

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 02.12.2015

Date of Decision : 16.12.2015

Appeal No. 97 of 2014

1. Mr. Ravi Mohan
7, Joy Palasia,
Indore-452 001
Madhya Pradesh
2. Ms. Gopali Chandra Mohan
Raja Gokuldas Palace,
Jabalpur-482 002
3. Ms. Indumati R. Maheshwari
7, Joy Palasia,
Indore-452 001
Madhya Pradesh
4. Vishwa Securities & Finance Pvt. Ltd.
Raja Gokuldas Palace, Hanu Market,
Jabalpur-482 002,
Madhya Pradesh

...Appellants

Versus

Securities and Exchange Board of India,
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai - 400 051

...Respondent

Mr. P. N. Modi, Senior Advocate with Mr. Neville P. Lashkari, Advocate
and Mr. Pranav Arora, Advocate i/b Crawford Bayley & Co. for
Appellants.

Mr. Kumar Desai, Advocate with Mr. Mihir Mody and Ms. Shruti
Chiniwar, Advocates i/b K. Ashar & Co. for the Respondent.

WITH
Appeal No. 99 of 2014

1. Mr. Ravi Mohan
7, Joy Palasia,
Indore-452 001
Madhya Pradesh

2. Mr. Shrigopal Dhoot
C/o. Ramnath Dhoot & Co.
Ganganagar Gin Compound,
Station Road,
Ahmednagar-414 001
 3. Ms. Pratibha Dhoot
C/o. Ramnath Dhoot & Co.
Ganganagar Gin Compound,
Station Road,
Ahmednagar-414 001
 4. Ms. Gopali Chandra Mohan
Raja Gokuldas Palace,
Jabalpur-482 002
Madhya Pradesh
 5. Vishwa Mohan (HUF)
Raja Gokuldas Palace,
Jabalpur-482 002
Madhya Pradesh
 6. Ms. Indumati R. Maheshwari
7, Joy Palasia,
Indore-452 001
Madhya Pradesh
 7. Golkunda Commercial Pvt. Ltd.
1A/8A, Industrial Area, A. B. Road,
Dewas-455 001
Madhya Pradesh
- ...Appellants

Versus

Securities and Exchange Board of India,
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai - 400 051.

...Respondent

Mr. P. N. Modi, Senior Advocate with Mr. Neville P. Lashkari, Advocate
and Mr. Pranav Arora, Advocate i/b Crawford Bayley & Co. for
Appellants.

Mr. Kumar Desai, Advocate with Mr. Mihir Mody and Ms. Shruti
Chiniwar, Advocates i/b K. Ashar & Co. for the Respondent.

AND
Appeal No. 311 of 2014

1. Dr. Kailash S. Choudhari,
Unit 3314, The Address Hotel,
Dubai Mall,
UAE-31166
 2. Mrs. Seema Choudhari
A-12, First Floor, Geetanjali Enclave,
New Delhi-110 017
 3. Rohan Choudhari,
A-12, First Floor, Geetanjali Enclave,
New Delhi-110 017
 4. Rashi Choudhari
A-12, First Floor, Geetanjali Enclave,
New Delhi-110 017
 5. Mrs. Bharti Shailesh,
Flat No. 1201, Jahangir Towers, Setalwad Lane,
Nepean Sea Road,
Mumbai- 400 026
 6. Mr. Shailesh Popatlal Sundesha,
Flat No. 1201, Jahangir Towers, Setalwad Lane,
Nepean Sea Road,
Mumbai- 400 026
 7. Mrs. Sharda Popatlal,
Flat No. 1201, Jahangir Towers, Setalwad Lane,
Nepean Sea Road,
Mumbai- 400 026
 8. Mr. Popatlal Fulchand Sundesha,
Flat No. 1201, Jahangir Towers, Setalwad Lane,
Nepean Sea Road,
Mumbai- 400 026
 9. Ganpat Singh Bhandari,
C-54, Lal Kothi Scheme,
Jaipur- 302 015
- ...Appellants

Versus

Securities and Exchange Board of India,
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai - 400 051

...Respondent

Mr. Sanjay Israni, Advocate for Appellants.

Mr. Kumar Desai, Advocate with Mr. Tomu Francis, Advocate i/b Economic Laws Practice for the Respondent.

CORAM: Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member

Per: Justice J.P. Devadhar

1. Appellants in all these appeals are aggrieved by the orders passed by the Adjudicating Officers of Securities and Exchange Board of India (“SEBI” for short) whereby appellants in the respective appeals are held liable to pay penalty under section 15A(b) of the Securities and Exchange Board of India Act, 1992 (“SEBI Act” for short) jointly and severally for failing to make disclosure to the stock exchanges as contemplated under regulation 7(1A) read with regulation 7(2) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“Takeover Regulations, 1997” for short). Since the issue involved in these appeals is common, all these appeals are heard together and disposed of by this common decision.

2. Although facts of each case have very little relevance in resolving the controversy raised in these appeals, for better appreciation of the controversy, few facts in Appeal No. 97 of 2014 are set out herein below:-

- a) Appellants in Appeal No. 97 of 2014 together with several others were the original promoters of Hind Syntex Ltd. (“Target Company” for convenience) a

company incorporated under the Companies Act, 1956 on 03.12.1980. The shares of the said company were listed on the Bombay Stock Exchange Ltd. (“BSE” for short) and National Stock Exchange Ltd. (“NSE” for short).

b) As on 31.12.2004, four out of several promoters, who are appellants in Appeal No. 97 of 2014 held shares of the target company as follows:-

i) Appellant No. 1: 231400 shares (2.13% of the total capital)

ii) Appellant No. 2: 9786 shares (0.09% of the total capital)

iii) Appellant No. 3: 246600 shares (2.27% of the total capital)

iv) Appellant No. 4: 10100 shares (0.09% of the total capital)

c) Between 03.01.2005 and 04.02.2005 each of the appellants sold following shares of the target company:-

i) Appellant No. 1: 70600 shares (0.65% of the total capital)

ii) Appellant No. 2: 3895 shares (0.04% of the total capital)

- iii) Appellant No. 3: 148445 shares (1.36% of the total capital)
- iv) Appellant No. 4: 3600 shares (0.03% of the total capital)
- d) Since aggregate sale of shares of the target company effected by four appellants during the aforesaid period exceeded 2% on 04.02.2005, the Appellant No. 1 on 05.02.2005 made disclosure of above sale to the target company but failed to make disclosure to the stock exchanges as contemplated under regulation 7(1A) of the Takeover Regulations, 1997.
- e) Some time in February 2013, a third party sought to make an open offer, with a view to acquire shares of the target company from the appellants. In the Draft Letter of Offer filed before SEBI, the lead Manager had observed that in the year 2005 the appellants had failed to comply with regulation 7(1A) of the Takeover Regulations, 1997.
- f) On the basis of above observation, show cause notice was issued by SEBI on November 28, 2013 calling upon the appellants to show cause as to why action should not be taken against the appellants for failing to make disclosure to the stock exchanges, in the year 2005 regarding sale of more than two per cent shares

of the target company as contemplated under regulation 7(1A) of the Takeover Regulations, 1997.

- g) In the meantime, on 03.04.2013, appellants as and by way of abundant caution had made disclosures to the BSE and NSE as required under regulation 7(1A) of the Takeover Regulations, 1997 and intimated the same to SEBI.
- h) On receiving reply to the show cause notice, SEBI granted personal hearing to the appellants and by the impugned order dated 18.02.2014 imposed penalty of ₹ 6 lac on the appellants for violating regulation 7(1A) and directed the appellants to pay the said penalty jointly and severally. Challenging the impugned order, appellants have filed Appeal No. 97 of 2014.
- i) It is not in dispute that the facts in other cases are similar to the facts in Appeal No. 97 of 2014.

3. Mr. Modi, learned Senior Advocate appearing on behalf of appellants in Appeal No. 97 of 2014 and Appeal No. 99 of 2014 and Mr. Sanjay Israni, learned counsel appearing on behalf of appellants in Appeal No. 311 of 2014 have submitted as follows:-

- a) The expression 'Any acquirer' under regulation 7(1A) of the Takeover Regulations, 1997 is relatable to a

single acquirer and not to a group of acquirers and therefore, even if the promoter group of the appellants held 39% shares of the target company, regulation 7(1A) of the Takeover Regulations, 1997 would get triggered only when each acquirer acquires or sells 2% or more shares of the target company individually and not collectively along with other co-acquirers.

- b) Obligation to make disclosure under regulation 7(1A) of the Takeover Regulations, 1997 arises only when the acquirer covered under regulation 11(1), individually purchases or sells shares of the target company aggregating to 2% or more of the share capital of the target company. Since purchase or sale aggregating to 2% or more in regulation 7(1A) is referable to aggregate purchase or sale effected by each acquirer, the AO of SEBI was not justified in aggregating the sales of all the appellants who are independent acquirers. None of the appellants individually have sold more than 2% shares of the target company and therefore, regulation 7(1A) being not attracted, none of the appellants were required to make disclosure under 7(1A) of the Takeover Regulations, 1997. When in law the appellants were not required to make disclosure under regulation 7(1A), mere fact that the appellants erroneously made

disclosure to the target company and belatedly to the stock exchanges, cannot be a ground to hold that the appellants have violated regulation 7(1A) by failing to make disclosure to the stock exchanges under regulation 7(1A).

- c) Appellants were the original promoters of the target company and therefore, appellants could not be said to have acquired shares under regulation 11(1) as contemplated under regulation 7(1A) of the Takeover Regulations, 1997 and consequently regulation 7(1A) would not apply to the case of the appellants.
- d) Relying on a decision of this Tribunal in case of HB Stockholdings Ltd. v/s SEBI (Appeal No. 114 of 2012 decided on 27.08.2013) it is submitted that in the present case, alleged disclosure was required to be made in February 2005, whereas, show cause notice has been issued to the appellants in November 2013, that is after delay of more than 8 years and hence the impugned order is liable to be quashed and set aside.
- e) Regulation 7(3) of the Takeover Regulations, 1997 provides that every target company whose shares are acquired in the manner referred to in regulation 7(1) & 7(1A) of the Takeover Regulations, 1997 to make disclosure to the stock exchanges the aggregate

number of shares held by 'each of such persons' within the time stipulated therein, which obviously means that the obligation to make disclosure to the target company under regulation 7(1A) is on individual acquirer and not collectively along with other co-acquirers.

- f) Under regulation 8(2) of the Takeover Regulations, 1997, a promoter is required to disclose the number and percentage of shares in the target company held by him and by persons acting in concert with him. In regulation 7(1A) of the Takeover Regulations, 1997 reference to 'persons acting in concert' is conspicuously absent. Therefore, disclosure obligation under regulation 7(1A) is relatable to the shareholding of each acquirer individually and not collectively with other co-acquirers or persons acting in concert with the acquirer.
- g) Expression 'acquirer' as also the expression 'persons acting in concert' defined under regulation 2(1)(b) & 2(1)(e) of the Takeover Regulations, 1997 respectively refer to acquisition of shares of the target company and not to the sale of shares. Therefore, definition of those words cannot be applied to sale of

shares referred to under regulation 7(1A) of the Takeover Regulations, 1997.

- h) In para 9 of the impugned order (in Appeal No. 97 of 2014) it is recorded that the target company has been disclosing to the stock exchanges the shareholding of the appellants under the category of promoters. In spite of above findings recorded in para 9, a contradictory finding is recorded in para 11 of the impugned order (in Appeal No. 97 of 2014) to the effect that ‘it is only through the mechanism of stock exchanges dissemination of information takes place for the benefit of the public/investors at large’ and hence the disclosures made to the company would not suffice nor would act as a substitute to the disclosure to be made by the acquirer to the stock exchanges.
- i) The target company had made numerous filings and disclosures to the stock exchanges including the quarterly filing of shareholding pattern with the stock exchanges and the publication of the quarterly accounts which showed reduction in the promoters shareholding. Therefore, all the relevant and correct information was in fact in the public domain and was made available to investors and public shareholders.

- j) Regulation 7(2) of the Takeover Regulations, 1997 apply only to allotment/ acquisition of shares and not to the sale of shares and hence regulation 7(2) is not applicable to the present case. However, in the impugned order it is erroneously held that the appellants have breached regulation 7(2) of the Takeover Regulations, 1997.
- k) In the impugned order (in Appeal No. 97 of 2014) it is recorded that on account of sale, the shareholding of the promoter group went down from 39.68% to 37.60%. The said small sale of shares did not at all affect the significant shareholding of the promoter group and there was no change of control or management.
- l) The aggregate quantity of shares sold by all the appellants together was in excess of 2% only to the extent of 0.08%, that is, a mere 8703 shares of which the sale value was a mere ₹ 1,18,573, yet a completely disproportionate penalty of ₹ 6 lac has been imposed on the appellants in Appeal No. 97 of 2014.
- m) It is well established in law that the power to levy penalty is a discretionary power and the levy of penalty is not mandatory only because it is lawful to

do so. In the present case, no investor has made any complaint. There are no allegations of any price or volume manipulations or any other form of mischief. Therefore, the breach or violation, if any, being technical and/or venial, the same ought to have been excused with a warning at the highest, instead of imposing heavy monetary penalty on the appellants.

- n) As the AO could not ascertain or quantify any disproportionate gain to the appellants or any loss to the investors on account of the alleged non-disclosure, the penalty of ₹ 6 lac imposed on appellants in Appeal No. 97 of 2014 deserves to be deleted. For the same reason, it is submitted that the penalty imposed on appellants in other appeals also deserve to be deleted.

4. Mr. Kumar Desai, learned counsel appearing on behalf of SEBI on the other hand submitted as follows:-

- a) Appellants (in Appeal No. 97 of 2014) in their common reply to the show cause notice had stated that they were part of the promoter group and on sale of shares in excess of 2% the appellants had made required disclosures under regulation 7(1A) to the company but not to the BSE and NSE due to bonafide oversight on part of the promoter group. It was further

stated in the said reply that belatedly on 02.04.2013 that is approximate delay of about 8 years, disclosure under regulation 7(1A) has been made to the BSE and NSE. Therefore, having accepted that the appellants were obliged to make disclosure under regulation 7(1A) to the stock exchanges and that the failure to make such disclosure was due to bonafide oversight, it is not open to the appellants now to turn-a-round and contend before this Tribunal that they were not obliged to make disclosures either to the target company or to the stock exchanges under regulation 7(1A) of the Takeover Regulations, 1997.

- b) In the disclosure made to the stock exchanges on 02.04.2013 appellants (in Appeal No. 97 of 2014) had shown themselves as promoters and persons acting in concert with the promoters. Since the order impugned in the appeal is based on the facts admitted by the appellants, no fault can be found with the impugned order and it is not open to the appellants to put up a new case before this Tribunal.
- c) Obligation to make disclosures under Chapter II and Chapter III of the Takeover Regulations, 1997 are separate and distinct. Disclosure obligation under Chapter II are to be complied with by every person set

out therein and the disclosure obligation under Chapter III is a joint and several obligation of the persons required to make the open offer as acquirers, that is, the acquirers and persons acting in concert with them for the purpose of substantial acquisition of shares or acquisition of control as set out therein.

- d) Regulation 7(1A) was inserted to the Takeover Regulations, 1997 with effect from 09.09.2002 as recommended in the report submitted by the Committee constituted under Chairmanship of Justice P. N. Bhagwati. In the said report it was recommended that acquirers holding 15% and above should disclose purchases or sales at every 2% level. Since acquisition of 15% and more shares is directly linked to the control over the company, it is apparent that acquisition of shares by an acquirer under regulation 7(1A) would be acquisition of shares by the acquirer himself together with the persons acting in concert with the acquirer.
- e) On harmonious/purposive reading of regulation 7(1A) with regulation 11(1) of the Takeover Regulations, 1997, it becomes clear that any acquirer(s) together with persons acting in concert with him/them who have acquired shares or voting rights under regulation

11(1) of the Takeover Regulations, 1997, that is, holding 15% or more but less than 55% of the shares or voting rights shall be obliged to make disclosure of purchase or sale aggregating to 2% or more of the share capital of the target company, to the target company and to the stock exchange within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale. Acquirer/s holding shares or voting rights between 15% to 55%, apart from making disclosures when the purchase or sale exceeds 2% are required to make an open offer if the aggregate limit of 5% is crossed in any financial year ending 31st March.

- f) Since the object of regulation 7(1A) as per the recommendations of the Bhagwati Committee report 2002 is to make it mandatory for acquirers holding (together with persons acting in concert) shares between 15% to 55% to disclose purchase or sale of those shares in excess of 2%, it must be held that the obligation to make disclosure under regulation 7(1A) arises when the aggregate purchase or sale of shares held by the acquirer together with persons acting in concert with him exceeds 2%. In support of the above contention reliance is placed on a decision of the

Bombay High Court in case of Anand Rathi vs SEBI reported in (2002) 1 Mh. L.J. 522.

- g) Fact that the appellants in each appeal constitute respective promoter group and combined sale of the appellants in the respective appeals exceed 2% is not in dispute. Therefore, the appellants in each appeal having effected sales in excess of 2% in concert with each other and having made disclosure to the target company under regulation 7(1A) are not justified in contending that the obligation to make disclosure to the stock exchange under regulation 7(1A) arises only when the sale of shares by individual acquirer exceeds 2%.
- h) The word 'promoter' defined under regulation 2(1) (h) includes 'promoters'. Similarly the word 'acquirer' defined under regulation 2(1) (b) would include acquires. This is evident from Section 13(2) of the General Clauses Act, 1852 which provides that the words in any Central Acts or Regulations would include the plural. Therefore, the obligation to make disclosure under regulation 7(1A) arises when the aggregate sale of shares by the acquirer together with persons acting in concert with him exceeds 2%.

- i) The word ‘any acquirer’ in regulation 7(1A) refers to an acquirer under regulation 11(1). Since the shareholding of the acquirer under regulation 11(1) is the referable to the shareholding of the acquirer together with the persons acting in concert with him, it is apparent that the purchase and sale of shares by the acquirer referred to in regulation 7(1A) is referable to the purchase or sale of shares by the acquirer together with the persons acting in concert with him.
- j) Since regulation 7(1A) contemplates disclosure of purchase or sale of shares aggregating to 2% or more to the target company and to the stock exchanges within 2 days of such purchase or sale, the word ‘acquirer’ in regulation 7(1A) would have to be purposively interpreted to include purchase or sale of shares by the acquirer together with the persons acting in concert with the acquirer.
- k) Fact that the word ‘acquirer’ and the word ‘persons acting in concert’ are separately defined under the Takeover Regulations, 1997 does not affect the interpretation of the word ‘acquirer’ in regulation 7(1A) put forth by SEBI, because, the expression ‘acquirer’ as defined under regulation 2(1) (b) refers

to acquisition of shares by the acquirer himself or with any person acting in concert with the acquirer. Therefore, for the purposes of regulation 7(1A) the purchase or sale of shares by an acquirer would be purchase or sale by an acquirer together with the persons acting in concert with such acquirer.

- l) Appellants who had made timely disclosure to the target company under regulation 7(1A) but failed to make timely disclosure to the stock exchange under regulation 7(1A) have clearly violated the mandate of the Takeover Regulations, 1997.
- m) Fact that the disclosure made by the appellants under regulation 7(1A) to the target company have been transmitted by the target company to the stock exchanges under regulation 7(3) does not absolve the appellants of their obligation to make disclosure to the stock exchanges under regulation 7(1A). In any event, taking all mitigating factors, nominal penalty of ₹ 6 lac is imposed on appellants (in Appeal No. 97 of 2014) as against the imposable penalty of ₹ 1 crore and therefore, the penalty imposed cannot be said to be unreasonable or excessive.
- n) Relying on the decisions of the Apex Court in case of Swedish Match vs. SEBI reported in (2004) 11 SCC

641 and in case of Chairman SEBI vs. Shriram Mutual Fund reported in (2006) 5 SCC 361 it is submitted that the appellants who have violated regulation 7(1A) of the Takeover Regulations, 1997 cannot escape penalty irrespective of the fact that there was mens-rea in committing the violations or not.

- o) Relying on a decision of this Tribunal in case of Radheshyam Tulsian & Ors v/s SEBI (Appeal No. 106 of 2005 decided on 26.04.2006) it is submitted that in view of the expression 'acquirer' being defined under regulation 2(1)(b), the expression 'acquirer' in regulation 7(1A) would be referable to shares held by an acquirer together with all persons acting in concert with such acquirer. Therefore, an acquirer together with persons acting in concert with him holding 15% or more but less than 55% shares or voting rights of the target company, when purchases or sells shares of the target company together with persons acting in concert with him, aggregating 2% or more of the share capital of the target company, would be obliged to make disclosure to the target company under regulation 7(1A) of the Takeover Regulations, 1997.

Accordingly, it is submitted by counsel for SEBI that since the appellants in all these appeals have failed to make disclosure to the stock exchanges as contemplated under regulation 7(1A), no fault can be found with the decision in imposing penalty against the appellants and hence, all these appeals are liable to be dismissed with costs.

5. We have carefully considered the rival submissions.

6. Short question that falls for consideration in these appeals is, whether the obligation to make disclosure under regulation 7(1A) read with regulation 7(2) of the Takeover Regulations, relates to purchase or sale of shares or voting rights aggregating 2% or more of the share capital of the target company effected by an acquirer individually or by the individual acquirer together with the persons acting in concert with that acquirer.

7. Regulation 7(1A) was inserted to the Takeover Regulations, 1997 with effect from 09.09.2002. For better appreciation of the dispute raised in these appeals, it would be appropriate to quote regulation 7 of the Takeover Regulations, 1997, as it stood prior to insertion of regulation 7(1A) and subsequent to insertion of regulation 7(1A).

8. Regulation 7 of the Takeover Regulations, 1997 as it stood prior to insertion of regulation 7(1A) on 09.09.2002 reads thus:-

“7. Acquisition of 5% and more shares or voting rights of a company.—

(1) Any acquirer, who acquires shares or voting rights which (taken together with shares or

voting rights, if any, held by him) would entitle him to more than five per cent shares or voting rights in a company, in any manner whatsoever shall disclose the aggregate of his shareholding or voting rights in that company, to the company.

(2) The disclosures mentioned in sub-regulation (1) shall be made within four working days of –

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

(3) Every company, whose shares are acquired in a manner referred to in sub-regulation (1), shall disclose to all the stock exchanges on which the shares of the said company are listed the aggregate number of shares held by each of such persons referred above within seven days of receipt of information under sub-regulation (1).”

9. Regulation 7 of the Takeover Regulations, 1997 (as substituted by SEBI) (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002, (‘2002 amendment’ for short) with effect from 9.9.2002 reads thus:-

“Acquisition of 5 per cent and more shares or voting rights of a company.

7. [(1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five

per cent or ten per cent or fourteen per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.]

[(1A) Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.]

[Explanation—For the purposes of sub-regulations (1) and (1A), the term ‘acquirer’ shall include a pledge, other than a bank or a financial institution and such pledgee shall make disclosure to the target company and the stock exchange within two days of creation of pledge.]

(2) The disclosures mentioned in [sub-regulations (1) and (1A)] shall be made within [two days] of,—

- (a) the receipt of intimation of allotment of shares; or*
- (b) the acquisition of shares or voting rights, as the case may be.*

[(2A) The stock exchange shall immediately display the information received from the acquirer under sub-

regulations (1) and (1A) on the trading screen, the notice board and also on its website.]

(3) Every company, whose shares are acquired in a manner referred to in [sub-regulations (1) and (1A)], shall disclose to all the stock exchanges on which the shares of the said company are listed the aggregate number of shares held by each of such persons referred above within seven days of receipt of information under [sub-regulations (1) and (1A)].”

10. At this stage, we may also quote regulation 2(1)(b) which defines the expression ‘acquirer’ for the purposes of Takeover Regulations, 1997 as follows:-

“Definitions—

2 (1) In these Regulations, unless the context otherwise requires:--

(a)....

(b) “acquirer” means any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer;”

11. Regulation 7 is contained in Chapter II of the Takeover Regulations, 1997. Chapter II consists of regulations 6 to 9, under the heading ‘Disclosures of shareholding and control in a listed company’. As per Chapter II, disclosures have to be made by the entities specified therein at various stages as more particularly set out therein.

12. Regulation 6 in Chapter II of the Takeover Regulations, 1997 provides for disclosure by the entities specified therein on the basis of their shareholding as on the date of the said regulation came into force. Regulation 7 provides for disclosure by the entities specified therein, after the Takeover Regulations, 1997 came into force.

13. Prior to insertion of regulation 7(1A), disclosure obligation under regulation 7(1) was only in relation to acquisition of shares or voting rights in excess of the limits prescribed in regulation 7(1) and the said disclosure obligation was required to be discharged within two days of the events specified under regulation 7(2). By 2002 amendment, regulation 7(1A) was inserted with effect from 09.09.2002. As per regulation 7(1A) any acquirer who has acquired shares or voting rights of a company under regulation 11(1) was required to disclose purchase or sale of the shares or voting rights of the target company aggregating 2% or more of the share capital of the target company to the target company and to the stock exchanges within two days of such purchase or sale. By the said 2002 amendment regulation 7(2) was also amended with effect from 09.09.2002, thereby providing that the disclosures under regulation 7(1) & 7(1A) be made within two days of the events set out under regulation 7(2).

14. Argument of the appellants in nutshell is that firstly, the disclosure obligation under regulation 7(1A) arises only when purchase or sale of shares or voting rights effected by any individual acquirer exceeds the limit prescribed under regulation 7(1A) and in the cases in hand, since

sale of shares effected by appellants as individual acquirers being less than 2%, it could not be said that the appellants have violated regulation 7(1A). Secondly, assuming, disclosure obligation under regulation 7(1A) arises when purchase or sale of shares or voting rights by an acquirer together with persons acting in concert with him exceeds 2% of the share capital and that obligation has to be discharged within two days of the events specified under regulation 7(2), since regulation 7(2) does not contemplate disclosure of sale of shares or voting rights covered under regulation 7(1A), appellants cannot be penalized for failing to disclose to the stock exchanges, within the time stipulated under regulation 7(1A) read with regulation 7(2).

15. First contention of the appellants is that regulation 7(1A) refers to the obligation of 'Any acquirer', and therefore, it must be held that regulation 7(1A) gets triggered only when purchase or sale of shares or voting rights of the target company aggregating 2% or more of the share capital of the target company is effected by any individual acquirer. Since sales of shares effected by the individual appellant acquirer in all the appeals do not exceed 2% of the share capital of the target company regulation 7(1A) does not get triggered and therefore the appellants cannot be held guilty of violating regulation 7(1A).

16. There is no merit in the above contention, because, expression 'acquirer' defined under regulation 2(1)(e) stipulates that wherever the expression 'acquirer' is used in the Takeover Regulations, 1997 it shall be referable to a person who acquires shares or voting rights in the target

company either by himself or with any person acting in concert with the acquirer. Therefore, purchase or sale of shares by 'Any acquirer' under regulation 7(1A) would be referable to purchase or sale of shares effected by the acquirer either by himself or with persons acting in concert with the acquirer and would not be relatable to purchase or sale of shares by the acquirer alone as contended by the appellants. Since aggregate sale of shares effected by the appellants as 'persons acting in concert' has exceeded 2% of the share capital of the target company, the appellants were obliged to disclose the said sale to the target company and to the stock exchange within the time stipulated under regulation 7(1A) read with regulation 7(2). Admittedly, the appellants had acquired shares of the target company as promoter group with the common object of controlling the target company. Under regulation 2(1)(e) of the Takeover Regulations 1997, when persons acquire shares or voting rights with the common object of controlling the target company, then the said persons are said to be 'persons acting in concert'. Therefore, the appellants as persons acting in concert having acquired shares of the target company to the extent specified under regulation 11(1) were obliged under regulation 7(1A) to make disclosure when they as persons acting in concert sold shares exceeding 2% of the share capital of the target company. It is not in dispute that as soon as sale of shares of the target company effected by the appellants as persons acting in concert exceeded 2% of the share capital of the target company disclosure was made by appellants to the target company as contemplated under regulation 7(1A) but no disclosure was made to the stock exchanges as required under regulation 7(1A).

Having correctly understood the scope of the obligation under regulation 7(1A), appellants are not justified in taking a stand to the contrary by contending that the disclosure obligation under 7(1A) arises only when purchase or sale of shares by an acquirer individually exceeds 2% of the share capital of the target company.

17. It is relevant to note that regulation 7(1A) is applicable to an acquirer who has acquired shares or voting rights of a company under regulation 11(1), that is, an acquirer who, together with persons acting in concert with him, has acquired in accordance with the provisions of law, 15% or more but less than 55% of the shares or voting rights in the target company. Admittedly, the appellants as persons acting in concert had acquired 39.68% shares of the target company and therefore, appellants were 'acquirer' covered under regulation 11(1). When appellants as persons acting in concert sold shares of the target company in excess of 2% of the share capital of the target company, appellants were obliged to make disclosure to the target company and to the stock exchanges under regulation 7(1A). Thus, regulation 7(1A) refers to the shares held by an acquirer together with persons acting in concert with him, and that acquirer together with persons acting in concert with him, when purchases or sells shares or voting rights of the target company in excess of the limits prescribed under regulation 7(1A), is required to make disclosure to the target company and to the stock exchanges. In other words, regulation 7(1A) provides that an acquirer who has acquired shares with persons acting in concert, when acquires additional shares or sells existing shares with persons acting in concert with him must make

disclosure. Therefore, argument that regulation 7(1A) refers to purchase or sale of shares by an individual acquirer cannot be accepted.

18. Appellants contend that in regulation 11(1), 11(2) and 11(2A) of the Takeover Regulations, 1997 reference is made to the shareholding of an acquirer together with persons acting in concert with him, whereas, in regulation 7(1A) reference is made to the shareholding of the acquirer alone, and therefore, it must be held that regulation 7(1A) refers to the shareholding of an individual acquirer and not to the shareholding of an acquirer together with persons acting in concert with him. Submission is that wherever, the regulation intended to refer to the shareholding of an acquirer together with the persons acting in concert, it has specifically stated so in the regulation itself. Since, regulation 7(1A) refers to the shareholding of the acquirer alone it would be just and proper to hold that regulation 7(1A) gets triggered when purchase or sale of shares or voting rights effected by the acquirer alone exceeds the limits prescribed under regulation 7(1A). Similar argument is also advanced on behalf of the appellants by referring to regulation 8(2) of the Takeover Regulations, 1997 wherein reference is made to the shareholding of a promoter together with persons acting in concert with him.

19. We see no merit in the above contention. Once the regulation defines the expression 'acquirer' under regulation 2(1)(b) of the Takeover Regulations to mean a person who has acquired shares or voting rights of the target company either by himself or with any person acting in concert with the acquirer then, that meaning has to be assigned to the expression

‘acquirer’ wherever used in the Takeover Regulation, 1997. Therefore, it would be just and proper to hold that the expression ‘acquirer’ in regulation 7(1A) is referable to a person who has acquired shares of the target company either by himself or with the persons acting in concert with him. Even after defining the expression ‘acquirer’, fact that in some regulations the expression ‘acquirer’ is used and in some regulations the expression ‘acquirer’ together with persons acting in concert’ is used, it cannot be presumed that in regulation 7(1A) the expression ‘acquirer’ is referable to a person holding shares of the target company individually. In other words, whether the expression ‘acquirer’ is followed by the words ‘together with persons acting in concert’ or not, the said expression used in regulation 7(1A), would be referable to purchase or sale of shares by the acquirer either by himself or with persons acting in concert with the acquirer. In the present case, aggregate sale of shares of the target company by the appellants (acquirers) as persons acting in concert when exceeded 2% of the share capital of the target company, appellants were obliged to make disclosure to the target company and to the stock exchanges and since appellants failed to make disclosure to the stock exchanges the appellants have violated regulation 7(1A).

20. Argument of the appellants that they have not acquired shares of the target company under regulation 11(1) and hence regulation 7(1A) is not attracted is without any merit, because, regulation 11(1) does not prescribe any particular mode of acquiring shares but merely refers to acquisition of 15% or more but less than 55% of the shares by an acquirer together with persons acting in concert with him in accordance with the

provisions of law. By referring to an ‘acquirer’ covered under regulation 11(1) in regulation 7(1A), it is made clear that an acquirer covered under regulation 11(1) i.e. an acquirer (either by himself or together with persons acting in concert with him) holding 15% or more but less than 55% shares of the target company when either by himself or together with persons acting in concert with him purchases or sells shares of the target company aggregating 2% or more of the share capital of the target company, then such acquirer shall make disclosure as provided under regulation 7(1A). Fact that the appellants in all these appeals held shares of the target company more than 15% but less than 55% in accordance with law as stipulated under regulation 11(1) is not in dispute. Therefore, appellants holding shares of the target company to the extent specified under regulation 11(1), when sold shares of the target company as persons acting in concert in excess of 2% of the share capital of the target company, were obliged to make disclosure under regulation 7(1A).

21. Relying on regulation 7(3) of the Takeover Regulations, 1997 which refers to the information received from ‘each person’ referred to in regulation 7(1) and 7(1A), it is contended on behalf of the appellants that the information by way of disclosure to be made by an acquirer under regulation 7(1A) is relatable to the shareholding of an acquirer alone and is not relatable to the shareholding of the acquirer together with persons acting in concert with the acquirer. This argument of the appellant is also without any merit, because, as noted earlier, the expression ‘acquirer’ defined under regulation 2(1)(b) is referable to the shares or voting rights of the target company held by an acquirer alone or by an acquirer

together with persons acting in concert with him and therefore, the information referred to in regulation 7(3) would be the information furnished by an acquirer under regulation 7(1) and 7(1A) in relation to the purchase or sale of shares by an acquirer together with persons acting in concert with him in excess of the limits prescribed under regulation 7(1) and 7(1A).

22. Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no. 114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than 8 years in issuing the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court in case of Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C) has held that if there no statutory bar for adjudicating the matter beyond a particular date, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice. In the Takeover Regulations, 1997 there is no time limit prescribed either for issuing show cause notice or for adjudicating the show cause notice. Therefore, argument of the appellants that in view of the delay in issuing the show cause notice the impugned order must be quashed cannot be accepted. However, we make it clear that in the absence of time limit prescribed for issuing show cause notice or for

completing the adjudication proceedings, SEBI cannot arbitrarily delay the proceedings and must take all reasonable steps to initiate and complete the proceedings in accordance with law as expeditiously as possible. In the facts of present case (Appeal No. 97 of 2014) it is not in dispute that sometime in February 2013 SEBI came to know that the appellants had failed to comply with regulation 7(1A) in the year 2005 and immediately thereafter, show cause notice was issued in November 2013. Therefore, in the facts of present case, no fault can be found with SEBI in initiating proceedings against the appellants in November 2013.

23. For all the aforesaid reasons we hold that the obligation to make disclosure under regulation 7(1A) arises when an acquirer covered under regulation 11(1) purchase or sells shares of the target company together with persons acting in concert with that acquirer, aggregating to 2% or more of the share capital of the target company.

24. Question then to be considered is, whether the AO is justified in imposing penalty on the appellants on the ground that by failing to make disclosure of sale of shares aggregating to 2% or more of the share capital of the target company to the stock exchanges, within the stipulated time the appellants have violated regulation 7(1A) read with regulation 7(2) of the Takeover Regulations, 1997?

25. It is relevant to note that the disclosure obligation under regulation 7 as originally introduced was only in relation to acquisition of shares in excess of the limits prescribed under regulation 7(1) and that obligation

had to be discharged under regulation 7(2) within two days of (a) receiving intimation of allotment of shares or (b) acquisition of shares or voting rights as the case may be. Thus the obligation to make disclosure under regulation 7(1) was only in relation to acquisition of shares in excess of the limit set out therein and the said obligation had to be discharged within two days of the events specified under regulation 7(2).

26. By inserting regulation 7(1A) after regulation 7(1) in the Takeover Regulations, 1997 with effect from 09.09.2002, it is provided that where an acquirer who together with persons acting in concert with him has acquired 15% or more but less than 55% shares or voting rights of the target company and that acquirer either by himself or together with persons acting in concert with him, purchases or sells shares or voting rights aggregating to 2% or more of the share capital of the target company, then such acquirer shall make disclosure of such purchase or sale to the target company and to the stock exchanges within two days of such purchase or sale.

27. It is relevant to note that while inserting regulation 7(1A), SEBI has deemed it proper to amend regulation 7(2) with effect from 09.09.2002 by providing that the disclosure obligation under regulation 7(1) and 7(1A) shall be discharged within two days of the events specified under regulation 7(2). Thus, as a result of insertion of regulation 7(1A) and amendment of regulation 7(2), the disclosure obligation in relation to purchase or sale of shares referred to in regulation 7(1A) has to be made within two days of the events specified

in regulation 7(2). On perusal of regulation 7(2) it is seen that the events enumerated therein relate only to acquisition of shares and do not relate to sale of shares or voting rights in excess of the limits prescribed under regulation 7(1A). As a result, even though regulation 7(1A) contemplates that an acquirer together with persons acting in concert with him when sell shares of the target company in excess of the limits prescribed under regulation 7(1A) must make disclosure within two days of such sale, in view of the amendment to regulation 7(2), the disclosure obligation under regulation 7(1A) has to be discharged within two days of the events specified under regulation 7(2). Since regulation 7(2) as amended does not contemplate any obligation to disclose sale of shares by an acquirer covered under regulation 7(1A), the question of discharging that obligation arising under regulation 7(1A) read with regulation 7(2) does not arise at all.

28. It was open to SEBI to make newly inserted regulation 7(1A) self operative, because regulation 7(1A) itself provides that the obligation set out therein has to be discharged within two days of purchase or sale specified therein. However, SEBI in its wisdom deemed it fit to amend regulation 7(2) with effect from 09.09.2002 by providing that the disclosure obligation specified under regulation 7(1) and 7(1A) has to be discharged within two days of the events specified under regulation 7(2). Thus, by 2002 amendment it is made clear that although disclosure of purchase or sale referred to under regulation 7(1A) has to be discharged within two days of purchase or sale, of shares referred to therein, by

amending regulation 7(2) it is provided that two days time to make disclosure under regulation 7(1A) shall commence on the happening of events specified under regulation 7(2). Since regulation 7(2) (as amended) does not set out any event relating to sale of shares specified under regulation 7(1A), the question of complying with regulation 7(1A) within two days of sale of shares does not arise at all.

29. It is not even the case of SEBI, that regulation 7(1A) is self operative and that the obligation there under has to be discharged independent of regulation 7(2). In fact, in the impugned order, it is held by the AO that by failing to make disclosure to the stock exchanges regarding aggregate sale of shares or voting rights in excess of 2% of the share capital of the target company, the appellants are guilty of violating regulation 7(1A) read with regulation 7(2) of the Takeover Regulations, 1997. Therefore, when the Takeover Regulations, 1997 provides that the disclosure obligation specified under regulation 7(1A) has to be discharged in the manner specified under regulation 7(1A) read with regulation 7(2) and regulation 7(2) does not provide for disclosure in relation to sale of shares in excess of the limits prescribed under regulation 7(1A), SEBI is not justified in holding that the appellants by failing to make disclosure of sales covered under regulation 7(1A) within the stipulated time, have violated regulation 7(1A) read with regulation 7(2) of the Takeover Regulations, 1997. Consequently, SEBI is not justified in imposing penalty on the appellants.

30. It is apparent that after having specified two days time for complying with the obligation specified under regulation 7(1A), there was no need for SEBI to amend regulation 7(2) in relation to the disclosure obligation under regulation 7(1A). In any event, having deemed it fit to amend regulation 7(2), SEBI ought to have ensured that regulation 7(2) as amended contains a clause relating to disclosure of sale of shares or voting rights specified under regulation 7(1A). However, SEBI has failed to do so.

31. It is relevant to note that Takeover Regulations, 1997 have been replaced by Takeover Regulations, 2011. In the Takeover Regulations, 2011, SEBI has taken care to ensure that the disputes raised herein do not arise in those regulations. Since Takeover Regulations, 1997 is replaced by Takeover Regulations 2011, there is no need to issue any direction for taking remedial steps in the matter.

32. Reliance placed by counsel for SEBI on a Division Bench decision of the Bombay High Court in case of Anand Rathi & Ors. vs. SEBI reported in 2002 (1) Mh. L. J. 522 is misplaced. In that case the dispute that fell for consideration of the High Court was, whether pending investigation, SEBI has the authority of law under Section 11, 11B of the SEBI Act to order suspension as an interim measure. In that context quoting the words of Denning J. in Seaford Court Estates Ltd. vs. Asher reported in (1949) 2 All.E.R. 155 it was held that in order to protect the interest of the investors and for the orderly and healthy growth of securities market if wide powers are conferred on SEBI by the Parliament,

then that intention of the Parliament has to be implemented. That decision cannot be applied to the present case, because, under the Takeover Regulations, 1997 disclosure obligation arising under regulation 7(1A) of the Takeover Regulation, 1997 has to be discharged under regulation 7(1A) read with regulation 7(2) and as noted above, regulation 7(2) does not provide for disclosure obligation arising from sale of shares or voting rights specified under regulation 7(1A). In such a case, there being no obligation under regulation 7(2) to make disclosure of sale of shares specified under regulation 7(1A), appellants cannot be held guilty of failing to make disclosure under regulation 7(1A) read with regulation 7(2) of the Takeover Regulations, 1997. In these circumstances, reliance placed by counsel for appellants on the decision of the Bombay High Court in case of Anand Rathi (Supra) is misplaced.

33. For all the aforesaid reasons, the issues raised in these appeals are answered as follows:-

- a) Under regulation 7(1A) of the Takeover Regulations, 1997, an acquirer who, together with persons acting in concert with him has acquired 15% or more but less than 55% shares of the target company when purchases or sells shares of the target company together with the persons acting in concert with the acquirer, aggregating 2% or more of the share capital of the target company, then the said acquirer is required to make disclosure of such purchase or sale

within two days of purchase or sale under regulation 7(1A) read with regulation 7(2) of the Takeover Regulations, 1997.

- b) Disclosure obligation under regulation 7(1A) has to be discharged in accordance with regulation 7(1A) read with regulation 7(2). Since regulation 7(2) does not contemplate for disclosure relating to sale of shares in excess of the limits set out under regulation 7(1A), appellants herein cannot be said to have failed to comply with regulation 7(1A) within the time stipulated under regulation 7(1A) read with regulation 7(2). Consequently penalty imposed on the appellants cannot be sustained.

34. All the appeals are disposed of in the above terms with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

16.12.2015
Prepared & Compared By: PK