

SECURITIES AND EXCHANGE BOARD OF INDIA

Order under Regulation 13 of the of Securities and Exchange Board of India (Procedure for holding enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002 in the matter of enquiry against M/s Doogar & Associates Ltd., Merchant Banker registered with SEBI.

WTMO/10/MIRSD/10/03

1.0 BACKGROUND

- 1.1 M/s Doogar & Associates Ltd. (hereinafter referred to as "DAL") inter alia is registered with SEBI as a Category – I Merchant Banker, bearing registration no INM000001188.
- 1.2 CMS Traffic Systems Ltd. & others (hereinafter referred to as the "Acquirers") made a public announcement in terms of Regulations 10 & 12 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 on February 19, 2002 to acquire 20% shares of M/s. Kaycee Industries Ltd. (hereinafter referred to as the Target company). The shares of the Target company are listed in the Stock Exchange, Mumbai. The aforesaid public announcement was made on behalf of the Acquirers by DAL - the Manager to the offer.
- 1.3 On September 26, 2002 SEBI received an appeal filed by Shri Satish Gupta & others bearing no. CWP 3066 / 2002 before the Delhi High Court, inter alia, alleging that the advertisement for the public announcement for the acquisition of shares of the Target company by DAL was not issued in the New Delhi edition of Nav Bharat Times dated February 19, 2002 as stated in Para 2.2.1 on page 5 of the Letter of Offer.
- 1.4 Consequently, SEBI directed DAL to give details in this regard. In reply, DAL vide its letter dated January 23, 2003 inter alia submitted that it had instructed M/s Insite Advertising Services (hereinafter referred to as "the Advertising Agency") to issue the public announcement in all the editions of Asian Age (English), Nava Bharat (Hindi) and Nav Shakti (Marathi) on February 15, 2002. Further DAL submitted that on coming to know about the writ petition filed by Shri Satish Gupta, it enquired from the Advertising Agency about the release of advertisement, which informed that the public announcement was made only in Mumbai edition of Nava Bharat and Asian Age. Further DAL also submitted a copy of letter dated May 21, 2002 written by the Advertising Agency to them inter alia stating that due to communication error on the Advertising Agency's part the Advertising Agency could not publish the advertisement in all the editions of Asian Age and Nav Bharat.
- 1.5 On perusal of the reply of DAL, it prima facie appeared that it had contravened the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and SEBI (Merchant Bankers) Rules and Regulations, 1992

2.0 APPOINTMENT OF ENQUIRY OFFICER

- 2.1 In view of the above, as required under Chapter II of SEBI (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002, an Enquiry Officer was appointed by SEBI vide order dated March 19, 2003 to, inter alia, inquire into the alleged contravention of provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and SEBI (Merchant Bankers) Regulations, 1992 by DAL in the matter of open offer by the Acquirers to acquire the shares of the Target company.
- 2.2 The Enquiry Officer issued a show cause notice to DAL vide letter dated May 21, 2003. DAL submitted its reply to the show cause notice vide letter dated May 28, 2003. DAL was also granted an opportunity of personal hearing before the Enquiry Officer. After considering the reply of DAL and oral submissions, the Enquiry officer submitted his report to SEBI on June 30, 2003.
- 2.3 The Enquiry Officer in his report dated June 30, 2003, inter alia, found that *the merchant banker had acted negligently and did not ensure that the public announcement is published in all editions of the English and Hindi National Dailies as per the requirement of Regulation 15(1) of SEBI (SAST) Regulations, 1997*. Based on the said findings, the Enquiry Officer recommended a *minor penalty of suspension of certificate of Registration of DAL for a period of one month, in terms of Regulation 13(1)(a)(iv) of SEBI(Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002*.

3.0 SHOW CAUSE NOTICE

- 3.1 Subsequently, enclosing a copy of the Enquiry Report a show cause notice dated July 24, 2003 was issued to DAL as to why the penalty of suspension of certificate of registration for a period of one month as recommended by the Enquiry Officer cannot be imposed against it.

4.0 REPLY AND HEARING

4.1 DAL in its reply dated August 19, 2003 made following submissions :

A. "the mistake of non-publication of public announcement was **not deliberate** but a genuine error on part of the advertising agency, M/s. Insight Advertising Services". Further "we do not agree with Mr. S.V. Krishna Mohan (Adjudications and Enquiry Officer) that we the merchant banker can not **abdicated our responsibility by shifting blame to the Advertising Agency, M/s. Insight Advertising Services**, who released the public announcement for the open offer as stated herein above". Further "... the way Advertising Agencies function in India, it would not have been possible for us to control any of the events or activities being carried out by them They are neither registered with the capital markets regulatory body nor answerable to them. We have to re-iterate that, we had furnished a copy of our written communication to the Advertising Agency M/s. Insight Advertising Services vide our letter dated 15-02-2002, which was duly acknowledged by them." Further "What we have stated on page no. 5, para 2.2.1 of the Letter of Offer dated 30/03/2002 was based on our understanding that the aforesaid Advertising Agency had published the public announcement as per our written instruction dated 15-02-2002, as there was nothing contrary to the same either informed by them or otherwise" Further "we have acted diligently within our **means and resources**, i.e. by issuing a written instruction to the Advertising Agency M/s Insight Advertising Services as per letter dated 15-02-2002. We could not have had control on their activities otherwise." Further..."that the mistake was **not noticed till May 2002**. Whereas, the offer opened on April 19, 2002 and closed on May 18, 2002. In this connection, we have to submit that the same has come to our notice (as well as that of SEBI) in month of May 2002, only upon a complaint being filed by some of the shareholders, viz. Mr. Satish Gupta and others with malafide intentions."

B "...the un-intentional act, supposedly on our part and that it did not cause any prejudice to the shareholders.....You will also observe that the percentage response (in terms of no. of applications as well as no. of shares) has been well spread from these cities. This clearly shows that the open offer received widespread response from the concerned centres.... The response to the Open Offer to the shareholders of Kaycee Industries Ltd was as follows

City-wise Response

Sr. No.	City	No. of share-holders	Total no. of shares held	Response no. of share-holders	Response in no. of shares	% response no. of share-holders	% response no. of shares
1	MUMBAI	248	15,590	81	3,745	32.66	24.02
2	JALLANDAR CITY	1	10	1	10	100.00	100.00
3	VARANASI	1	1	1	25	100.00	2500.00
4	PATNA	2	30	2	30	100.00	100.00
5	HYDERABAD	3	51	2	30	66.67	58.82
6	JAIPUR	2	35	1	20	50.00	57.14
7	CHANDIGARH	12	132	3	20	25.00	15.15
8	BANGALORE	13	150	3	40	23.08	26.67
9	AHMEDABAD	24	272	5	37	20.83	13.60
10	PUNE	5	162	1	10	20.00	6.17
11	CHENNAI	10	409	2	35	20.00	8.56
12	LUDHIANA	9	169	1	9	11.11	5.33
TOTAL		330	17,011	103	4,011	31.21%	23.55%
Total (of the Target Co.)		715	25,485	187	6,543	26.15%	25.67%

C. " the target company was incorporated in **December 1942 in Lahore (now in Pakistan)**. The shareholders base has been wide spread and some of the shareholder are either deceased or their successors might not have been aware of their shareholding in the target company. **Inspite of the such deficiency, the acquirers have been able to receive response of 1.34 times the open offer size**, which you may please appreciate."

D. "...we **do not wish to challenge the recommended penalty by Mr. S.V. Krishna Mohan (Adjudication and Enquiry Officer)**." Further I have noted the submission that "We have to also state that we have already filed an application for **surrendering the Certificate of Registration as Category – I Merchant Banker vide our letter dated 16-06-2003**. "

5.0 HEARING

5.1 An opportunity of hearing was granted to DAL. Their authorised representative, Shri Deepak Singhvi appeared for the hearing on September 22, 2003. During the hearing, the authorised representative admitted the violation of Regulation 15(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 by DAL, while making submissions on the lines of the reply dated August 19, 2003 to the Show Cause Notice.

6.0 ISSUE

- 6.1 I have carefully considered the findings of the enquiry as communicated in the show cause notice dated July 24, 2003 and the submissions made by DAL vide its letter August 19, 2003 and also during the hearing held on September 22, 2003. The following issue arises for consideration:
- 6.2 Whether DAL has failed to exercise due care and diligence and contravened the provisions of Regulations 24(2), 24(4), and 24(5) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with Clause 2 and 9 of the Code of Conduct as specified in Schedule III of Regulation 13 of SEBI (Merchant Bankers) Regulations, 1992.

7.0 CONSIDERATION OF THE ISSUE

- 7.1 The following provisions viz. Regulations 13, 15 & 24 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 & Clauses 2 and 9 of the Code of Conduct as specified in Schedule III of Regulation 13 SEBI (Merchant Bankers) Regulations, 1992 are relevant for the consideration of the issue:

Regulation 13-(Substantial Acquisition of Shares and Takeovers) Regulations, 1997

"Before making any public announcement of offer referred to in Regulation 10 or Regulation 11 or Regulation 12, the acquirer shall appoint a Merchant Banker in Category I holding a certificate of registration granted by the Board, who is not an associate of or group of the acquirer or the target company."

Regulation 15 -(Substantial Acquisition of Shares and Takeovers) Regulations, 1997

"15. (1) The public announcement to be made under Regulations 10 or Regulation 11 or Regulation 12 shall be made in all editions of one English national daily with wide circulation, one Hindi national daily with wide circulation and a regional language daily with wide circulation at the place where the registered office of the target company is situated and at the place of the stock exchange where the shares of the target company are most frequently traded."

Regulation 24-(Substantial Acquisition of Shares and Takeovers) Regulations, 1997

"24. (1) (d) Before the public announcement of offer is made, the merchant banker shall ensure that the public announcement of offer is made in terms of the Regulations.

(2) The merchant banker shall furnish to the Board a due diligence certificate which shall accompany the draft letter of offer.

4) The merchant banker shall ensure that the contents of the public announcement as well as letter of offer are true, fair and adequate and based on reliable sources, quoting the source wherever necessary.

(5) The merchant banker shall ensure compliance of the Regulations and any other laws or rules as may be applicable in this regard."

Clause 2 and 9 of the Code of Conduct as specified in Schedule III of Regulation 13 of SEBI (Merchant Bankers) Regulations, 1992regulations:

"Clause 2 A merchant banker shall render at all times high standards of service, exercise due diligence, ensure proper care and exercise independent professional judgement."

Clause 9 " A merchant Banker shall abide by the provisions of the Act, rules and regulations and which may be applicable and relevant to the activities carried on by the merchant banker."

- 7.2 It is clear from the combined reading of the aforesaid provisions that the onus of making public announcement on behalf of acquirer in terms of Takeover Regulations lies on the Merchant Banker. It is the responsibility of the merchant banker to exercise due diligence and ensure proper care and simultaneously abide by the provisions of the relevant Act. In terms of Regulations, a public announcement by the Merchant Banker, on behalf of the acquirer, shall be made in all editions of one English national daily with wide circulation, one Hindi national daily with wide circulation and a regional language daily with wide circulation at the place where the registered office of the target company is situated and at the place of the stock exchange where the shares of the target company are most frequently traded.
- 7.3 On perusal of the facts of the instant case I find :
- a) DAL acting as merchant banker for the Acquirers viz. CMS Traffic Systems Ltd. had written on February 15, 2002 to the advertising agency for publishing of the advertisement regarding public announcement in all the editions of Asian Age (English), Navbharat (Hindi) and Navshakti (Marathi).
- b) The public announcement was published in the Mumbai edition of the Asian Age, Mumbai edition of Navbharat and in Navshakti, on February 19, 2002.

c) A letter of offer was submitted by the Merchant Banker before SEBI on March 30, 2002 stating inter alia that "*The Acquirers have made a Public Announcement in the following newspapers namely i) The Asian Age (English), ii) Nava Bharat (Hindi) and, iii) Nav Shakti (Marathi), which appeared in the newspapers on February 19, 2002 in terms of Regulation 15 and pursuant to Regulation 10 of the SEBI (SAST) Regulations 1997.*"

d) The offer opened on April 19, 2002.

e) The offer closed on May 18, 2002.

f) The advertising agency wrote a letter on May 21, 2002 to DAL that due to a communication error on their part the advertisement could not be published in the Mumbai editions of the Asian Age and Navbharat

g) SEBI received a copy of CWP No. 3066 of 2002 in the matter of Satish Gupta and others vs SEBI on September 26, 2002 filed before the Delhi High Court on May 14, 2002, inter alia, alleging that the advertisement for the public announcement for the acquisition of shares of the Target company by DAL was not issued in the New Delhi edition of Nav Bharat Times dated February 19, 2002.

- 7.4 I have noted that DAL seeks to shift the blame to the advertising agency for not carrying out its instructions. DAL should have followed up with the advertising agency for the effective compliance of Regulation 15(1). I find that DAL did not bother to ensure whether the public announcement had been published in all the editions of Asian Age and Navbharat and the fact of non-publishing of public announcement in all the editions of Asian Age and Navbharat was brought to light only on May 21, 2002 (i.e. after the date of closure of offer) i.e. following the writ petition filed by Shri Satish Gupta before the Delhi High Court. The aforesaid negligence or the lack of due diligence on the part of DAL had resulted in non compliance with the regulatory provisions. Further, the letter of offer submitted to SEBI on March 30, 2002 inter alia confirming that public announcement had been made in terms of Regulation 15 was also wrong.
- 7.5 In this regard, it will be pertinent to refer to report of the Committee on substantial acquisition of shares and Takeovers under the Chairmanship of Justice P.N. Bhagwati wherein, it has inter alia been observed that "the committee envisaged a far more crucial role for the merchant banker with additional responsibility under the revised Regulations, which would require the merchant banker to be an independent and responsible person, so that he can exercise due diligence independently of the acquirer in the discharge of his responsibilities and at the same time be accountable to SEBI". The Committee had also recognized the experience of SEBI that acquirers pay lip service to compliance with the regulatory provisions by releasing the public announcement in "obscure dailies with very limited circulations" defeating the very purpose of releasing public announcement.
- 7.6 In view of the above, I agree with the finding of the Enquiry Officer that DAL had acted negligently and did not exercise due diligence by failing to ensure that the public announcement was published in all the editions of one English and one Hindi National Dailies as required under the Regulations and contravened the provisions of Regulations 24(2), 24(4), and 24(5) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with Clause 2 and 9 of the Code of Conduct as specified in Schedule III of Regulation 13 of SEBI (Merchant Bankers) Regulations, 1992.
- 7.7 I do not agree with the contention that the Acquirers were able to get a response of 1.34 times of the open offer size, and non publication of the public announcement in all editions as required did not cause any prejudice to the shareholders. It is observed that almost 80% of the responses had come from Mumbai city and the response from 11 other cities had been ranging between 1 and 24 and none from Delhi.
- 7.8 Further from the facts of the case I find that some of the shareholders of the Target company viz. Shri Satish Gupta and others filed a writ bearing no. CWP 3066 / 2002 before the Delhi High Court, inter alia, alleging that the advertisement for the public announcement for the acquisition of shares of the Target company by DAL was not issued in the New Delhi edition of Nav Bharat Times dated February 19, 2002.
- 7.9 Thus, the non-publication of public announcement in all the editions of Asian Age and Navbharat has deprived the shareholders of the target company in certain centres the equality of opportunity to participate in the public offer made by the Acquirers.
- 7.10 I find that the Enquiry Officer has recommended a minor penalty of suspension of certificate of Registration of DAL for a period of one month and DAL has not challenged the penalty recommended. DAL has however submitted that it has applied for surrendering the certificate of registration. It is observed that the application has not yet been accepted. The merchant banker seems to avoid the stigma of penalty by surrendering the certificate of Registration.
- 7.11 In conclusion, I find that DAL has failed to exercise due care and diligence in terms of Regulations 24(2), 24(4), and 24(5) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with Clauses 2 and 9 of the Code of Conduct as specified in Schedule III of Regulation 13 of SEBI (Merchant Bankers) Regulations, 1992.

8.0 ORDER

8.1 In view of the foregoing, I concur with the recommendation of the Enquiry Officer that a minor penalty of suspension of Certificate of Registration of Dooger and Associates Ltd. as a Merchant Banker for a period of one month be imposed and order accordingly.

Place: Mumbai

Date: 17.10.2003

T M NAGARAJAN

WHOLE-TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA