been submitted that in all 9 applicants for 958 shares out of 3511 applicants for 64,78,485 shares withdrew their applications.

6.4 The merchant banker has stated that as the information about the criminal complaint was circulated amongst the prospective investors they cannot be said to have failed to ensure that there was no misguiding or exaggerated claims or that there was a lack of proper disclosure of information or that the investors were not made aware of the attendant risks in view of the fact that the matter relating to the criminal complaint was already provided to the prospective investors after the same was received by them.

7.0 I have carefully considered the show cause notice, the submissions of the merchant banker and the material available on record. It is true that the Merchant Banker acted upon the complaint immediately after receipt from SEBI. However, the question remains is, when did it act upon and how did it act upon. It can be ascribed from the submissions of the merchant banker that it did not show any additional efforts apart from contacting the company in writing to ascertain about the details of the criminal case pending against the Chairman & Managing Director of the company. Further, the merchant banker had also received a copy of the complaint from the complainant i.e M/s. Prashant Glass Works Pvt. Ltd. directly as in the said letter it was explicitly shown as copy marked to the merchant banker. The merchant banker chose not to disclose this fact at any stage of the proceedings. The merchant banker failed to write to the complainant itself seeking the details of the complaint.

7.1 The Merchant Banker has relied on the decision of Delhi High Court in the matter of Shadi Lal Batra (A.I.R.1968 DEL.283). The relevant paragraph reads as under:

"Professional misconduct on the part of the person exercising one of the technical professions cannot fairly or reasonably be found, merely on a finding of a bare non-performance of a duty or some default in performing it. The charge is not one of inefficiency, but of misconduct and in an allegation of misconduct an imputation of a certain mental condition is always involved. I think, it would be impossible for any professional man to exercise his profession if he was to be held guilty of misconduct simply because he had not, in a given case, been able to do all that was required in the circumstances or that had misconceived his duty or failed to perform a part of it. I think the test must always be whether in addition to the failure to do the duty, partial or entire which had happened, there had also been a failure to act honestly and reasonably."

I am of the view that this case is not applicable to the present case since here the question is not misconduct but of professional efficiency of Merchant Banker being diligent. In light of the facts and circumstances of the case as enumerated above, I am of the view that the Merchant Banker failed to act reasonably during the period when the Company's issue was open. The merchant banker did not take maximum care and caution while lead managing the issue and failed to act on its own quickly and promptly and reasonably. Its failure to contact the complainant and the Managing Director directly clearly establishes that the merchant banker has not exercised due diligence. I am aware that a clarification letter was issued to the investors informing them of the pending criminal case against the Chairman and Managing Director of the issuer company whereby an exit option was given to the investors before the allotment was made. However, I feel that the merchant banker apart from writing to the company seeking the confirmation and details of the criminal case pending against the Chairman and Managing Director of the issuer company did not show necessary efforts in fulfilling the criteria of proper care and due diligence, as prescribed under SEBI (Merchant Bankers) Regulations, 1992, to the fullest possible extent. I do not agree with the contention of the merchant banker that they could not contact CMD since he was abroad. In this age of information revolution, distance cannot be an excuse for failure to get information/explanation from the CMD, particularly when the issue was open for subscription.

The Enquiry Officer in his report dated September 30, 2002 has recommended that the certificate of registration granted to the merchant banker be suspended for a period of 3 months. In view of the facts and circumstances of the case and also keeping in view of the fact that a clarification letter was issued to the investors informing them of the pending criminal case against the Chairman and Managing Director of the issuer company whereby an exit option was given to the investors before the allotment was made, I am of the considered view that ends of justice would be met if suspension of 15 days is imposed instead of 3 months as recommended by the Enquiry Officer.

Therefore, in exercise of the powers conferred upon me by Sub Section (3) of Section 4 of SEBI Act, 1992 read with Regulation 13(4) of SEBI(Procedure for holding enquiry)Regulations, 2002, I hereby suspend M/s. Imperial Corporate Finance & Services Pvt. Ltd. for a period of 15 days w.e.f. 8/5/03.

G. N. Bajpai

Chairman

Securities and Exchange Board of India

Place : Mumbai

Date : 10th April, 2003