

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 07.03.2016

Date of Decision : 13.04.2016

Appeal No. 55 of 2015

1. Mr. Victor Fernandes
B-604 Gill-Haze Apts,
Lourdes Colony Orlem,
Malad West,
Mumbai-400 064

2. Ms. Sangeeta Fernandes
B-604 Gill-Haze Apts,
Lourdes Colony Orlem,
Malad West,
Mumbai-400 064

...Appellants

Versus

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

2. Independent Media Trust
Through its trustee
Sanchar Content Private Limited's Director,
Mr. L.V. Merchant
3rd Floor, Maker Chambers IV,
222 Nariman Point,
Mumbai- 400 021

3. Reliance Industrial Investments and Holdings Limited
Through its Director,
Mr. Hital R. Meswani
3rd Floor, Maker Chambers IV,
222 Nariman Point,
Mumbai- 400 021

4. Reliance Industries Limited
Through its Chairman and Managing Director,
Mr. Mukesh D. Ambani
3rd Floor, Maker Chambers IV,
222 Nariman Point,
Mumbai- 400 021

5. JM Financial Institutional Securities Limited

Through its Director,
Mr. Nimesh N. Kampani
7th Floor, Cnergy,
Appasaheb Marathe Marg,
Prabhadevi,
Mumbai- 400 025

6. Network 18 Media & Investments Limited

Through its Director,
Mr. Raghav Bahl
503, 504 and 507, 5th Floor,
Mercantile House, 15, Kasturba Gandhi Marg,
New Delhi- 110 001

...Respondents

Mr. Victor Fernandes, Appellant in Person for Appellants.

Mr. Fredun Devitre, Senior Advocate with Mr. Mihir Mody,
Mr. Harekrishna Ashar and Mr. Saurabh Bachhawat, Advocates i/b K.
Ashar & Co. for the Respondent No. 1

Mr. Rafique Dada, Senior Advocate with Mr. Rohan Rajadhyaksha,
Advocate i/b AZB & Partners for Respondent Nos. 2.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Vaidhyanathan Iyer,
Mr. Shwetank Ginodia and Mr. Dhirajkumar Totala, Advocates, i/b AZB
Partners for Respondent No. 5.

Mr. Rohan Rajadhyaksha, Advocate with Ms. Gulnar Mistry, Advocate
for Respondent No. 3, 4 & 6.

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

Per: Justice J.P. Devadhar

1. Although appellants have raised several questions in this appeal, principle question to be considered herein is, whether the Securities and Exchange Board of India (“SEBI” for short) by its communication dated 17.11.2014 was justified in permitting respondent no. 2 to 4 (‘acquirers’ for convenience) to acquire shares of respondent no. 6 i.e. Network 18 Media & Investments Limited (‘target company’ for convenience) at an

open offer price of ₹ 41.04 per share as against the open offer price of ₹ 5,68,430.32 per share claimed by the appellants. It is not in dispute that in implementation of SEBI communication dated 17.11.2014 the acquirers have acquired the shares of the target company at an open offer price of ₹ 41.04 per share from the public investors of the target company and the entire open offer process has been completed on 26.12.2014. It is also not in dispute that instead of participating in the open offer by offering to sell the shares of the target company to the acquirers without prejudice, the appellants have chosen to file the present appeal inter alia with a view to challenge the communication of SEBI dated 17.11.2014.

2. Under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“Takeover Regulations, 2011” for short) when any indirect acquisition of shares or voting rights in, or control over the target company triggers open offer obligation, then the open offer price shall be the highest negotiated price per share of the company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer. In the present case, appellants submit that the highest negotiated price per share of the target company as per the Share Purchase Agreement (“SPA” for short) dated 29.05.2014 which triggered the obligation to make public announcement of an open offer comes to ₹ 5,68,430.32 per share of the target company and therefore this Tribunal must set aside the communication of SEBI dated 17.11.2014 which permitted the acquirers to acquire the shares of the target company in open offer at ₹ 41.04 per share. Appellants further seek an order directing the acquirers to pay to

the appellants ₹ 568,43,03,200/- jointly and severally, for the 10,000 shares of the target company which the appellants want to tender to the acquirers at a price of ₹ 5,68,430.32 per share which according to the appellants is the highest price paid by the acquirers for acquisition of the shares of the target company under the SPA dated 29.05.2014.

3. Facts relevant for the present appeal are as follows:-

- a) Appellants are shareholders of the target company.
The shares of the target company are listed on the Stock Exchanges.
- b) Respondent no. 5, a Merchant Banker, was the Lead Manager to the public offer made by the acquirers (respondent no. 2 to 4) for the purpose of acquiring the shares of the target company in the open offer.
- c) Mr. Raghav Bahl and his wife Ritu Kapur ('Bahl group' for convenience) were the promoters of the following six companies viz;-
 - i) Adventure Marketing Pvt. Ltd.
 - ii) Colorful Media Pvt. Ltd.
 - iii) Watermark Infratech Pvt. Ltd.
 - iv) RRB Mediasoft Pvt. Ltd.
 - v) RB Mediasoft Pvt. Ltd.
 - vi) RB Media Holding Pvt. Ltd.

Each of these six companies had issued 10,000 equity shares and the entire 60,000 shares issued by the six companies were held the Bahl Group. These six companies 100% owned and controlled by the Bahl group are hereinafter referred to as 'six holding companies'.

- d) The six holding companies along with another company promoted by Bahl Group held 48.30% shares of the target company. As a result of holding 100% shares of the six holding companies, the Bahl Group apart from having 100% direct control over the six holding companies, had indirect control over 48.30% shares of the target company (through the six holding companies).
- e) Respondent no. 2 is a Trust set up under a Trust Deed dated 22.11.2011. Mr. L.V. Merchant was the 'settlor' of the Trust with Nirlab Consultancy Pvt. Ltd. as the first trustee of the Trust. The name of Nirlab Consultancy Pvt. Ltd. was later on changed as Digital Content Pvt. Ltd. ('DCPL' for short). 100% shares of DCPL were held by the Bahl Group. Under the Trust Deed respondent no. 4 is the sole beneficiary of the Trust and respondent no. 3 is the protector of respondent no. 2 Trust.

- f) Respondent no. 2 Trust held 1.85% shares of the target company. As per the Trust Deed, the trustee (DCPL) had the power to vote on behalf of respondent no. 2 Trust. Thus, the aggregate indirect control of Bahl Group over the target company was 50.15% (i.e. 48.30% indirect control through six holding companies + 1.85% indirect control as a trustee of respondent no. 2 Trust). It is not in dispute that in view of certain employee welfare trusts which also had shares of the target company, the aggregate control of the Bahl Group in the target company exceeded 51% as stipulated under Guidelines framed by the Ministry of Information and Broadcasting. The target company in turn held 51.23% shares of TV18 Broadcast Ltd., (“TV 18” for short). Thus, TV 18 was a subsidiary of the target company.
- g) On 27.02.2012 an Investment Agreement was entered into by and between the aforesaid six holding companies, respondent no. 2 and the Bahl Group. As per the said agreement, the respondent no. 2 Trust was to invest amounts in the six holding companies by subscribing to the Zero Coupon, Optionally and fully Convertible Debentures (“ZOCD” for convenience). The investment agreement dated 27.02.2012 is hereinafter referred to as the ‘ZOCD agreement’.

Maturity period for each ZOCD under the ZOCD agreement was 10 years from the completion date i.e. the date on which allotment of the ZOCDs were completed.

- h) As per the ZOCD agreement, the amounts invested by respondent no. 2 in the six holding companies by subscribing to the ZOCD's were to be utilized for acquiring the shares of the target company and TV 18 under the rights issue and the respondent no. 2 had the option either to seek refund of the amount invested without interest or seek conversion of ZOCD's into equity shares of the six holding companies to the extent specified under the ZOCD agreement. The option for conversion of ZOCD's into equity shares could be exercised by the respondent no. 2 at any time during the period from the date of issuance of ZOCDs till maturity of the ZOCDs issued under the ZOCD agreement.
- i) In implementation of the ZOCD agreement, the respondent no. 2 invested ₹ 2211.80 crore in the six holding companies by subscribing to 22,11,79,894 ZOCD's. It is not in dispute that the respondent no. 2 could opt for conversion of ZOCD's at any time and on such option being exercised, the six holding

companies were required to issue 221,17,98,940 equity shares in favour of respondent no. 2 and in that event, the total shares issued by six holding companies would be 221,18,58,940 shares out of which 221,17,98,940 shares (99.997%) would be with respondent no. 2 and the balance 60,000 shares (0.003%) would be with the Bahl Group. In other words, on respondent no. 2 opting for conversion of ZOCDs issued under the ZOCD agreement, the 100% shareholding of Bahl Group in six holding companies was to get automatically reduced to 0.003% (approx.) It is a matter of record that at no point of time the respondent no. 2 has sought conversion of ZOCD's and hence, the question of the six holding companies issuing equity shares in favour of respondent no. 2 did not arise at all. Consequently, the Bahl Group holding 60,000 shares of the six holding companies continued to be 100% shareholders of the six holding companies with 100% voting rights and the respondent no. 2 continued to be holder of ZOCDs issued under the ZOCD agreement.

- j) It is not in dispute that the six holding companies have utilized the amount of ₹ 2211.80 crore received from respondent no. 2 for subscribing to the shares of the target company and TV 18 under the rights issue. As

a result of acquiring the shares of the target company under the rights issue, the shareholding of the companies promoted by the Bahl Group in the target company increased from 48.30% shares to 71.25% shares i.e. total 74,61,88,987 shares.

- k) By resolutions dated 12.11.2012 and 20.05.2014, Mr. Atul S. Dayal, Mr. P.M.S. Prasad and Sanchar Content Pvt. Ltd. ('SCPL' for short) were inducted as additional trustees of respondent no. 2 Trust.
- l) On 29.05.2014 a Share Purchase Agreement ("SPA" for short) was entered into by and between the Bahl Group, respondent no. 2, six holding companies and RB Holdings Pvt. Ltd. ("RBHPL" for short). Admittedly, 100% shares of RBHPL were held by the Bahl Group. As per the said SPA, the respondent no. 2 was to acquire 100% equity shares of six holding companies held by the Bahl Group (i.e. 60,000 shares) as also 100% equity shares of RBHPL which were also held by the Bahl Group. The purchase consideration payable by respondent no. 2 Trust to the Bahl Group for acquiring 100% equity shares of six holding companies was ₹ 705,95,68,376/- and ₹ 1 crore for acquiring 100% shares of RBHPL. Apart from the above, SPA dated 29.05.2014 records the following transactions:-

- i) Clause 3.1 of SPA provides that the respondent no. 2 Trust shall provide loan of ₹ 43,08,26,586 to the six holding companies as per details set out in schedule 3 and Clause 4.1 of the SPA provides that the said loan shall be utilized by the six holding companies to repay their liabilities to the entities specified in Schedule 5.
- ii) Clause 3.2 of the SPA provides that the respondent no. 2 shall provide loan to RBHPL under the head 'RBH loan Amount' which is defined under Clause 1.1 of the SPA to mean loan of ₹ 304,94,08,453/- payable by the respondent no. 2 to RBHPL. Clause 4.2 of the SPA provides that the aforesaid loan received from respondent no. 2 shall be utilized by RBHPL for discharging its liabilities to the extent specified and to the entities specified in Schedule 6.
- m) Acquiring 100% shares of the six holding companies and 100% shares of RBHPL from the Bahl Group amounted to the respondent no. 2 indirectly acquiring

71.25% shares of the target company from the Bahl Group. Regulation 3 read with regulation 5 of the Takeover Regulations, 2011, provide that where an acquirer acquires shares or voting rights in the target company which entitle them to exercise 25% or more of the voting rights in such target company, then, such acquisition triggers open offer obligation. In the present case, since indirect acquisition of the shares of the target company under the SPA was in excess of 25%, the respondent no. 2 was required to make an open offer for acquiring the shares of the target company in accordance with the Takeover Regulations, 2011. Accordingly, on 29.05.2014, the respondent no. 2 along with respondent no. 3 & 4 as persons acting in concert (“PAC” for short) made a public announcement through respondent no. 5 (manager to the offer) under Chapter III of the Takeover Regulations, 2011 offering to purchase up to 22,99,46,996 shares of the target company from the public shareholders at an offer price of ₹ 41.04 per share. It is relevant to note that as per the valuation report submitted by the valuer appointed by respondent no. 2 viz. Ernst & Young Merchant Banking Services Pvt. Ltd. on 29.05.2014, the fair value per equity share of the target company as on 29.05.2014 was ₹ 40.50 per share. However, the

acquirers/manager to the offer considered that the highest negotiated price of the shares of the target company ought to be ₹ 41.04 per share, which is higher than the price determined by the above valuer appointed by respondent no. 2.

- n) On 11.06.2014, the acquirers viz the respondent no. 2 to 4 filed draft letter of offer with SEBI together with requisite disclosures relating to the public offer as contemplated under the Takeover Regulations, 2011.
- o) In the meantime, the appellant no. 1 had sent an E-mail to the respondent no. 5 on 09.06.2014 requesting respondent no. 5 to ensure that the proposed open offer is in compliance with all applicable statutory provisions. After the draft letter of offer was filed by respondent no. 5 on behalf of the acquirers, the appellant no. 1 made another representation to the respondent no. 5. In that representation it was stated that the open offer obligation got triggered more than two years ago on execution of ZOCD agreement and the claim made in the letter of offer that SPA dated 29.05.2014 triggered open offer obligations besides being gross misrepresentation of facts amounts to harming the interest of investors.

- p) On 12.06.2014, respondent no. 5 submitted its due diligence certificate to SEBI stating that the acquirer has duly discharged its responsibility for the correctness, adequacy and disclosure of all relevant information in the draft letter of offer. On 18.06.2014 the respondent no. 5 addressed a letter to the appellant no. 1 wherein all issues raised in the E-mail dated 09.06.2014 were refuted. There upon, the appellant no. 1 on 25.06.2014 filed a complaint before SEBI inter alia alleging various violations in the draft open offer submitted by the acquirers. One of the grievance made in the complaint was that the highest negotiated price paid by the acquirer to the sellers under the SPA was in fact ₹ 5,68,430.32 per share, whereas, in the draft letter of offer the acquirers have sought to acquire shares of the target company at ₹ 41.04 per share which is in violation of regulation 8(1) and 8(2) of the Takeover Regulations, 2011. In the said complaint SEBI was requested to direct the acquirers under regulation 32(f) of the Takeover Regulations, 2011 to revise the offer price and make an open offer for acquiring shares of the target company at ₹ 5,68,430.32 per share instead of ₹ 41.04 per share as stated in the draft letter of offer.

- q) On receipt of the draft letter of offer, SEBI sought various clarifications and particulars from the lead manager and on 17.11.2014 subject to compliance of the requirements set out therein gave its observations/comments to the draft letter of offer. In other words, subject to compliance of the requirements set out in the letter dated 17.11.2014, SEBI granted its approval to the acquirers to acquire shares of the target company at an open offer price of ₹ 41.04 per share.
- r) The acquirers complied with the observations contained in SEBI's letter dated 17.11.2014 and submitted their final letter of offer to SEBI on 21.11.2014. Thereafter, the public offer process was conducted in accordance with the Takeover Regulations, 2011 and the public offer was completed on 26.12.2014. Admittedly, appellants did not participate in the public offer by offering to sell the shares of the target company to the acquirers.
- s) On 29.12.2014 the appellants have filed the present appeal before this Tribunal.
- t) During the pendency of the appeal, SEBI by its communication dated 09.02.2015 rejected all contentions raised in the complaint filed by the

appellant no. 1 on 25.06.2014. Appellants have not challenged the said communication of SEBI dated 09.02.2015.

4. Mr. Victor Fernandes, (appellant no. 1) appearing in person made oral submissions and also tendered written submissions on behalf of the appellants. Mr. Devitre, Mr. Dwarkadas, Mr. Dada, learned Senior Advocates made oral submissions and also tendered written submissions on behalf of respondent no. 1, respondent no. 5 and respondent no. 2 respectively. Mr. Rajadhyaksha learned advocate appearing on behalf of respondent nos. 3,4 & 6 has adopted the submissions made by counsel for respondent no. 2.

5. Crux of the arguments advanced by Mr. Fernandes on behalf of appellants (orally and by way of written submissions) may be summarized as follows:-

a) In the draft letter of offer submitted by the acquirers it is stated that only the following transactions were the transactions to be executed under the SPA dated 29.05.2014, namely,

- i) ₹ 706.96 crore being the purchase consideration payable to Bahl Group for acquiring 100% equity shares of the six Holding Companies and RBHPL;
- ii) ₹ 43.08 crore being the loan to be paid by respondent no. 2 to the six holding companies so as to enable the six holding companies to repay their outstanding liabilities to the parties specified under Schedule 5 of the SPA.

- i) ₹ 304.94 crore being the loan to be paid by respondent no. 2 to RBHPL so as to enable RBHPL to repay its outstanding liabilities to the parties specified in Schedule 6 of the SPA.

Thus, in the draft letter of offer it is stated that the transactions under the SPA were for ₹ 1054.98 crore (₹ 706.96 Cr + ₹ 43.08 Cr + ₹ 304.94 Cr). However, as per the disclosures made in the draft letter of offer, it is seen that the transaction consideration under the SPA has been enhanced from ₹ 1054.98 crore to ₹ 3266.78 crore by including the amount of ₹ 2211.80 crores which was invested by respondent no. 2 in the six holding companies in October 2012 as per the terms of the ZOCD Investment Agreement dated 27.02.2012. Appellants submit that SEBI failed to appreciate that indirect acquisition of 71.25% shares of the target company was effected by the acquirers on the basis of two distinct agreements namely, the ZOCD agreement dated 27.02.2012 and SPA dated 29.05.2014. Therefore, the acquirers were not justified in including the consideration amount of ₹ 2211.80 crore paid under the ZOCD agreement while determining the highest negotiated price paid by respondent no. 2 under the SPA dated 29.05.2014.

- b) By subscribing to the ZOCD's under the ZOCD agreement dated 27.02.2012, the acquirers had

effectively acquired 99.997% shares of the six holding companies and therefore, even though the SPA dated 29.05.2014 refers to acquisition of 100% of the outstanding shares of the six holding companies, in reality, the outstanding shares that could be acquired by respondent no. 2 from the Bahl Group under the SPA was only to the extent of 0.003% of the fully diluted share capital of the six holding companies. Since 99.997% of the fully diluted share capital i.e. 99.997% of the economic interest of the six holding companies were already held by the acquirers even prior to entering in to the SPA, SEBI was not justified in approving the decision of the acquirers to include the amount invested under the ZOCD agreement dated 27.02.2012 while determining the highest negotiated price per share paid under the SPA dated 29.05.2014.

- c) Admittedly, the amounts paid by respondent no. 2 under the ZOCD agreement dated 27.02.2012 have been utilized by the said six holding companies for acquiring the shares of the target company and TV 18 under the rights issue and as a result of such acquisition the shares of the target company held by the six holding companies and RBHPL rose from 48.30% to 71.25%. Since respondent no. 2 had entered into two agreements for indirectly acquiring

71.25% shares of the target company from the six holding companies and RBHPL, to determine the acquisition prices paid by the acquirers under each of the two agreements and the related transactions needed to be separately identified and independently evaluated in order to determine at each stage (one) the amounts paid by the acquirers (two) the economic interest acquired by the acquirers in each of the six holding companies and (three) the corresponding economic interest acquired by the acquirers in the shares of the target company. Since SEBI has failed to consider each of the two agreements independently, the impugned decision of SEBI cannot be sustained.

- d) According to SEBI, SPA dated 29.05.2014 attracted the obligation to make public announcement of an open offer. As per the SPA, the acquirers were to acquire 100% of the outstanding shares of each of the six holding companies. Since each of the six holding companies held shares of the target company, it was necessary for SEBI to determine the effective price paid by the acquirers for indirect acquisition of the shares of the target company (through the six holding companies) under the ZOCD agreement, before ascertaining the highest price paid by the acquirers for

the indirect acquisition of the shares of the target company under the SPA dated 29.05.2014.

- e) SEBI has failed to evaluate individually, the acquisition of shares of the target company by each of the six holding companies. Instead, SEBI has only considered the total number of shares i.e. 74.619 crore shares of the target company held by the six holding companies while determining the offer price at ₹ 41.04 per share of the target company. SEBI has also committed an error in including the amount of ₹ 2211.80 crore paid by the acquirer under the ZOCD agreement in October 2012, while computing the open offer price, despite knowing that the transactions/acquisitions under the ZOCD agreement were independent transactions unconnected with the SPA. In order to determine the highest price paid for any acquisition by the acquirer under regulation 8(2) (a) of the Takeover Regulations, 2011, SEBI ought to have considered only those transactions that were executed under the agreement attracting the open offer obligation. In the present case, since the SPA dated 29.05.2014 triggered open offer obligation, the aggregate amount of ₹ 1054.98 crore paid thereunder alone ought to have been considered for determining the offer price. By including the amount of ₹ 2211.80

crore paid under the ZOCD agreement, SEBI has wrongly considered the amount of ₹ 3266.78 crore as the total consideration paid by respondent no. 2 for indirect acquisition of the shares of the target company and TV 18 from the six holding companies. After deducting the amount of ₹ 204.42 crore paid for acquisition of TV 18 shares, balance amount of ₹ 3062.36 crore has been wrongly considered to be the price paid for indirect acquisition of 74,61,88,987 shares of the target company which according to SEBI amounts to indirectly acquiring the shares of the target company at the rate of ₹ 41.04 per share.

- f) Regulation 8 (8) of the Takeover Regulations, 2011 provides that where an acquirer has acquired or agreed to acquire any shares or voting rights in the target company during the offer period, at a price higher than the offer price, then the offer price shall stand revised to the highest price paid or payable for any such acquisition. In the present case, indirect acquisition of the shares of the target company and TV 18 under the SPA were completed on 07.07.2014 for an aggregate amount of ₹ 1054.98 crore during the offer period. As the provisions of regulation 8(8) got triggered during the offer period, SEBI ought to have taken into account the consideration paid per share of

the target company under the transactions executed on 07.07.2014 while determining the offer price. If SEBI had prudently reviewed the transactions executed on 07.07.2014, SEBI would have easily understood and appreciated that the total amount paid by the acquirer for the said transaction was ₹ 1054.98 crore and not ₹ 3266.78 crore. Therefore, to ensure compliance with regulation 8(8), if the amount of ₹ 1054.98 crore paid for direct acquisition of the shares of the six holding companies and indirect acquisition of the shares of the target company and TV 18 from the Bahl Group were methodically reviewed, it would lead to the clear conclusion that the highest price paid by respondent no. 2 to the Bahl Group on 07.07.2014 would be ₹ 5,68,430.32 per share of the target company. The said price being the highest price, SEBI could not have approved the offer price of ₹ 41.04 per share as claimed by the acquirers.

- g) To determine the highest negotiated price, it was necessary for SEBI to split the indirect acquisition of 74,61,88,987 shares of the target company by the acquirers through the six holding companies under two agreements i.e. firstly, investment of ₹ 2211.80 crore under the ZOCD agreement dated 27.02.2012 and secondly, investment of ₹ 1054.98 crore under the

SPA dated 29.05.2014. According to the appellants, indirect acquisition of the shares of the target company by respondent no. 2 has to be worked out in the following manner:-

- i) Under the ZOCD agreement, the respondent no. 2 had invested ₹ 2211.80 crore in six holding companies by subscribing to the ZOCDs and the amounts so invested were to be utilized for acquiring the shares of the target company and TV 18 under the rights issue. On acquiring the shares of the target company and TV 18 under the rights issue, the total number of shares held by the six holding companies in the target company and TV 18 were 74,61,88,987 shares and 6,77,33,486 shares respectively.
- ii) If the respondent no. 2 were to opt for conversion of ZOCD's, then, the six holding companies would have been required to issue in all 221,17,98,940 equity shares in favour of respondent no. 2. In that event, the fully diluted equity shares of the six holding companies would be 221,18,58,940 shares (i.e. 221,17,98,940 shares issued by six holding companies to the respondent no. 2 + 60,000 shares originally issued by six holding

companies to the Bahl Group). Thus, on conversion of ZOCD's, into equity shares the respondent no. 2 would hold 99.997% shares /economic interest and the Bahl Group would 0.003% shares/economic interest in the six holding companies. Consequently, respondent no. 2 would have 99.997% indirect economic interest in the shares of the target company held by the six holding companies and the Bahl Group would have 0.003% indirect economic interest in the shares of the target company held by the six holding companies. In other words, since the shares of the target company and TV 18 held by the six holding companies were 74,61,88,987 shares and 6,77,33,486 shares respectively, as a result of ZOCD agreement, out of 74,61,88,987 shares of the target company held by six holding companies respondent no. 2 would have indirect economic interest in 74,61,68,627 shares (99.997%) and the Bahl Group would have indirect economic interest in 20360 shares (0.003%). Similarly, out of 6,77,33,486 shares of TV 18 held by six holding companies, respondent no. 2 as a result of ZOCD agreement would have indirect economic interest in 6,77,31,750 shares and the

Bahl Group would have indirect economic interest in 1736 shares (0.003%). Thus, on execution of the ZOCD agreement, the direct and indirect economic interest of the Bahl Group in the six holding companies and the target company/TV 18 would get reduced from 100% to 0.003%, whereas, the direct and indirect economic interest of respondent no. 2 in the six holding companies and the target company / TV 18 would be 99.997% respectively.

- iii) By executing SPA dated 29.05.2014, respondent no. 2 acquired from the Bahl Group 60,000 shares of the six holding companies which amounts to acquiring 0.003% direct economic interest in six holding companies and consequently amounts to acquiring 0.003% indirect economic interest in the target company and TV 18. Since 0.003% indirect economic interest in the target company comes to 20360 shares it is evident that for acquiring those indirect economic interest in the target company as also 0.003% indirect economic interest in TV 18 the respondent no. 2 has paid under the SPA ₹ 1054.98 crore which

effectively works out to acquiring each share of the target company at ₹ 5,68,430.32 per share. That being the highest negotiated price SEBI ought to have determined the open offer price at ₹ 5,68,430.32 per share.

- iv) Takeover Regulations, 2011 is based on the recommendation of the Takeover Regulations Advisory Committee report ('TRAC report' for short) dated 19.07.2010. As per the Takeover Regulations, 2011, it is mandatory for an acquirer to make disclosures to the investors and/or the target company in specified form as also in the letter of offer disclosing the pre and post offer shareholding pattern of the target company. The shareholding information, especially that of the promoter group and acquirers to be disclosed to the shareholders of the target company has to be as on the date of the letter of offer and for that purpose the percentage holding has to be taken on the basis of diluted share capital as defined in the Takeover Regulations, 2011. The expression diluted share capital is defined under the Takeover Regulations, 2011 to mean the total number of shares in the target company

assuming full conversion of the outstanding convertible securities into equity shares of the target company. Therefore, in the facts of the present case, even though the ZOCD's were not opted to be converted into equity shares, for the purposes of making disclosures under Chapter V and also for the purposes of open offer process contained in Chapter III, the diluted equity capital ought to have been taken into consideration. Regulation 28(2), 29(2), 30(1) and 30(2) contained in Chapter V of the Takeover Regulations, 2011 in fact mandate disclosure of shareholding on the basis of diluted share capital and for the purposes of disclosures the acquisition and holding of any convertible security be regarded as shares. As the diluted share capital has not been taken into consideration in computing the offer price, the respondent no. 2 as also SEBI violated the provisions contained in the Takeover Regulations, 2011.

- h) Regulation 5(2) of the Takeover Regulations, 2011 stipulates the circumstances under which the indirect acquisition attracting the provisions of regulation 5(1) shall be regarded as direct acquisition. Applicability

of regulation 5(2) to the facts of present case is not in dispute. Therefore, fact of indirect acquisition of the shares of the target company (through the six holding companies) ought to have been considered for all purposes of the Takeover Regulations including those related to pricing and compliance (including disclosure) requirements for the open offer in the same manner as set out in regulation 28(2) of the Takeover Regulations, 2011 which stipulates that the acquisition and holding of any convertible security shall also be regarded as shares and disclosures of such acquisitions and holdings shall be made accordingly. To put it simply, in view of regulation 5(2) read with regulation 28(2), the acquisition and holding of ZOCD's must necessarily be regarded as holding shares of each of the six holding companies to the extent permissible under the ZOCD agreement and accordingly compute the acquisition of the economic interest in the shares of the target company by the respondent no. 2 from the six holding companies.

- i) The computation of the economic ownership of a shareholder i.e. the shareholder's effective economic interest in a company and its underlying assets/ investments is not a subjective parameter and has to be computed in the same manner, whether for the

holding company or for the target company and irrespective of whether the company is private or listed. If the effective economic interest of the acquirer held indirectly through the six holding companies is computed without considering the ZOCD's, then the very purpose for the disclosure obligation related to shareholding in a company to include and consider convertible securities as shares would be negated and would tantamount to giving a free reign to acquirers to circumvent and void the regulatory intent, purpose and underlying philosophy of the Takeover Regulations. In support of the above contentions, reliance is placed on the decision of the Apex Court in case of Nirma Industries Ltd. vs SEBI in (2013) 8 SCC 20.

- j) In the past, in respect of a transaction between the acquirer group and the target company group, the economic interest held indirectly by the acquirer group (through the holding company Equator) in a step-down company (Prism) has been disclosed by both the acquirer as well as the target company (in its Rights Issue Offer Document) as equivalent to the acquirer's diluted shareholding (%) in the holding company Equator multiplied by equator's diluted shareholding (%) in its step down company prism

(held in the form of equity shares and convertible securities). Since SEBI has approved the open offer price by taking diluted shareholding in the aforesaid case, even in the present case, SEBI ought to have approved the open offer price by taking the diluted shareholding of the target company acquired under SPA dated 29.05.2014.

- k) With the help of a chart, the appellants sought to demonstrate that if the gross amount of ₹ 1054.98 crore paid by the acquirers under the SPA dated 29.05.2014 is segregated, then it would reveal that for indirect acquisition of the diluted share capital of the target company (through the six holding companies) the acquirers have paid ₹ 5,68,430.32 per share of the target company.
- l) Appellants submit that the concept of ‘economic interest’ cannot be restricted to Chapter V of the Takeover Regulations, 2011. The expression ‘shareholding’ is not defined under regulation 2(1) however, the expression ‘shareholding’ is used in regulation 2(1)(e) & 2(1)(o) of Chapter I, regulations 3,6,7 & 10 of Chapter II, regulation 16 in Chapter III and regulation 32 under Chapter VI. Since the expression ‘shareholding’ is not defined under the

Takeover Regulations 2011, it becomes necessary to review and understand that expression within the overall frame work of the Takeover Regulations, 2011. Regulation 28(2) clearly provides that acquisition and holding of any convertible security shall also be regarded as shares and disclosures of such acquisitions and holdings shall be made accordingly. It would mean, that within the framework of the Takeover Regulations, an acquirer could have a shareholding (economic interest) in a company even if the acquirer does not hold any outstanding shares in the said company. Therefore, the concept of economic interest being a relevant criteria for open offer process in Chapter III, while determining the open offer price per share of the target company the said criteria ought to have been applied in the present case.

- m) The format for the letter of offer prescribed by SEBI under regulation 16(1) in Chapter III titled ‘open offer process’ mandates that the ‘pre and post offer shareholding pattern of the target company’ in the table format specified by SEBI be disclosed as on the date of letter of offer. The note below the specified table format states that ‘The percentage holding shall be taken on the basis of diluted share capital as

defined in the SAST Regulations, 2011'. Since none of the regulations in the Takeover Regulations define the expression 'diluted share capital' referred to in the above note and that expression is defined in the format prescribed by SEBI under regulation 29(1) in Chapter V it is apparent that the expression 'diluted share capital' used in the format prescribed under regulation 29(1) in Chapter V, would apply to the provisions contained in Chapter III. Therefore, the argument of respondents that the concept of 'diluted share capital' in Chapter V would not apply to Chapter III is without any merit. In support of the above submission reliance is placed on the decision of the Apex Court in case of R.B.I. vs Peerless General Finance & Investment Co. Ltd. reported in AIR 1987 S.C. 1023.

- n) As per the TRAC Report on the basis of which the Takeover Regulations, 2011 is framed, the disclosure obligations under the Takeover Regulations are fairly critical and form an important component of the legal regime governing substantial acquisition of shares and takeovers. Hence, the respondents are not justified in contending that the provisions contained in Chapter V have no relevance to the provisions of Chapter III of the Takeover Regulations, 2011.

- o) Disclosure obligations and economic interest, irrespective of whether dealt with under Chapter V or elsewhere in the Takeover Regulations, 2011 form an integral part of the legal regime governing substantial acquisition of shares and takeovers. Therefore, if the effective economic interest of the acquirer held indirectly through the six holding companies is computed without considering the ZOCDs, then the very purpose for the disclosure obligation would be defeated and would tantamount to giving a free reign to acquirers to circumvent and void the regulatory intent, purpose and underlying philosophy of the Takeover Regulations, 2011.
- p) The format prescribed under regulation 16(1), mandates the acquirers to ensure that the minimum disclosure requirements are contained in the letter of offer including the shareholding pattern as on the date of letter of offer. In the present case, the pre and post offer shareholding pattern of the target company have not been disclosed and hence the disclosures are not in compliance with the format prescribed. If the pre and post offer shareholding pattern of the target company was disclosed as per the prescribed form, then there would not have been any difficulty in ascertaining the offer price per share of the target company.

- q) By subscribing to the ZOCD's under the ZOCD agreement the acquirers had acquired economic interest in 99.997% of the 71.25% shareholding in the target company and therefore, fact that the respondent no. 2 has not sought conversion of ZOCDs into equity share would not result in any change in the economic interest held by the acquires in the target company.
- r) In para 59 of its affidavit in reply SEBI has admitted that while processing the draft letter of offer dated 11.06.2014 it is noticed that the respondent no. 2 had acted in concert with the promoter and promoter group of the target company, but the same was not disclosed under clause 35 of the listing agreement as part of the quarterly shareholding statements to be furnished to the stock exchange and therefore, issue of violation of clause 35 of listing agreement is being looked into by SEBI from the enforcement angle. Thus, the prima facie view of SEBI is that the disclosures made in the draft letter of offer were not in accordance with the provisions contained in the Takeover Regulations, 2011. In such a case, where the disclosures made in the draft letter of offer do not depict true picture the economic interest (shareholding) in the target company, SEBI was not

justified in approving the offer price at ₹ 41.04 per share of the target company.

- s) As per clause 1.1.22 of the ZOCD agreement dated 27.02.2012 the expression 'Equity Securities' would inter alia include the ZOCDs. Thus, by investing in the ZOCD's, the respondent no. 2 has acquired 99.997% economic interest in the 71.25% shareholding in the target company held by the six holding companies. Therefore, the argument of the respondents that in commercial parlance, the ZOCDs are primarily understood as mere borrowings cannot be accepted.
- t) In the draft letter of offer it is stated that in terms of SPA, the respondent no. 2 has agreed to buy and the sellers have agreed to sell 100% of the outstanding equity shares of the six holding companies. Thus, SEBI had complete knowledge that the 'diluted share capital' of the six holding companies was definitely not the same as their 'outstanding share capital'. Since the holding in a company is determined on the basis of its diluted share capital, SEBI is not justified in contending that by executing SPA, the respondent no. 2 acquired 100% shares of the six holding companies held by the Bahl Group. By subscribing to the ZOCD's, the respondent no. 2 had acquired from Bahl

Group 99.997% economic interest in six holding companies and by executing SPA what could be acquired by respondent no. 2 from the Bahl Group was only 0.003% direct economic interest in the six holding companies and consequently 0.003% indirect economic interest in the shares of the target company held by the six holding companies.

- u) It is not in dispute that the transactions under the SPA were completed on 07.07.2014 i.e. during the offer period which was extended to 26.12.2014. Therefore, the transactions completed on 07.07.2014 necessarily needed to be taken into consideration while determining the highest negotiated price under regulation 8(8) as the said transactions were effected during the offer period.
- v) Irrespective of the date on which the acquirers obligation to make a public announcement for the open offer got triggered, in the facts of present case, the acquisitions completed by the acquirers on 07.07.2014 would attract the provisions of offer price related regulation 8(8) as the said transactions were executed within the offer period. If the offer price was computed in accordance with regulation 8(8) then the open offer price would have been revised to the highest price paid by the respondent no. 2 on

07.07.2014 i.e. ₹ 5,68,430.32 per share of the target company.

- w) Whether the appellants have participated in the open offer or not, the appellants are entitled to challenge the decision of SEBI in approving the offer price at ₹ 41.04 which is in contravention of the provisions contained in the Takeover Regulations, 2011. The appellants unwillingness to tender shares in the open offer at offer price of ₹ 41.04 cannot be construed as an unwillingness to tender shares in the open offer at an offer price of ₹ 5, 68,430.32 per share. Since the open offer did not provide for any conditional acceptance by the shareholders of the target company, the appellants could not have participated in the open offer by contending that determination of the open offer price at ₹ 41.04 is in violation of the Takeover Regulations, 2011. Thus, the appellants who are aggrieved by open offer price approved by SEBI have legal right to agitate the same before this Tribunal, even though the appellants have not participated in the open offer. In support of the above contention reliance is placed on a decision of this Tribunal in case of Subramanian R. Venkat & Anr. vs SEBI & Ors. (Appeal No. 111 of 2010 decided on 03.05.2011) which is upheld by the Apex Court.

- x) The respondent no. 5 failed in its duty to protect interest of investors. The respondent no. 5 has knowingly and willfully acted contrary to the code of conduct prescribed for Merchant Bankers by SEBI and also acted in violation of Takeover Regulation, 2011. In support of above contention reliance is placed on facts set out in Table 'E', para 33 of the affidavit in rejoinder filed by the appellants. By relying on a decision of this Tribunal in case of Enam Securities Pvt. Ltd. vs SEBI (Appeal No. 39 of 2011 decided on 15.02.2012) it is contended that by failing to disclose all facts relating to open offer as contemplated under the Takeover Regulations 2011, the respondent no. 5 has failed to protect the interest of investors.

6. Counsel for the respondents, on the other hand, supported the decision of SEBI in approving the open offer price at ₹ 41.04 per share of the target company. Their main contention is that, in case of convertible securities having no fixed date of conversion, the public announcement obligation under the Takeover Regulations, 2011, get triggered on the date on which the option to convert such securities into shares is exercised. In the present case, the option for conversion of ZOCDs has not been exercised by respondent no. 2 and therefore, the six holding companies have not issued equity shares in favour of respondent no. 2. In the absence of acquiring equity shares, the respondent no. 2 could not

exercise any voting rights or control over the six holding companies by merely being a ZOCD holder. Thus, subscribing to the ZOCDs under the ZOCD agreement did not confer on respondent no. 2 any voting rights or control over the six holding companies and consequently respondent no. 2 could not be said to have indirectly acquired shares or voting rights in, or control over the target company. In such a case, it cannot be said that on subscribing to the ZOCDs under the ZOCD agreement the respondent no. 2 was obliged to public announcement of an open offer. It is only when the respondent no. 2 entered into SPA dated 29.05.2014 for acquiring 60,000 shares of the six holding companies which constituted acquisition of 100% shares of the six holding companies, the public announcement obligation under the Takeover Regulations, 2011 got triggered. Accordingly, public announcement was made on 29.05.2014 by offering to purchase shares of the target company from the public shareholders at ₹ 41.04 per share being the highest negotiated price per share of the target company. It is further contended by the respondents that the entire open offer process has been carried out in accordance with law and the appellants who have not participated in the open offer process are not entitled to any relief in the present appeal.

7. We have carefully considered the rival submissions.

8. At the outset it is relevant to note that the entire dispute in the present case commenced with the appellant no. 1 filing a complaint before SEBI on 25.06.2014 wherein it was inter-alia alleged that the open offer obligation got triggered on execution of ZOCD agreement and not on execution of SPA as wrongly stated in the open offer document. It was

further alleged in the said complaint that there are various infirmities in the open offer process carried out by respondent no. 2 through respondent no. 5 and therefore appropriate action be taken against the acquirers and respondent no. 5. Apart from the above, it was alleged that in the facts of present case, the open offer price ought to have been determined at ₹ 5,68,430.32 per share instead of ₹ 41.04 per share of the target company. SEBI, after considering the complaint initially issued a communication on 17.11.2014, thereby granting its approval to the open offer price at ₹ 41.04 per share instead of ₹ 5,68,430.32 per share as claimed by the appellants. Subsequently, by its communication dated 09.02.2015 SEBI rejected various allegations made in the complaint filed on 25.06.2014 for the reasons recorded therein.

9. Even before receiving the communication of SEBI dated 09.02.2015, appellants had filed the present appeal on 29.12.2014 to challenge the communication of SEBI dated 17.11.2014. However, on receipt of communication dated 09.02.2015, the appellants have neither chosen to amend the present appeal so as to challenge the communication of SEBI dated 09.02.2015 nor the appellants have filed any independent appeal to challenge the communication of SEBI dated 09.02.2015 whereby various allegations made in the complaint filed by the appellants have been rejected as having no merit in it. Without challenging the communication of SEBI dated 09.02.2015, appellants are not justified in agitating the issues which have been rejected by SEBI by its communication dated 09.02.2015. Accordingly, we refrain from considering various issues raised in this appeal relating to the alleged

violation of the provisions contained in the Takeover Regulations, 2011 as well as the violations allegedly committed by respondent no. 5 as lead Manager to the open offer made by the acquirers viz. respondent nos. 2 to 4. Thus, the only issue that falls for consideration in this appeal is, whether SEBI by its communication dated 17.11.2014 was justified in approving the open offer price at ₹ 41.04 per share of the target company offered by the acquirers as against the open offer price claimed by the appellants at ₹ 5,68,430.32 per share of the target company.

10. Open offer obligations under the Takeover Regulations, 2011 arise when any acquirer acquires shares or voting rights or control in a target company in excess of the limits prescribed under the said Regulations. As per regulation 3(1) of the Takeover Regulations, 2011 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 25% 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 the said regulations. Regulation 4 provides that irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over the target company, without making a public announcement of an open offer. Regulation 5 provides for public announcement of an open offer in case of indirect acquisition of shares or voting rights in, or control over the target company. Regulation 7 deals with open offer size and regulation 8 deals with the

open offer price. Since strong reliance is placed by appellants on regulation 5, we quote regulation 5 of the Takeover Regulations, 2011 (to the extent relevant) herein below:-

“Indirect acquisition of shares or control.

5. (1) For the purposes of regulation 3 and regulation 4, acquisition of shares or voting rights in, or control over, any company or other entity, that would enable any person and persons acting in concert with him to exercise or direct the exercise of such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations, shall be considered as an indirect acquisition of shares or voting rights in, or control over the target company.

(2) Notwithstanding anything contained in these regulations, in the case of an indirect acquisition attracting the provisions of sub-regulation (1) where,—

- (a) the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;*
- (b) the proportionate sales turnover of the target company as a percentage of the consolidated*

sales turnover of the entity or business being acquired; or

- (c) *the proportionate market capitalisation of the target company as a percentage of the enterprise value for the entity or business being acquired;*

is in excess of eighty per cent, on the basis of the most recent audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the target company for all purposes of these regulations including without limitation, the obligations relating to timing, pricing and other compliance requirements for the open offer.”

11. In the present case, it is not in dispute that prior to the ZOCD agreement, the Bahl Group consisting of Mr. Raghav Bahl and his wife Mrs. Ritu Kapur were the promoters holding 100% shares (60,000 shares) of the six holding companies. The six holding companies promoted by the Bahl Group along with RBHPL also promoted by the Bahl Group held 48.30% shares of the target company. It is on record that the six holding companies have been declared as promoters of the target company and TV 18 in the stock exchange declarations for the quarter ending on December 31, 2011. Thus, at the relevant time, the Bahl Group were the promoters of six holding companies and the said six holding companies were the promoters of the target company and TV 18. Since the six holding companies (promoted by Bahl Group) and RBHPL

(also promoted by Bahl Group) held 48.30% shares of the target company, under the Takeover Regulations 2011, the Bahl Group would be deemed to have 48.30% indirect shareholding in the target company.

12. The respondent no. 2, by executing the ZOCD agreement on 27.02.2012 agreed to invest funds in the six holding companies by subscribing to the ZOCDs (valid for 10 years) with a condition that the amounts so invested shall be utilized by the six holding companies for subscribing to the shares of the target company and TV 18 under the rights issue. The ZOCDs so subscribed were liable to be converted into equity shares of the six holding companies as and when opted by respondent no. 2 without making any further payment. It is not in dispute that as per the ZOCD agreement the respondent no. 2 has invested ₹ 2211.80 crore by subscribing to the ZOCDs and the said amount has been utilized by the six holding companies for acquiring the shares of the target company and TV 18 under the rights issue. It is also not in dispute that till date the respondent no. 2 has not exercised its option either to seek refund of ₹ 2211.80 crore invested under the ZOCD agreement or seek conversion of ZOCD's into equity shares as provided under the ZOCD agreement. As a result of subscribing to the shares of target company and TV 18 under the rights issue, the direct shareholding of the six holding companies and RBHPL promoted by the Bahl Group in the target company rose from ₹ 48.30% to 71.25% and consequently, the indirect shareholding of the Bahl Group in the target company (through the companies promoted by the Bahl group) rose from 48.30% to 71.25%.

13. Regulation 13(2)(b) of the Takeover Regulations 2011, provides that where an acquirer acquires shares or voting rights in or control over the target company upon converting the convertible securities without a fixed date of conversion, then the open offer obligation gets triggered on the date on which the option to convert such securities into shares of the target company is exercised. Thus, in the ordinary course, when a person subscribes to the ZOCDs under a ZOCD agreement without a fixed date for conversion of ZOCDs into equity shares, then that person is said to have acquired shares of that company only on the date on which the option for conversion of ZOCDs into equity shares is exercised and the open offer obligation, if any, gets triggered on the date on which such option is exercised.

14. In the present case, the acquirers contend that the open offer obligation got triggered on execution of SPA dated 29.05.2014. However, while determining the open offer price at ₹ 41.04 the acquirers have taken into account the amount invested by respondent no. 2 under the ZOCD agreement dated 27.02.2012 and hence we deemed it fit to look into the clauses contained in the said ZOCD agreement.

15. On perusal of the ZOCD agreement dated 27.02.2012 we were surprised to find that although the parties to the said agreement were the six holding companies, the respondent no. 2 and the Bahl Group consisting of Mr. Raghav Bahl and his wife Mrs. Ritu Kapur, the ZOCD agreement is signed only by Mr. Raghav Bahl and his wife Mrs. Ritu Kapur on behalf of all parties. While Mr. Raghav Bahl and Mrs. Ritu

Kapur have signed the ZOCD agreement as 100% shareholders of six holding companies, Mr. Raghav Bahl has also signed the ZOCD agreement as Director of each of the six holding companies and has also signed the ZOCD agreement as authorized representative of respondent no. 2.

16. Apart from the above, following clauses in the ZOCD agreement prima facie give an impression that the Bahl Group by signing the ZOCD agreement has agreed that on execution of the ZOCD agreement, the respondent no. 2 without giving any consideration to the Bahl Group shall be entitled to exercise control over the six holding companies and consequently exercise control over the target company and TV 18, even before the respondent no. 2 exercised option to seek conversion of ZOCDs into equity shares of the six holding companies. The said unusual clauses in the ZOCD agreement are as follows:-

- a) Clause 5.5 & 5.6 of the ZOCD agreement records that if the costs of the shares of the target company & TV 18 to be acquired by the six holding companies under the rights issue is more than the amount paid by respondent no. 2 under the ZOCD agreement, then the respondent no. 2 shall make good the differential amount and if the cost of the said shares is less than the amount paid by respondent no. 2 under the ZOCD agreement, then the six holding companies shall refund the differential amount to the respondent no. 2. This clause indicates that the sole object of the

respondent no. 2 in executing the ZOCD agreement was not to advance loan to the six holding companies but to invest requisite amount for acquiring the shares of the target company and TV 18 under the rights issue through the six holding companies.

- b) Clause 6.1 of the ZOCD agreement records that from the date of the ZOCD agreement till completion date i.e. the date on which allotment of ZOCDs are completed, the six holding companies and the Bahl Group shall ensure that the six holding companies shall conduct their business only in the ordinary course of business. From this clause it is apparent that from the date of ZOCD agreement restriction is imposed on the Bahl Group while carrying on the business of the six holding companies. Very fact that the said restriction is only till the allotment of ZOCDs are complete, prima facie shows that after the allotment of ZOCDs the business of the six holding companies were to be conducted by respondent no. 2 as respondent no. 2, at its will, was entitled to receive equity shares amounting to 99.997% shareholding of the six holding companies.
- c) Clause 7.1 of the ZOCD agreement records that the respondent no. 2 is entering into the ZOCD agreement

by relying on the shareholder warranties given by the Bahl Group as more particularly set out in Schedule 2 to the ZOCD agreement. Schedule 2 to the ZOCD agreement records that the Bahl Group inter alia agrees that on the respondent no. 2 opting for conversion of ZOCDs, the six holding companies shall issue requisite equity shares in favour of respondent no. 2. Since the ZOCDs issued under the ZOCD agreement could be converted into equity shares at any point of time, by giving warranties under the ZOCD agreement, the Bahl Group have assured respondent no. 2 that control over the six holding companies and consequently control over the target company and TV 18 could be exercised by respondent no. 2 at any time under the ZOCD agreement, without the Bahl Group receiving any consideration from respondent no. 2. It is inconceivable that the Bahl Group would agree to such a clause in the ZOCD agreement, which had the effect of divesting direct and indirect control of the Bahl Group over the six holding companies and the target company/TV 18 respectively without the Bahl Group receiving any consideration.

- d) Clause 9 of the ZOCD agreement records that the Bahl Group as shareholders of the six holding

companies shall not transfer any equity securities of the six holding companies or transfer any right, title or interest in the six holding companies without the prior written consent of respondent no. 2. Thus the Bahl Group apart from confirming that at any time after execution of the ZOCD agreement, their shareholding in the six holding companies could be reduced from 100% to 0.003% thereby divesting the control over the six holding companies as well as control over the target company and TV 18 from the Bahl Group to the respondent no. 2 without the Bahl Group receiving any consideration, the Bahl Group further represented to the respondent no. 2 under clause 9 of the ZOCD agreement that they shall not transfer the shares of the six holding companies held by them without the prior written consent of respondent no. 2.

- e) Clause 11.1 of the ZOCD agreement records that the Bahl Group shall procure from the target company & TV 18 that they shall not issue any equity securities of any type or class to any person whether by way of rights issue or otherwise, unless first offered to the six holding companies and if the six holding companies elect to subscribe to such shares, then the respondent no. 2 and/or its Affiliates shall have the sole discretion to fund the six holding companies for subscribing to

those shares. This clause prima-facie belies the contention of the respondents that the ZOCD agreement was mere a loan agreement. On the contrary from this clause, prima facie, it appears that by executing the ZOCD agreement, the respondent no. 2 not only exercised control over the Bahl Group but the respondent no. 2 through the Bahl Group exercised control over the six holding companies as well as the target company & TV 18.

- f) Clause 11.4 read with clause 1.1.42 of the ZOCD agreement provides that the Bahl Group shall ensure that the promoter group entities listed in Part A, Part B & Part C of Schedule 6 shall not transfer any equity securities or any right, title or interest of the target company & TV 18 without giving a right of first refusal to the respondent no. 2. This clause further demonstrates that by executing the ZOCD agreement the respondent no. 2 not only sought to acquire control over the shares of the target company and TV 18 held by the Bahl Group (through the six holding companies) but also sought to acquire control over the shares of the target company and TV 18 held by the Bahl Group (through other promoter group entities) set out in Schedule 6 to the ZOCD agreement.

- g) Clause 12.1 of the ZOCD agreement records that each party to the said agreement shall not, without the prior written consent of the other party, disclose the terms and conditions of the ZOCD agreement to any third party. As noted earlier, the Bahl Group alone being signatories to the ZOCD agreement there was no question of either keeping the terms of the agreement as secret or disclosing it to third parties with the consent of the other party. In any event, if the ZOCD agreement was a mere loan agreement, then there was no reason to keep the terms and conditions of the ZOCD agreement confidential. Very fact that the terms of the ZOCD agreement were sought to be kept confidential, clearly shows that it was not a loan agreement executed in the ordinary course of business.
- h) Clause 13.1 of the ZOCD agreement provides that the six holding companies shall remain as private limited companies and passive strategic investment companies and shall not carry on any other activity. This clause read with clause 6.1, clearly show that on execution of the ZOCD agreement, respondent no. 2 conducted the business of the six holding companies in the manner desired by respondent no. 2 and that too

before the respondent no. 2 exercised its option to seek conversion of ZOCDs into equity shares.

- i) Clause 14.1 of the ZOCD agreement provides that Mr. Raghav Bahl undertakes to own and control the companies listed in Part A of Schedule 6 and shall continue to remain the Trustee of trusts listed in Part B of Schedule 6. Clause 14.2 provides that the Bahl Group shall ensure that no member of the promoter group transfers any equity securities of the target company, TV 18 and each of their respective subsidiaries and Affiliates without the prior written consent of respondent no. 2. Clause 14.3 provides that the promoters shall validly execute and deliver the Single Unit Agreement and shall procure that the six holding companies and each member of the promoter group shall validly execute and deliver the ‘Single Unit Agreement’. The expression ‘Single Unit Agreement’ as per clause 1.1.54 of the ZOCD agreement means an agreement to act as a Single Unit as required under the Ministry of Information and Broadcasting Guidelines among the target company and the promoters of the six holding companies (including the six holding companies, Mrs. Ritu Kapur & Mr. Raghav Bahl) for managing the matters of the target company & TV 18 and to appoint

majority of the Board of Directors of the target company & TV 18. All these sub-clauses in clause 14 of the ZOCD agreement read with the expression 'control' defined under regulation 2(1)(e) of the Takeover Regulations, 2011 prima facie, show that by the ZOCD agreement, the Bahl Group not only permitted respondent no. 2 to exercise control over the six holding companies as well as the target company and TV 18 but also permitted respondent no. 2 to exercise control over the shares of the target company held by other entities promoted by the Bahl Group.

- j) Apart from the above, it is relevant to note that Mr. Raghav Bahl and his wife Mrs. Ritu Kapur have given warranties on behalf of six holding companies and RBHPL (see clause 8.11 in Schedule 7 to the SPA dated 29.05.2014) to the effect that none of those companies have any employees. Thus it is evident that all activities of the six holding companies were executed by the Bahl Group and the Bahl Group for the reasons best known to it agreed to divest control over the six holding companies and consequently agreed to divest control over the target company and TV 18 without receiving any consideration.

17. As the aforesaid clauses in the ZOCD agreement, in our opinion prima facie demonstrate, that the respondent no. 2 through Bahl Group exercised direct control over the six holding companies and indirect control over the target company & TV 18 even before respondent no. 2 exercised its option to seek conversion of ZOCDs into equity shares, we called upon the respondents to explain the motive behind executing such ZOCD agreement.

18. Counsel for respondent no. 2 by his oral (as also by written arguments) submitted that the ZOCD agreement in question was executed in the ordinary course of business. It is submitted that since the Bahl Group did not have the requisite resources to subscribe to the shares of the target company and TV 18 under the rights issue and the only asset of the six holding companies were the shares of the target company & TV 18 valued at ₹ 2450 crore (approx.) against the value of ZOCDs of about ₹ 2211.80 crore, it was negotiated and agreed that although as per the terms of the ZOCD agreement respondent no. 2 had the ability to convert the ZOCDs into equity shares of the six holding companies at any time, Mr. Raghav Bahl and his team would continue to have full operational and management control over the target company and TV 18. It is also submitted that no conversion was possible without the concurrence of Mr. Raghav Bahl who was in control over one of the trustees of respondent no. 2 viz. Nirlab Media Pvt. Ltd. (now DCPL). It is further submitted that the restriction imposed on transfer of shares held by Bahl Group was to ensure that the control of the target company remains with Mr. Raghav Bahl and even after execution of ZOCD

agreement Mr. Raghav Bahl continues to control and manage the target company as agreed between the parties.

19. Counsel for SEBI on instruction submitted that SEBI has already looked into the allegations made in the complaint filed by appellant no. 1 and found that there is no merit in those allegations.

20. It is relevant to note that in the complaint filed by appellant no. 1 on 25.06.2014 it was specifically alleged (at para 103) that the open offer obligation in the present case got triggered on execution of the ZOCD agreement dated 27.02.2012 and not on execution of SPA dated 29.05.2014. The said allegation was rejected by SEBI vide communication dated 09.02.2015 (see para 10 and 11 thereof) by merely recording that the respondent no. 2 has not acquired any voting rights, shares or control over the six holding companies by subscribing to the ZOCDs and therefore, the question of respondent no. 2 exercising or directing the exercise of voting rights in the shares of the target companies held by six holding companies under the ZOCD agreement does not arise. Admittedly, the appellants have chosen not to challenge the said communication of SEBI dated 09.02.2015, hence it would not be open to the appellants to contend in the present appeal that the open offer obligation got triggered on execution of the ZOCD agreement. However, fact that the appellants have chosen not to challenge the decision of SEBI dated 09.02.2015, does not preclude this Tribunal from directing SEBI, in public interest, to investigate the matter afresh especially when the decision of SEBI contained in its communication dated 09.02.2015 does

not even remotely deal with the aforesaid unusual clauses contained in the ZOCD agreement. Accordingly, we direct SEBI to reinvestigate matter to find out as to whether the respondent no. 2 in the guise of entering into ZOCD agreement acquired direct control over the six holding companies and indirect control over the target company from the Bahl Group so as to trigger open offer obligation under the Takeover Regulations, 2011 and if so, take appropriate action for not complying with the said obligation so that such instances do not occur again in the future.

21. As noted earlier, the only question that falls for consideration in the present appeal is, whether SEBI is justified in approving the open offer price at ₹ 41.04 per share of the target company.

22. First contention of the appellants is that the shares of the target company held by the six holding companies were acquired by respondent no. 2 under two agreements, namely, ZOCD agreement dated 27.02.2012 and SPA dated 29.05.2014. The appellants submit that in the draft letter of offer having stated that the transactions under the SPA were for ₹ 1054.98 crore, in the disclosures made in the draft letter of offer, the transaction consideration under the SPA could not have been enhanced from ₹ 1054.98 crore to ₹ 3266.78 crore by including the amount of ₹ 2211.80 crore which was invested by the respondent no. 2 in the six holding companies under the ZOCD agreement dated 27.02.2012. There is no merit in this contention because, adding any amount to the consideration paid under SPA dated 29.05.2014 would obviously

enhance the price paid per share of the six holding companies under SPA dated 29.05.2014 and since the appellants contend that price per share of the target company paid under the SPA dated 29.05.2014 should be much more than the price approved by SEBI, appellants cannot find fault merely because the amount invested under the ZOCD agreement has been added to the price paid under SPA dated 29.05.2014 while determining the open offer price.

23. Second argument of the appellants is that by subscribing to the ZOCDs under the ZOCD agreement dated 27.02.2012 the acquirers had acquired 99.997% shares of the six holding companies and, therefore, even though the SPA dated 29.05.2014 refers to acquisition of 100% of the outstanding shares of the six holding companies from the Bahl Group, in reality acquiring 60,000 shares from the Bahl Group amounts to acquiring 0.003% of the fully diluted shares capital of the six holding companies. In such a case, it is submitted by the appellants that once 99.997% of the fully diluted share capital or economic interest in the six holding companies have been acquired under ZOCD agreement, then it is apparent that the amount paid under the SPA was only with a view to acquire 0.003% diluted share capital or economic interest in the six holding companies. There is no merit in the above contentions, because, under the Takeover Regulations, 2011 when an acquirer acquires shares or voting rights in, or control over the target company upon converting convertible securities without a fixed date of conversion, the obligation to make public announcement of an open offer, if any, arises on the date on which option for conversion of such securities into shares of the target

company is exercised. In the present case, no such option is exercised and hence it cannot be said the respondent no. 2 has acquired 99.997% shares of the six holding companies. As on the date of ZOCD agreement and as on date of SPA, the total shares issued by the six holding companies was only 60,000 shares and all those 60,000 shares were held by the Bahl Group. In such a case, acquiring 60,000 shares of the six holding companies from the Bahl Group would mean acquiring 100% shares and not acquiring 0.003% shares of the six holding companies as wrongly contended by the appellants. At this stage, we would like to make it clear that the question as to whether the respondent no. 2 in the guise of entering into ZOCD agreement had acquired control over the six holding companies as well as control over the target company is not the question that falls for consideration in this appeal. In fact by choosing not to challenge the decision of SEBI contained in its letter dated 09.02.2015, appellants are precluded from agitating the above question in the present appeal. However, fact that this Tribunal has directed SEBI to reinvestigate the matter cannot be a ground to uphold the contention of the appellants that on execution of ZOCD agreement, 99.997% shares of the six holding companies stood vested in respondent no. 2.

24. Argument of the appellants that for determining the highest negotiated price, amounts paid under each of the two agreements and the related transactions needed to be separately identified is without any merit because, the very basis of the argument of the appellants that the respondent no. 2 has acquired the shares of the six holding companies under two agreements is faulty because, respondent no. 2 has not opted

for conversion of ZOCDs into equity shares under the ZOCD agreement and consequently no equity shares have been issued to the respondent no. 2 under the ZOCD agreement. In such a case, it cannot be said any voting rights or shares have been acquired by respondent no. 2 by subscribing to the ZOCDs under the ZOCD agreement.

25. If the argument of the appellants that on execution of the ZOCD agreement, 99.997% interest in the shares of the six holding companies vested in respondent no. 2 and consequently 99.997% interest in the shares of the target company held by the six holding companies stood vested in respondent no. 2 is accepted then it would mean that on execution of SPA only 0.003% shares or economic interest in the shares of six holding companies and consequently 0.003% shares of the target company held by the six holding companies have been acquired by respondent no. 2. In such a case, acquiring 0.003% shares of the target company would not trigger open offer obligation and consequently determining the highest negotiated price paid per share of the target company under SPA dated 29.05.2014 does not arise at all.

26. Argument of the appellants based on regulation 5(2),8(2)(a) and regulation 8(8) of the Takeover Regulations is mutually contradictory. The deeming fiction of regarding indirect acquisition as direct acquisition under regulation 5(2) comes into operation only in the circumstances set out therein. None of those circumstances set out in regulation 5(2) of the Takeover Regulations, 2011 exist in the present case and hence regulation 5(2) would not be applicable to the present case. Similarly,

reliance placed by appellants on regulation 8(2)(a) and regulation 8(8) of the Takeover Regulations, 2011 is misplaced, because, what was acquired by respondent no. 2 from the Bahl Group under the SPA dated 29.05.2014 was the entire 60,000 shares representing 100% of the shares issued by the six holding companies. In such a case, determining the highest negotiated price per share on the basis of the amount paid under SPA dated 29.05.2014 for acquiring 60,000 shares would be much less than ₹ 41.04 per share. Therefore, no fault could be found with SEBI in determining the highest negotiated price at ₹ 41.04 per share by including the amount invested by respondent no. 2 under the ZOCD agreement.

27. Argument of appellants that acquisition of shares of the six holding companies by respondent no. 2 from the Bahl Group under SPA dated 29.05.2014 amounted to acquisition of 0.003% of shares of the target company held by the six holding companies could be accepted only if it is accepted that by subscribing to the ZOCDs under the ZOCD agreement the respondent no. 2 had acquired 99.997% interest in the shares of the target company held by the six holding companies even before the option for conversion of ZOCDs into equity shares is exercised. As noted earlier, specific plea raised to that effect in the complaint dated 25.06.2014 was refuted by SEBI perfunctorily vide communication dated 09.02.2015 and the appellants have chosen not to challenge the said decision of SEBI contained in communication dated 09.02.2015. Therefore, the argument of the appellants that under SPA dated 29.05.2014, acquisition of 60,000 shares of the six holding companies from the Bahl Group by respondent no. 2 represented acquisition of

0.003% interest in the diluted share capital of the six holding companies cannot be accepted because, as on the date of SPA, the option for conversion of ZOCDs into equity shares was not exercised by respondent no. 2 and acquisition of 60,000 shares represented acquisition of 100% shares of the six holding companies from the Bahl Group.

28. To overcome the above difficulty, appellants rely on the format for disclosures prescribed by SEBI under regulation 30(1) and 30(2) of the Takeover Regulations, 2011 wherein, the expression ‘Diluted share/voting capital’ is stated to mean the total number of shares in the target company assuming full conversion of the outstanding convertible securities/warrants into equity shares of the target company. No doubt, that the format for the letter of offer prescribed by SEBI under regulation 16(1) in Chapter III titled ‘open offer process’ mandates that the ‘pre and post offer shareholding pattern of the target company’ in the table format specified by SEBI be disclosed as on the date of letter of offer and the note below the specified table format states that ‘The percentage holding shall be taken on the basis of diluted share capital as defined in the SAST Regulations, 2011’. Relying on the aforesaid formats it is contended by the appellants that under the Takeover Regulations, 2011 open offer price has to be determined by considering the shares that are liable to be issued under the ZOCD agreement even though option for conversion of ZOCDs into equity shares have not been exercised. We see not merit in the above contentions, because, the expression ‘diluted share capital’ is not defined under any of the regulations framed in Takeover Regulations and that expression defined in the format prescribed under the Takeover

Regulations, 2011 is restricted for the purpose of disclosures only. Even regulation 28(2) contained in Chapter V, of the Takeover Regulations, 2011 provide that for the purposes of the said Chapter relating to disclosures of shareholding and control, the acquisition and holding of any convertible security shall also be regarded as shares and disclosures of such acquisitions and holdings shall be made accordingly. Therefore, fact that some of the formats set out in the Takeover Regulations, 2011, provide that for the purposes of disclosures the acquisition and holding of any convertible security shall be regarded as shares, cannot be a ground to hold that while determining the highest negotiated price, it must be presumed as if option for conversion is exercised and the shares are issued. Accepting such a contention would mean extending the deeming fiction beyond the scope for which it is created which is not permissible in law.

29. Apart from the above, when regulation 13(2)(b) of the Takeover Regulations specifically provides that the date on which option for conversion of ZOCDs into equity shares is exercised shall be the date for triggering the open offer process, it would be improper on the basis of the format set out in the Takeover Regulations, 2011 to hold that even if option is not exercised open offer obligation get triggered on execution of convertible securities. It is well established in law, that even if there is any conflict between the regulation and the format prescribed thereunder, then the regulation shall prevail. Therefore, in view of the specific provision contained in regulation 13(2) (b) of the Takeover Regulations 2011, it is not possible to hold that the deeming fiction created for the

purposes of disclosures in the format prescribed in the Takeover Regulations, 2011 has to be applied while determining the highest negotiated price for the purposes of open offer under the Takeover Regulations, 2011.

30. Reliance placed by the appellants on various decisions of the Apex Court as also decisions of this Tribunal are misplaced, because, in none of those decisions it is held that the deeming fiction created for a particular purpose can be extended beyond the purpose for which it is created and therefore, all those decisions being distinguishable on facts have no relevance to the facts of the present case.

31. In the result we pass the following order:-

- a) Appellants while challenging the decision of SEBI dated 17.11.2014 have deemed it fit not to challenge the decision of SEBI dated 09.02.2015, wherein, various allegations made by the appellants against the acquirers (respondent no. 2 to 4) and respondent no. 5 have been rejected. Without challenging the decision of SEBI dated 09.02.2015 appellants are not justified in making grievances against the acquirers and respondent no. 5 which are covered under the decision of SEBI dated 09.02.2015. In these circumstances, we decline to consider grievances of the appellants against the acquirers and respondent no. 5 which are covered in the decision of SEBI dated 09.02.2015.

- b) Argument of the appellants that SEBI by its communication dated 17.11.2014 ought to have approved the open offer price at ₹ 5,68,430.32 per share of the target company instead of approving the open offer price at ₹ 41.04 per share of the target company is without any merit. Under SPA dated 29.05.2014 acquisition of 60,000 shares of the six holding companies by respondent no. 2 from the Bahl Group constituted acquisition of 100% shares of the six holding companies, because as on that date the six holding companies had not issued any equity shares under the ZOCD agreement on account of respondent no. 2 not exercising its option to seek conversion of ZOCDs into equity shares of the six holding companies. Since acquisition of 100% shares of the six holding companies amounted to the respondent no. 2 indirectly acquiring the shares of the target company from the Bahl Group (through the six holding companies) which entitled the respondent no. 2 to exercise voting rights in the target company in excess of twenty-five percent, obligation to make public announcement of an open offer under the Takeover Regulations, 2011 got triggered. In such a case, if the gross amount paid under the SPA dated 29.05.2014 for acquisition of the shares of the six

holding companies and RBHPL and consequently acquiring shares of the target company and TV 18 from the Bahl Group (through six holding companies) is segregated, it is seen that the respondent no. 2, under the SPA dated 29.05.2014 has paid much less than ₹ 41.04 per share of the target company. Therefore, in the facts of present case, decision of SEBI in approving the open offer price at ₹ 41.04 per share, by taking into consideration the amount invested under the ZOCD agreement cannot be faulted.

- c) Decision of the acquirers to consider the amount invested under the ZOCD agreement while determining the open offer price, led us to consider the clauses contained in the ZOCD agreement. Perusal of various clauses contained in the ZOCD agreement as more particularly set out in para 16 above, led us to believe, prima facie, that by executing ZOCD agreement on 27.02.2012 the Bahl Group sought to divest its control over the six holding companies and consequently sought to divest control over the target company and TV 18 without receiving any consideration which is rather strange and unusual to say the least.

d) In our opinion, divesting the control over the target company in the facts of present case, prima facie falls within the meaning of the word 'control' defined under regulation 2(1)(e) of the Takeover Regulations, 2011. In such a case, whether the obligation to make a public announcement of an open offer under the Takeover Regulations, 2011 has triggered or not is a question which needs consideration. Although SEBI claims to have considered that question in its communication dated 09.02.2015, there is nothing in the said communication to suggest that various clauses contained in the ZOCD agreement have been considered by SEBI. In any event, since SEBI has failed to give reasons as to why various clauses contained in the ZOCD agreement do not amount to divesting control over the target company from the Bahl Group to the respondent no. 2, we in public interest direct SEBI to reinvestigate the question as to whether the respondent no. 2 in the guise of executing ZOCD agreement, indirectly acquired control over the target company without following the procedure prescribed under the Takeover Regulations, 2011 and if so, take appropriate action against the concerned person or persons for violating the provisions contained in the Takeover Regulations, 2011 so that such violations are not committed again.

- e) SEBI is directed to complete the reinvestigation and submit the action taken report to this Tribunal within six months from today.

32. Appeal is disposed of in the above terms with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

13.04.2016
Prepared & Compared By: PK