

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 23 of 2013

Date of decision: 19.06.2013

1. Shri Sunil Krishna Khaitan
77, Biplabi Ambika Chakraborty,
Sarani, Khaitan Park,
Kolkata – 700 029.

2. Late Shri Shree Krishna Khaitan
77, Biplabi Ambika Chakraborty,
Sarani, Khaitan Park,
Kolkata – 700 029.

3. M/s. Khaitan Lefin Limited
46C, Jawahar Lal Nehru Road,
Kolkata – 700 071.

4. M/s. The Oriental Mercantile Company
Ltd.
7, Red Cross Place,
4th Floor, Kolkata – 700 001.

.....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. Janak Dwarkadas, Senior Advocate with Mr. Vyapak Desai,
Ms. Ruchi Biyani, Ms. Payel Chatterjee and Mr. Aditya Shukla,
Advocates for Appellants.

Mr. Kumar Desai, Advocate with Mr. Akhilesh Singh, Advocate for the
Respondent.

CORAM : Jog Singh, Member & Presiding Officer (*Offg.*)

Per : Jog Singh

1. The present appeal has been filed by four Appellants who are stated to be the promoters of M/s. Khaitan Electrical Ltd., hereinafter referred to as “Company”. It was incorporated in 1975 and registered under the Companies Act, 1956. Its registered office is at Hyderabad and it is listed on two exchanges i.e., BSE and NSE. The Company is engaged in the business of manufacturing and marketing of electrical goods.

2. All the four Appellants before this Tribunal are part of the promoter group of the Company and are aggrieved of the action of the Respondent in passing the Impugned Order dated December 31, 2012 hereinafter referred to as “Impugned Order”, against them for the alleged failure to make a public announcement within the stipulated time as required under the provisions of regulations 10 and 11(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, hereinafter referred to as “SAST Regulations, 1997”, in respect of the acquisition of shares in question by the Company. The promoter group of the Company, interalia, includes all the four Appellants, their family members, relatives and associate persons/entities. M/s. Khaitan Lefin Ltd., hereinafter referred to as “KLL”, and M/s. Oriental Mercantile Company Ltd., hereinafter referred to as “OMCL”, became part of the promoter group on March 31, 1998 and March 31, 2000 respectively. The Company had an authorized share capital of INR 17,50,00,000 and a paid-up capital of INR 72,000,000 comprising of 7,200,000 shares with a

face value of INR 10 each, at the end of the financial year on March 31, 2006.

3. By the Impugned Order passed by the whole time member of the Respondent, hereinafter referred to as “WTM”, the Appellants have been directed to make a combined public announcement to acquire shares of the Company in terms of regulations 10 and 11(1) of the SAST Regulations, 1997 within a period of 45 days from the date of the Impugned Order for the violation of said Regulations allegedly committed by the Appellants in the year 2006-2007. The Appellants, alongwith consideration amount, have also been called upon to pay interest at the rate of 10% per annum, from June 16, 2007 to the date of payment of consideration to the shareholders who were holding shares in the Company on the date of the alleged violation and whose shares have been accepted in the open offer, after adjustment of dividend, if any, paid.

4. On March 12, 2007, the noticees acquired 13,00,000 shares in the appellant Company in two tranches i.e. 5,00,000 shares in one transaction and 8,00,000 shares in the other. Out of these 13,00,000 shares, Mr. Sunil Khaitan and Mr. Krishna Khaitan acquired 50,000 shares each, KLL acquired 9,00,000 shares and OMCL acquired 3,00,000 shares. The Respondent issued a show cause notice, hereinafter referred to as “SCN” on March 26, 2012 to the Appellants alleging that consequent to the acquisition of shares on March 12, 2007 there was increase in their pre-acquisition shareholding as on March 11, 2007 as under :-

(a) KLL, individually, from 10,73,415 shares (10.52%) to 19,73,415 (17.16%) shares in the target Company and KLL failed to make a public announcement to acquire shares in accordance with the provisions of regulation 10 read with regulation 14(1) of the Takeover Regulations, 1997 within 4 working days from March 12, 2007;

(b) The promoter group, collectively, from 26,34,639 shares (25.83%) to 39,34,639 shares (34.21%) and the acquirers collectively failed to make a public announcement in accordance with the provisions of regulation 11(1) read with regulation 14(1) of the Takeover Regulations, 1997 within 4 working days from March 12, 2007.

5. Accordingly, the Appellants were called upon to show cause as to why suitable directions under sections 11 and 11B of the SEBI Act read with regulations 44 and 45 of the SAST Regulations, 1997 and regulations 32 and 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereinafter referred to as “SAST Regulations, 2011”, should not be issued against them for the above stated alleged violations. The Appellants filed their reply vide letter dated June 11, 2012, and during the personal hearing before the Respondent on August 21, 2012, Mr. Vyapak Desai, Advocate, appeared and made submissions on behalf of the Appellants. Subsequently, the Appellants also filed their written submissions on August 24, 2012.

6. It appears from the records that the Company, in order to meet its business requirements, conducted two extraordinary general meetings,

each of the two hereinafter referred to as “EGM”, for issuance of preferential shares under Sections 81 and 81 (1A) of the Companies Act, 1956. The first EGM was held on March 23, 2006 approving issuance of 10 lac equity warrants with a face value of Rs.10/- each at a premium of Rs.50/- each on preferential basis to four members of the company i.e. the four Appellants who were admittedly acting in concert. As per law, these warrants were to be converted into equity shares within a period of eighteen months from the date of allotment.

7. Similarly, in the second EGM held on November 29, 2006, the shareholders approved issuance of 25 lac equity shares with a face value of Rs.10/- each and at a premium of Rs.121/- each on a preferential basis to strategic investors. The promoter group, consisting of the four Appellants, did not participate in this allotment. Secondly, 10 lac warrants with a face value of Rs.10/- each and at a premium of Rs.121/- each, on a preferential basis, were also allotted to appellant no. 3, i.e. KLL to be converted into equity shares within a period of eighteen months. KLL is also an identified member of the promoter group, acting in concert for the purpose of acquiring the preferential shares in question.

8. After obtaining the consent of the shareholders in the two EGMs, the Company allotted 10 lac equity warrants in the respective proportions, as approved in the first EGM, to the four Appellants. Further, 25 lac equity shares were allotted to strategic investors on December 14, 2006. These 25 lac shares were also admitted for trading on BSE on February 23, 2007 and NSE on March 1, 2007. Similarly, 10

lac warrants were allotted to KLL on December 14, 2006. The company accordingly took the following actions:-

- i. *500,000 equity shares were allotted pursuant to the conversion of 500,000 Warrants by Appellant no. 3 on June 30, 2006. These shares were admitted for trading on the BSE on December 4, 2006 and on the NSE on January 17, 2007.*
- ii. *Further, 500,000 equity shares were allotted pursuant to the conversion of 500,000 Warrants by Appellants on March 12, 2007.*
- iii. *Another set of 800,000 equity shares were allotted pursuant to the conversion of 800,000 Warrants by Appellant No. 3.”*

9. It can be surmised from the pleadings that after the above said allotment of shares, the shareholding pattern of the promoter group and, particularly that of Appellants, underwent change during the relevant period as under :-

Sr. No.	Shareholder Name	Shareholding as of March 31, 2006		Pre-Allotment Shareholding (June 29, 2006)		Post-Allotment Shareholding (March 12, 2007)	
		No.	Percentage	No.	Percentage	No.	Percentage
1	Sunil Krishna Khaitan	9060	0.13	9060	0.12	59060	0.51
2	Shree Krishna Khaitan	66784	0.93	66784	0.87	116784	1.02
3	KLL	573415	7.96	573415	7.96	1973415	17.16
4	OMCL	7660	0.11	7660	0.10	307660	2.68
Total Promoter Group		3433268	47.68	2133468	29.63	3934639	34.21
Grand Total		7200000	100.00	7,200,000	100.00	11500000	100.00

10. The case of the Appellants is that as a promoter group they have been in control of the Company since its inception and there was no change in control despite conversion of the warrants, in question, into equity shares of the company. It is further submitted that as a promoter group, the Appellants have always acted in a bonafide manner by complying with the SAST Regulations, 1997 and other connected norms of law prescribed by the Respondent from time to time by duly informing them of all the transactions in question and that the Respondent raised no objection for years together and rather allowed things to settle down and gather dust. The process of acquisition of shares/voting rights was carried out in an extremely transparent and compliant manner. The shareholders duly approved allotment after convening the two EGMs as per procedure established by law. They were informed in the EGM notice itself of the details and purpose of the EGM, specifically identifying the four Appellants who were acting in concert. Thus, the allotment of warrants to the four Appellants was effectuated only after due approval of the shareholders was obtained in the open EGMs. Similarly, disclosures were made by the Appellants in compliance with the instant requirements as laid down by the SAST Regulations, 1997 and SEBI (Prohibition of Insider Trading) Regulations, 1992.

11. The Appellants further submit that the SCN itself and the consequent proceedings are not warranted in this matter since the Appellants kept the Respondent informed of the acquisition in question at all stages. The next contention of the Appellants is that the learned

WTM has not correctly applied the provisions of law. The Impugned Order, at the outset, mentions that it has been passed in accordance with the provisions of SAST Regulations, 2011 read with SAST Regulations, 1997. The point being emphasized by the Appellants is that the SAST Regulations, 2011 are not applicable to the present matter in as much as the alleged violations took place in the year 2006-07. The said regulations of 2011 do not have any retrospective application.

12. Next, it is also contended that regulations 10 and 11(1) of SAST Regulations, 1997 are mutually exclusive and either one of them, but not both, may triggered at a time. Therefore, the learned WTM erred in concluding that there was violation of both the regulations, i.e, 10 and 11(1) of the SAST Regulations, 1997. Further, no clarity has been given by the learned WTM as to in what cases regulations 10 and 11 may overlap.

13. It is also one of the contentions of the Appellants that regulation 10 of the SAST Regulations, 1997 is not applicable in this situation since KLL, who has been a part of the promoter group all along and admittedly acting in concert with the three other Appellants, has always held voting rights beyond 15% in the Company even before the acquisition on May 12, 2007 took place. In this context, the Appellants have emphasized and explained the meaning of various expressions defined in the SAST Regulations, 1997 such as ‘persons acting in concert’ (PAC) in regulation 2(1)(e), ‘acquirer’ in regulation 2(b) and ‘control’ in regulation 2(c). After analysing the aforesaid regulations of the SAST Regulations, 1997,

the Appellants have illustrated that the shareholding of KLL taken together with that of the other Appellants in the promoter group falls under regulation 11(1) of the SAST Regulations, 1997 and, therefore, there has been no violation of regulation 10 whatsoever.

14. Furthermore, it is also pertinently pointed out by the learned senior counsel for the Appellants that SAST Regulations, 2011 have clarified that persons acting in concert individually on crossing the threshold of 15% under regulation 10 would be required to make an open offer. There was no such obligation imposed prior to the amendment of 2011 of the SAST Regulations, 1997 coming into force. The submission is, therefore, that the learned WTM has tried to introduce the provisions of the amended regulations of SAST Regulations, 2011 from the back door, which is not permissible in law.

15. Turning to regulation 11 of the SAST Regulations, 1997, the submission advanced on behalf of the Appellants is that it applies to those acquirers who, either by themselves or together with other persons acting in concert, hold atleast 15% of the shares or voting rights in the company, which at the same time must be less than 55% . The provisions make it mandatory for an acquirer to make an open offer if he acquires more than 5% of the company's shares or voting rights in any financial year. Thus, the crux of the submissions is that the creeping limit of acquisition of shares in the target company by an acquirer, whether by himself or with persons acting in concert with him, is the 5% increase in the percentage shareholding/voting rights of the target company. For this

purpose, the financial year is to be reckoned as of the end of March 31. This view has also been substantiated by the Bhagwati Committee Report, 2002 on the Takeover Code. Therefore, there has been no violation of regulation 11 of SAST Regulations, 1997. This has been attempted to be demonstrated through a chart which is as under:-

Transa ction No.	Description of Transaction	No. of shares involved in the transaction	Promoter Group Shareholding		Total No. of Shares
			No. of Shares	Percentage	
1	Holding as of March 31, 2006	N.A.	3,433,268	47.68%	7,200,000
2	Shares sold by Promoter Group (in April and May, 2006)	1,300,000	2,133,468	29.63%*	7,200,000
3	Conversion of Warrants allotted to Promoter Group (June 30, 2006)	500,000	2,633,468	34.20%	7,700,000
4	Market Purchase by Promoter Group (from July to September, 2006)	1,171	2,634,639	34.22%	7,700,000
5	Allotment of preferential equity shares to strategic investors (December 14, 2006)	2,500,000	2,634,639	25.83%	10,200,000
6	Conversion of Warrants allotted to Promoter Group (March 12, 2007) (@INR 60) (separate return of allotment filed)	500,000	3,134,639	29.30%	10,700,000
7	Conversion of Warrants allotted to Promoter Group (March 12, 2007) (@INR 131) (separate return of allotment filed)	800,000	3,934,639	34.21%	11,500,000

*Benchmark holding for considering creeping acquisition.

16. One of the arguments advanced by the Appellants is regarding the unexplained and inordinate delay of more than five years in initiating the proceedings in question against the Appellants. Lastly, it is also submitted that no benefit has accrued to the Appellants by virtue of the allotment of the said shares to the Appellants due to conversion of warrants by the Company. This has resulted in no loss to investors and

no gain to the Appellants. Relevant provisions of SAST Regulations, 1997, SAST Regulations, 2011 and the SEBI Act, 1992 are reproduced hereinbelow for the sake of convenience:-

SAST Regulations, 1997:-

“Acquisition of [fifteen] per cent or more of the shares or voting rights of any company.

“10. No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise [fifteen] per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations.”

Consolidation of holdings.

“11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, [15 per cent or more but less than [fifty five per cent (55%)]] of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than [5] per cent of the voting rights, [in any financial year ending on 31st March] unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.

(2) No acquirer, who together with persons acting in concert with him holds, fifty-five per cent (55%) or more but less than seventy five per cent (75%) of the shares or voting rights in a target company, shall acquire either by himself or through persons acting in concert with him any additional shares or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations :

Provided that in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent (10%) of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement

of the said rule, this sub-regulation shall apply as if for the words and figures 'seventy-five per cent (75%)', the words and figures 'ninety per cent (90%)' were substituted.

(2A) Where an acquirer who (together with persons acting in concert with him) holds fifty-five per cent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target company, is desirous of consolidating his holding while ensuring that the public shareholding in the target company does not fall below the minimum level permitted by the Listing Agreement, he may do so only by making a public announcement permitted by the Listing Agreement, he may do so only by making a public announcement in accordance with these regulations :

Provided that in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent (10%) of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures 'seventy-five per cent (75%)', the words and figures 'ninety per cent (90%)' were substituted.

(3) Notwithstanding anything contained in regulations 10, 11 and 12, in case of disinvestment of a Public Sector Undertaking, an acquirer who together with persons acting in concert with him, has made a public announcement, shall not be required to make another public announcement at the subsequent stage of further acquisition of shares or voting rights or control of the Public Sector Undertaking provided:-

- (i) both the acquirer and the seller are the same at all the stages of acquisition, and*
- (ii) disclosures regarding all the stages of acquisition, if any, are made in the letter of offer issued in terms of regulation 18 and in the first public announcement.*

Explanation,- For the purposes of regulation 10 and regulation 11, acquisition shall mean and include,-

- (a) direct acquisition in a listed company to which the regulations apply;*

- (b) *indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad.*”

“2(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”

“2(c) “control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

Explanation.- (i) Where there are two or more persons in control over the target company, the cesser of any one of such persons from such control shall not be deemed to be a change in control of management nor shall any change in the nature and quantum of control amongst them constitute change in control of management:

Provided that the transfer from joint control to sole control is effected in accordance with clause (e) of sub-regulation (1) of regulation 3.

(ii) If consequent upon change in control of the target company in accordance with regulation 3, the control acquired is equal to or less than the control exercised by person(s) prior to such acquisition of control, such control shall not be deemed to be a change in control”

“2(e) “person acting in concert” comprises, -

- (1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company,*

- (2) without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established :
- (i) a company, its holding company, or subsidiary or such company or company under the same management either individually or together with each other;
 - (ii) a company with any of its directors, or any person entrusted with the management of the funds of the company;
 - (iii) directors of companies referred to in sub-clause (i) of clause (2) and their associates;
 - (iv) mutual fund with sponsor or trustee or asset management company;
 - (v) foreign institutional investors with sub-account(s);
 - (vi) merchant bankers with their client(s) as acquirer;
 - (vii) portfolio managers with their client(s) as acquirer;
 - (viii) venture capital funds with sponsors;
 - (ix) banks with financial advisers, stock brokers of the acquirer, or any company which is a holding company, subsidiary or relative of the acquirer :
Provided that sub-clause (ix) shall not apply to a bank whose sole relationship with the acquirer or with any company, which is a holding company or a subsidiary of the acquirer or with a relative of the acquirer, is by way of providing normal commercial banking services or such activities in connection with the offer such a confirming availability of funds, handling acceptances and other registration work;
 - (x) any investment company with any person who has an interest as director, fund manager, trustee, or as a shareholder having not less than 2 per cent of the paid-up capital of that

company or with any other investment company in which such person or his associate holds not less than w per cent of the paid-up capital of the latter company.

Note : For the purposes of this clause “associate” means,-

- (a) any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and*
- (b) family trusts and Hindu undivided families”*

17. Regulations 44 and 45 of the SAST Regulations, 1997 are also reproduced hereunder:-

Directions by the Board.

“44. Without prejudice to its right to initiate action under Chapter VIA and section 24 of the Act, the Board may, in the interest of securities market or for protection of interest of investors, issue such directions as it deems fit including :-

- (a) directing appointment of a merchant banker for the purpose of causing disinvestment of shares acquired in breach of regulation 10, 11 or 12 either through public auction or market mechanism, in its entirety or in small lots or through offer for sale;*
- (b) directing transfer of any proceeds or securities to the Investors Protection Fund of a recognized stock exchange;*
- (c) directing the target company or depository to cancel the share where an acquisition of shares pursuant to an allotment is in breach of regulation 10, 11 or 12;*
- (d) directing the target company or the depository not to give effect to transfer or further freeze the transfer of any such shares and not to permit the acquirer or any nominee or any proxy of the acquirer to exercise any voting or other rights attached to such shares acquired in violation of regulation 10, 11 and 12;*

- (e) *debarring any person concerned from accessing the capital market or dealing in securities for such period as may be determined by the Board;*
- (f) *directing the person concerned to make public offer to the shareholders of the target company to acquire such number of shares at such offer price as determined by the Board;*
- (g) *directing disinvestment of such shares as are in excess of the percentage of the shareholding or voting rights specified for disclosure requirement under regulation 6, 7 or 8;*
- (h) *directing the person concerned not to dispose of assets of the target company contrary to the undertaking given in the letter of offer;*
- (i) *directing the person concerned, who has failed to make a public offer or delayed the making of a public offer in terms of these regulations, to pay to the shareholders, whose shares have been accepted in the public offer made after the delay, the consideration amount alongwith interest at the rate not less than the applicable rate of interest payable by banks on fixed deposits.”*

Penalties for non-compliance.

“45. (1) Any person violating any provisions of the regulations shall be liable for action in terms of the regulations and the Act.

(2) If the acquirer or any person acting in concert with him, fails to carry out the obligations under the regulations, the entire or a part of the sum in the escrow account shall be liable to be forfeited and the acquirer or such a person shall also be liable for action in terms of the regulations and the Act.

(1) The board of directors of the target company failing to carry out the obligations under the regulations shall be liable for action in terms of the regulations and the Act.

(2) The Board may, for failure to carry out the requirements of the regulations by an intermediary,

initiate action for suspension or cancellation of registration of an intermediary holding a certificate of registration under section 12 of the Act :

Provided that no such certificate of registration shall be suspended or cancelled unless the procedure specified in the regulations applicable to such intermediary is complied with.

(3) For any mis-statement to the shareholders or for concealment of material information required to be disclosed to the shareholder, the acquirers or the directors where the acquirer is a body corporate, the directors of the target company, the merchant banker to the public offer and the merchant banker engaged by the target company for independent advice would be liable for action in terms of the regulations and the Act.

(4) The penalties referred to in sub-regulations (1) to (5) may include :-

- (a) criminal prosecution under section 24 of the Act;*
- (b) monetary penalties under section 15H of the Act;*
- (c) directions under the provisions of section 11B of the Act;*
- (d) directions under section 11(4) of the Act;*
- (e) cease and desist order in proceedings under section 11D of the Act;*
- (f) adjudication proceedings under section 15HB of the Act.”*

18. Other provisions of the SEBI Act, 1992 relied upon in the

Impugned Order are as under:-

“11. Functions of Board. – (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.”

Section 11-B deals with power to issue directions.

“11-B. Power to issue directions. – Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary –

- (i) in the interest of investors, or orderly development of securities market; or
- (ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors of securities market; or
- (iii) to secure the proper management of any such intermediary or person, it may issue such directions –
 - (a) to any person or class of persons referred to in section 12, or associated with the securities market; or
 - (b) to any company in respect of matter specified in section 11-A,

As may be appropriate in the interests of investors in securities and the securities market.”

However, Section 11(2)(h) provides as under :-

“(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for –

- (h)Regulating substantial acquisition of shares and take-over of companies;”*

19. At this stage, it is necessary to revert to the provisions of the amended SAST Regulations, 2011 relied upon by the learned WTM in the Impugned Order are as under:-

SAST Regulations, 2011:-

“Section 3 which deals with substantial acquisition or voting rights reads as under:-

SUBSTANTIAL ACQUISITION OF SHARES, VOTING RIGHTS OR CONTROL

Substantial acquisition of shares or voting rights.

Penalties for non-compliance.

“3. (1) No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

(2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Explanation. – For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation, -

(a) gross acquisition alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition

(3) For the purposes of sub-regulation (1) and sub-regulation (2), acquisition of shares by any person, such that the individual shareholding of such person acquiring shares exceeds the stipulated thresholds, shall also be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of whether there is a change in the aggregate shareholding with persons acting in concert.”

“Power to issue directions.

32. (1) Without prejudice to its powers under Chapter VIA and section 24 of the Act, the Board may, in the interest of investors in securities and the securities market, issue such directions as it deems fit under section 11 or section 11B or section 11D of the Act, including, --

- (a) directing divestment of shares acquired in violation of these regulations, whether through public auction or in the open market, or through an offer for sale under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, and directing the appointment of a merchant banker for such divestiture;*
- (b) directing transfer of the shares, or any proceeds of a directed sale of shares acquired in violation of these regulations to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009;*
- (c) directing the target company or any depository not to give effect to any transfer of shares acquired in violation of these regulations;*
- (d) directing the acquirer or any person acting in concert, or any nominee or proxy not to exercise any voting or other rights attached to shares acquired in violation of these regulations;*
- (e) debarring any person who has violated these regulations from accessing the capital market or dealing in securities for such period as may be directed,*

having regard to the nature and gravity of the violation;

- (f) directing the acquirer to make an open offer for acquiring shares of the target company at such offer price as determined by the Board in accordance with these regulations;*
- (g) directing the acquirer not to cause, and the target company not to effect, any disposal of assets of the target company or any of its subsidiaries contrary to the contents of the letter of offer, where the conditions set out in the proviso to subregulation (2) of regulation 25 are not met;*
- (h) directing the acquirer who has failed to make an open offer or has delayed the making of an open offer, to make the open offer and to pay interest at such rate as considered appropriate by the Board along with the offer price;*
- (i) directing the acquirer who has failed to make payment of the open offer consideration to shareholders, not to make any open offer or enter into any transaction that would attract the obligation to make an open offer in respect of shares of any target company for such period as the Board may deem fit;*
- (j) directing the acquirer who has made an open offer but has delayed making payment of the open offer consideration to shareholders, to pay interest at such rate as considered appropriate by the Board for the delayed period;*
- (k) directing any person to cease and desist from exercising control acquired over any target company without complying with the requirements under these regulations;*
- (l) directing divestiture of such number of shares as would result in the shareholding of an acquirer and persons acting in concert with him being limited to the maximum permissible non-public shareholding or below.*
- (2) In any proceedings initiated by the Board, the Board shall comply with principles of natural justice before issuing directions to any person.*

(3)The Board may, for failure to carry out the requirements of these regulations by any intermediary registered with the Board, initiate appropriate proceedings in accordance with applicable regulations.”

20. We now come to the case of the Respondent which is twofold:-

- i. Since, as a result of the acquisition, the individual shareholding of KLL increased from 10.52% to 17.16%, it was required to make a public announcement in accordance with the provisions of regulation 10 read with regulation 14(1) of the SAST Regulations, 1997 within 4 working days from March 12, 2007. Thus, it is alleged that KLL, individually, failed to make the said public announcement within 4 working days from March 12, 2007 in violation of regulation 10 of the SAST Regulations, 1997.
- ii. Since, as a result of the acquisition, the collective shareholding of the promoter group (including the acquirers) increased from 25.83% to 34.21%, the acquirers, collectively, were required to make a public announcement in accordance with the provisions of regulation 11(1) read with regulation 14(1) of SAST Regulations, 1997 within 4 working days from March 12, 2007. Thus, it is alleged that the acquirers collectively failed to do so in violation of regulation 11(1) of the SAST Regulations, 1997.

21. It is argued by the Respondent that on March 12, 2007 there was an increase in the voting rights of KLL, individually, from 10.52% as on June 29, 2006 to 17.16% owing to the conversion of 9,00,000 warrants into an equal number of shares on March 12, 2007 itself, even though KLL is part of the promoter group and admittedly acting in concert with the other Appellants as one entity. The language of regulation 10 of the SAST Regulations is clear and unambiguous when it speaks of the responsibility of an acquirer of shares of any particular company to compulsorily make a public announcement as soon as the shareholding, individually or collectively, crosses the prescribed threshold of 15%. Therefore, on the acquisition of 9,00,000 shares by KLL individually on March 12, 2007, it incurred the obligation to make a public announcement under regulation 10. The WTM has taken recourse to the recommendations of the Justice Bhagwati Committee Report of 1997 in which the objective behind the framing of the SAST Regulations has been clearly spelt out, viz., the fair and equal treatment of all shareholders during acquisitions and takeovers while ensuring that the process and the procedure followed during such acquisitions and takeovers is transparent and does not lead to the defrauding of any unsuspecting shareholders.

22. With respect to the Appellant's argument that regulations 10, 11 and 12 of the SAST Regulations are mutually exclusive, the Respondent submits that they have been drafted in a way which makes them mutually exclusive. Nonetheless, in certain cases they might overlap triggering two

or more of these regulations. The Respondent has also referred to the decision of this Tribunal in the matter of Hanumesh Realtors Limited passed in 2012 in which it was held that if an acquirer exercises more than 5% of the voting rights in a financial year then, as per regulation 11(1) of the SAST Regulations, he is obliged to make a public announcement. With respect to the violation of regulation 11(1) of the SAST Regulations, 1997, it is further submitted by the Respondent that the following 3 ingredients need to be satisfied:

- (i) *“The acquirer together with persons acting in concert holds shares between 15% to 55% in the target company,*
- (ii) *The acquirer acquires additional shares or voting rights by himself or through or with persons acting in concert,*
- (iii) *The additional acquisition entitles the acquirer to exercise more than 5% of the voting rights in any financial year ending on 31st March.”*

It is stated by the Respondent that the first two ingredients required to constitute a violation under the said regulation are admittedly satisfied in the instant case. However, regarding the third ingredient the Appellants have contended that regulation 11(1) provides that any incremental increase in the acquirer's percentage shareholding has to be reckoned as of the end of the financial year ending on March 31. With respect to this contention of the Appellants the Respondent states that prior to the amendment of regulation 11(1) as drafted on the basis of the recommendations of the Justice Bhagwati Committee Report of 1997, creeping acquisition in any period of 12 months was permitted without incurring the obligation of making a public offer. The reference period

provided therein being vague, SEBI brought about the amendment of regulations on the basis of the following recommendation of the Justice P.N. Bhagwati Committee Report of 2002: “*The creeping acquisition limit may be reckoned with respect to financial year ending March 31 (i.e., April 1 to March 31).*”

23. It is submitted by the Respondent that in order to be eligible to derive the benefit under regulation 11(1) the acquisition should not entitle the acquirer to hold more than 5% of the voting rights in the target company in any financial year beginning on April 1 and ending on March 31. It is not the object nor is it the intention of the regulation to enable an acquirer to acquire a certain percentage of the shareholding in any financial year in the first place and then decrease it to 5% by disposing of some shares by the end of that financial year. This is evident from the fact that the regulation has put a limit on the percentage of creeping acquisition without allowing its netting and disinvestment for the purpose of identifying the percentage of increase. The Impugned Order also states that if in a particular financial year an acquisition of shares takes place and the threshold of 5% is breached by such acquisition, the obligation to make a public announcement accrues at that very moment. Regulation 11(1) does not allow the acquirer the liberty of waiting till the end of the financial year once the threshold is crossed.

24. The Respondent next deals with the contention of the Appellants that the pre-allotment benchmark shareholding for the purposes of calculating the percentage of creeping acquisition should be 29.63%, i.e.,

their shareholding on June 30, 2006 which is the day of the first acquisition when warrants were converted into 5,00,000 shares in the financial year ending on March 31, 2007. The learned WTM has interpreted regulation 11(1) and the word 'acquirer' as defined in regulation 2(1)(b) of the SAST Regulations, 1997 to mean that the person acquiring shares becomes liable to make a public announcement on the date of agreement to acquire shares so as to make the shareholding calculable as per the shareholding of the acquirer immediately prior to the acquisition. As such, in order to determine whether or not the Appellants breached the threshold of 5%, the shareholding of the Appellants as on the date of acquisition of additional shares should be taken into account.

25. It is also stated by the Respondent that the 5% creeping acquisition benchmark should be determined irrespective of the sale of 1,30,000 shares by the Appellants in April-May 2006 along with allotment of 25,00,000 shares to strategic investors and hence, should be calculated on the basis of the gross acquisition as opposed to it being calculated post netting the dilution and/or disinvestment. On the basis of this interpretation the Impugned Order has come to the conclusion that the acquisition of shares of the Company by the acquirers on March 12, 2007 crossed the threshold of 5% thereby triggering the obligation of the Appellants to make the public announcement.

26. After hearing both the learned senior counsel for the parties at length and perusing the documents and various Regulations of the SAST

Regulations of 1997 and those of 2011, including certain provisions of the SEBI Act, 1992, mainly two issues arise in the matter.

Firstly, whether the four Appellants should be treated as a single unit/group for the purpose of attracting the provisions of regulation 10 of the SAST Regulations, 1997 or should they be individually seen in the matter of acquisition of additional shares and their respective shareholdings for invoking regulation 10 for determining the crossing of the threshold laid down therein.

Secondly, is there any violation of the norm of creeping acquisition of 5% additional voting rights prescribed in Regulation 11(1) of the SAST Regulation, 1997 and if so, what penalty should be imposed on the Appellants.

27. At the outset, it may be noted that the four Appellants in this appeal are part of the promoter group of the Company. It is not disputed that they are in control of the affairs of the Company since its inception. They acquired preferential shares during the relevant period from April 1, 2006 to March 31, 2007. 10 lac warrants were allotted to the Appellants pursuant to the approval granted by the first EGM held on March 23, 2006. These warrants had a face value of Rs.10 each and were allotted at a premium of Rs. 50 on preferential basis to the four Appellants to be converted into equity shares within 18 months from the date of allotment.

28. Similarly, pursuant to the approval granted by the second EGM held on November 29, 2006 the shareholders of the company approved issuance of 25 lac equity shares with a face value of Rs.10 each at a

premium of Rs.125 on preferential basis to strategic investors. The promoter group did not participate in this allotment.

29. Next, 10 lac warrants with a face value of Rs.10 each at a premium of Rs.121 each, on a preferential basis, were allotted to KLL. Admittedly, KLL has been acting in concert with the other three Appellants all along for the purpose of acquisition of the preferential shares in question. Now, the case of the Respondent is that on the above said allotment of warrants and their conversion into equity shares, the individual shareholding of KLL went up from 10.52 % to 17.16 % on March 12, 2007. Therefore, in terms of Regulation 10 of the SAST Regulations 1997, KLL, individually, should have made a public announcement of an open offer with respect to the shares of the Company. Thus, according to the Respondent a breach has been committed by KLL in respect of the provisions of regulation 10.

30. A perusal of regulation 10 reveals that it deals with the subject “Acquisition of 15% or more of the shares/voting rights of any company”. It provides that no acquirer shall acquire shares/voting rights which taken together with shares/voting rights earlier held by him or by persons acting in concert with him which may entitle such acquirers to exercise 15% or more of the voting rights in a company. And if all these requirements are met, a public announcement to acquire shares of such a company is a must. The point to be noted here is that KLL has not acquired the shares in question individually. Admittedly, KLL has acted in concert with the other three Appellants for the said purpose.

Therefore, for determining the crossing of the threshold limit of 15% prescribed by Regulation 10, it is the collective holding of the entire unit which would be the benchmark for identifying the increase in shareholding and not KLL's shareholding as an individual. Once an individual becomes part of a group acting in concert with the intention of acquiring shares, it loses its identity as an individual and takes on the identity of the group as a whole. The individual is no longer regarded as a separate entity independent of the group, but a part of the entire unit as one cohesive structure. This is the logical inference since all the Appellants acting in concert with each other agreed to pull their holdings together in respect of the Company in a common basket and, hence, all the four Appellants in our opinion have acted as a unit/group and not in their individual capacity, at least for the limited purpose of the acquisition of shares/voting rights in question. It is not denied by the Respondent that the shareholdings of all the four Appellants taken together have all along been more than 15%. Therefore, it is our considered opinion that the Appellants have not violated the provision of Regulation 10 of the SAST Regulations, 1997.

31. In this connection, it may also be pertinently noted that the SAST Regulations, 1997 allow certain persons/ entities to act in concert for the purpose of acquisition. Even the definition of "persons acting in concert" as provided in Regulation 2 (e)(1) clearly provides that this expression includes persons who agree to cooperate with each other to acquire shares/voting rights in a target company or control over the target

company pursuant to a formal or informal understanding between them, directly or indirectly. Thus, the definition is wide enough and gives ample scope to persons to act in concert as one unit for the purpose of acquisition of shares/voting rights. Further, Regulation 2(e)(2) also enumerates various persons who could act in concert and they, inter alia, include a company, its holding company, a subsidiary, directors, mutual fund with sponsor or trustee, foreign institutional investors, merchant bankers, so on and so forth. In this context, if we look at the new SAST Regulations, 2011, we note that Regulation 3(3) specifically provides that acquisition of shares by any person within the meaning of sub-regulations 3(1) and 3(2) would be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of its aggregate shareholding with persons acting in concert if the shareholding of such individual person exceeds the threshold limit prescribed by regulation 10. It is pertinent to note that such a specific and unambiguous provision making an individual liable to make a public offer in case the individual shareholding increases during the course of the acquisition even while acting in concert with other persons is conspicuously missing in the SAST Regulations, 1997. KLL was, therefore, not required to make a public offer and the finding in the Impugned Order qua appellant no. 3, i.e., KLL is hereby set aside. At any rate, since the amendment of the Takeover Code and the inclusion of regulation 3(3) in the SAST Regulations, 2011 the discussion regarding the applicability of regulation 10 of the SAST Regulations, 1997 has been rendered academic. Having said that, in the facts and circumstances of the present case, KLL cannot

be called upon to make an open offer by applying regulation 3(3) of the new Takeover Code retrospectively.

32. As regards the finding of the Respondent against the Appellants in respect of the violation of Regulation 11(1) of the SAST Regulations 1997, which deals with the concept of creeping acquisition it may be noted that an acquirer together with persons acting in concert with him is entitled to acquire shares in the range of 15% to 55% of the shares/voting rights in a Company. Thus, the consolidation of holdings is permitted by law itself subject to certain limitations, one of them being that there is a clear bar against acquisition of more than 5% in one year beginning on April 1 and ending on March 31. Regulation 11(1) clearly provides that no acquirer shall, with persons acting in concert, acquire either by himself or through persons acting in concert with him, additional shares/voting rights entitling him or them to exercise more than 5% of the voting rights in any financial year without making a public announcement to acquire the shares in accordance with law. In the case in hand, the Appellants had a shareholding of 47.68% as a group on 31 March, 2006 and around 13 lac shares were sold by the promoter group in April/May 2006, thereby bringing the percentage down to 29.63%. On June 30, 2006 there was a conversion of warrants allotted to the Appellants to the tune of 5 lac shares. By virtue of this acquisition, the shareholding went up to 34.20%. The limit of 5% was, therefore, not crossed. There was a further marginal increase in shareholding between July to September, 2006 in the form of the purchase of around 1,171

shares by the promoter group from the market.

33. Again on December 14, 2006, 25 lac preferential equity shares were allotted to strategic investors. This led to a corresponding decrease in the shareholding of the promoter group taking it to 25.83%. Here too regulation 11 did not come into play. Further, 5 lac warrants were converted into shares by the Appellants on March 12, 2007 making the shareholding of the promoter group 29.30%. However, even this did not attract the provisions of Regulation 11(1) in as much as the increase was within the prescribed limit of 5%. Finally, the actual issue which led to the alleged default arose when on the same date, i.e., March 12, 2007 one more conversion of warrants to the tune of 8 lacs took place, raising the shareholding of the promoter group to 34.21%. Thus, there was an increase of 8.38% in the shareholding of the promoter group on March 12, 2007 albeit in two tranches, emanating from two separate and distinct transactions. This is a violation of the provisions of Regulation 11(1) of SAST Regulations, 1997 and we find no fault with the Impugned Order in this regard. However, the point to be analysed is whether or not the Appellants ought to be called upon to make a Public Offer at this belated stage or whether a monetary penalty should be imposed to meet the ends of justice by modifying the Impugned Order.

34. In this connection, the Appellants have relied upon the case of Ushdev Trade Ltd. vs. SEBI in which one promoter group company transferred its entire shareholding of 18.74% in the target company to another promoter group company in an off-market transaction. This

transfer of shares did not lead to any change in control over the target company. SEBI, after investigating the transaction, held the Appellant guilty of violating Regulation 10 of the SAST Regulation, 1997, i.e., acquiring more than 15% stake in the target company without making an open offer. The Appellant submitted that the purchase of shares was an inter-se transfer between two promoter group companies and the open offer was not made owing to a genuine belief that the obligation to do so had not accrued. This Tribunal held that the object of Regulation 10 is to give the other shareholders an opportunity to exit in case of a change in control. In this case there was no substantial change in the shareholding pattern which would have been the issue had a non-promoter acquired a sizeable chunk of the shares of the target company. This Tribunal, consequently, while holding that Regulation 10 had been violated, albeit in a technical sense, reduced the penalty imposed by the adjudicating officer to Rs.5 lac.

35. In the instant case too, as a matter of undisputed fact, the promoter group has been in control of the Company since its very establishment in the year 1975. The Appellants seem to have been aware of the implication of the limit of creeping acquisition of 5% and, hence, did not breach regulation 11 by letting some warrants lapse and not converting them into shares. In fact, the Tribunal notes that during the relevant period there were about 7 acquisitions but at no point of time did the Appellants violate the provisions of any law but for the two conversions on March 12, 2007. We also note from the records that the Appellants have invariably acted in a bonafide manner by keeping the concerned

stock exchanges and the Respondent informed regarding the true happenings with respect to the acquisitions of shares and the corresponding changes in the shareholding pattern. In this connection, the Tribunal has perused various corporate announcements made by the Company to the stock exchanges informing them about the allotment of equity shares as well as shareholding pattern as of March 2006, June 2006, September 2006 and December 2006. Letters dated April 10, 2006, October 13, 2006 and April 11, 2007 etc. are on record and have been perused by the Tribunal.

36. Similarly, it is noted that the two conversions of warrants on March 12, 2007, which were different transactions, in as much as the shares in the first tranche pertaining to 5 lac shares allotted to the promoter group were allotted pursuant to conversion of warrants at the rate of Rs.60 per share, and the shares in the second transaction consisting of 8 lac warrants were converted at the rate of Rs.131 per share. Although, the two spells were different, they were executed on the same date and the creeping acquisition limit of 5% was clearly crossed in respect of the acquisition by the promoter group. Therefore, technically there is violation of Regulation 11(1) of the Takeover Code of 1997. For this violation, we are of the opinion that a suitable monetary penalty, must be imposed instead of calling upon the Appellants to make a combined public announcement to acquire shares of the Company at this belated stage. The requirement of making a public announcement would be totally superfluous in the facts and circumstances of the case and

would not beget any good. The objective of the preferential allotment of shares in question was only to address the working capital requirements of the Company for its smooth day to day functioning. Therefore, a stable, low-cost funding-source, such as preferential allotment, was undertaken in the larger interests of the Company and, in effect, its shareholders. In this connection, it is pertinent to note that the allotment of preferential shares in question was made after seeking approval of the shareholders of the Company in two duly convened EGM's held on March 23, 2006 and November 29, 2006.

37. Lastly, the acquisitions/ incidents pertain to the year 2006-2007. The show cause notice was issued by the Respondent on March 26, 2012. After holding proceedings against the Appellants, the Impugned Order came to be passed only on December 31, 2012. We note that there is an inordinate delay of about 5 years even in issuing the show cause notice and no explanation has been offered for the same. The Respondent was kept duly informed by the Appellants of all the transactions/acquisitions in the year 2006-2007 along with information to other concerned authorities like various stock exchanges but no action was taken for the alleged violation for years together. Also, the point to be borne in mind while modifying the penalty imposed upon the Appellants is that the securities market is a volatile and pulsating structure wherein events unfold at a staggeringly fast pace. We feel that to compel the Appellants to make a combined public announcement to acquire shares today would be iniquitous and would lead to more harm than good for a mere

technical fault, which in our opinion is remissible. Indeed, this Tribunal has taken a view consistently that in such cases of technical violation a monetary penalty could be imposed to serve the ends of justice keeping in view the factuality of a given situation.

38. Therefore, in the facts and circumstances of the case, a monetary penalty of Rs.25 lac (Rs. Twenty five lac) is imposed on the Appellants for the breach of Regulation 11(1) of 1997 Takeover Code on March 12, 2007, and with this modification the appeal stands partly allowed. The Appellants shall deposit the said amount of Rs.25 lac with the Respondent within six weeks from the date of this order.

Sd/-
Jog Singh
Member &
Presiding Officer (*Offg.*)

19.06.2013
Prepared & Compared By: Pk