BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

**Order Reserved On: 29.04.2022**
**Date of Decision : 20.07.2022**

**Appeal No. 293 of 2018**

Vishvapradhan Commercial Pvt. Ltd.
4th Floor, Plot No. 38, Institutional Area,
Sector 32, Gurugram 122 001,
Haryana, India. …Appellant

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. Somasekhar Sundaresan, Mr. Rahul Dutt and Mr. Zarnaab Aswaad, Advocates i/b Khaitan & Co. for the Appellant.

Mr. Gaurav Joshi, Senior Advocate with Mr. Abhiraj Arora, Mr. Harshvardhan Nankani, Mr. Shourya Tanay and Ms. Anshu Mehta, Advocates i/b ELP for the Respondent.

**WITH**
**Misc. Application No. 189 of 2021**
**And**
**Appeal No. 294 of 2019**

Dr. Prannoy Roy
B-207, Greater Kailash – I,
Delhi – 110048. …Appellant

Versus

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

Ms. Fereshte Sethna, Advocate with Mr. Abhishek Tilak and Mr. Ameya Pant, Advocates i/b DMD Advocates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**
**Appeal No. 295 of 2019**

Radhika Roy
B-207, Greater Kailash – I,
Delhi – 110048. …Appellant

Versus

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

Ms. Fereshte Sethna, Advocate with Mr. Abhishek Tilak and Mr. Ameya Pant, Advocates i/b DMD Advocates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**
**Appeal No. 296 of 2019**

RRPR Holding Pvt. Ltd.
E – 186, Basement,
Greater Kailash – I,
New Delhi – 110 048. …Appellant

Versus

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

Ms. Fereshte Sethna, Advocate with Mr. Abhishek Tilak and Mr. Ameya Pant, Advocates i/b DMD Advocates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**
**Misc. Application No. 113 of 2021**
**And**
**Appeal No. 77 of 2021**

Dr. Prannoy Roy
B-207, Greater Kailash – I,
Delhi – 110048. …Appellant

Versus

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

Ms. Fereshte Sethna, Advocate with Mr. Abhishek Tilak and Mr. Ameya Pant, Advocates i/b DMD Advocates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**
**Appeal No. 78 of 2021**

Radhika Roy
B-207, Greater Kailash – I,
Delhi – 110048. …Appellant

Versus

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

Ms. Fereshte Sethna, Advocate with Mr. Abhishek Tilak and Mr. Ameya Pant, Advocates i/b DMD Advocates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**
**Appeal No. 79 of 2021**

RRPR Holding Pvt. Ltd.
E – 186, Basement,
Greater Kailash – I,
New Delhi – 110 048. …Appellant

Versus

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

Ms. Fereshte Sethna, Advocate with Mr. Abhishek Tilak and Mr. Ameya Pant, Advocates i/b DMD Advocates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**
**Misc. Application No. 123 of 2021**
**(Stay Application)**
**And**
**Appeal No. 80 of 2021**

New Delhi Television Ltd.
B 50A, 2nd Floor, Archana Complex,
Greater Kailash - I,
New Delhi – 110048. …Appellant

Versus

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

Mr. P. N. Modi, Senior Advocate with Ms. Fereshte Sethna, Mr. Abhishek Tilak and Mr. Ameya Pant, Advocates i/b DMD for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per: Justice Tarun Agarwala, Presiding Officer

1. Eight (8) appeals have been filed against four orders. The impugned orders flow from the consequences of the loan agreement dated July 21, 2009 and call option agreements dated July 21, 2009. Since the matter is interlinked in one way or the other, all the eight appeals are being decided together. Appeal No. 293 of 2018 has been filed by Vishvapradhan Commercial Pvt. Ltd. ("VCPL" for convenience) against the order dated June 26, 2018 passed by the Whole Time Member ("WTM" for convenience) of the Securities and Exchange Board of India directing VCPL to make an open offer in terms of Regulation 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and Regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("SAST Regulations, 2011" for convenience) SAST Regulations, 2011.

2. Appeal Nos. 294, 295 and 296 of 2019 has been filed by Dr. Prannoy Roy ("PR"), Radhika Roy ("RR") and RRPR Holding Pvt. Ltd. ("RRPR") respectively against the order dated

June 14, 2019 passed by the WTM restraining PR, RR and RRPR from accessing the securities market for a period of two years and further restraining PR and RR from holding or occupying any position as Director or as Key Managerial Personnel in NDTV for a period of two years or in any other listed Company for a period of one year.

3. Appeal No. 77 of 2021, 78 of 2021 and 79 of 2021 has been filed by PR, RR and RRPR respectively against the order dated December 24, 2020 passed by the Adjudicating Officer ("AO" for convenience) imposing a penalty of Rs. 25 crores under Section 15HA of the SEBI Act and Rs. 1 crore each under Section 23H of the Securities Contracts (Regulation) Act, 1956 ("SCRA" for convenience).

4. Appeal No. 80 of 2021 has been filed by NDTV against the order dated December 29, 2020 passed by the AO imposing a penalty of Rs. 5 crore under Section 23E of the SCRA.

5. The facts leading to the filing of Appeal No. 293 of 2018 is, that Prannoy Roy ("PR") and Radhika Roy ("RR") own and control RRPR Holding Pvt. Ltd. ("RRPR" for convenience) Prannoy Roy, Radhika Roy and RRPR Holding Pvt. Ltd.

(hereinafter referred to as "the promoters") are promoters of New Delhi Television Limited ("NDTV" for convenience), a public limited company holding 61.45% of the total shareholding of the Company.

6. In June 2008, the promoters of NDTV made an open offer for the shares of NDTV. To finance the open offer, they borrowed around Rs. 540 crores from Indiabulls Financial Services Limited, for which purpose, they pledged their shares in NDTV as security. In October 2008, the promoters took a loan of Rs. 375 crores from ICICI Bank Limited, in order to repay Indiabulls Financial Services Limited. The ICICI loan carried a rate of interest of 19% per annum. The promoters, in order to secure the borrowing of Rs. 375 crores, had encumbered their entire shareholding in NDTV by way of non-disposal undertakings with ICICI Bank. Individual promoters, i.e. Prannoy Roy and Radhika Roy also provided personal guarantees for this loan.

7. In July 2009, the promoters took a loan of Rs. 350 crores, from VCPL (the appellant) in order to repay ICICI Bank. RRPR, RR and PR and VCPL were signatories to the loan

agreement. Through this loan agreement, a sum of Rs. 350 crores was advanced to RRPR to enable RRPR to discharge its liability to ICICI Bank Limited. Simultaneously, two call option agreements dated July 21, 2009 were also executed for 1,63,05,404 equity shares of NDTV representing 26% of NDTV shares. The call option agreement between RRPR and Shyam Equities Private Limited ("SEPL" for convenience) in terms of which SEPL had the right to purchase 11.01% equity shares of NDTV from RRPR at a call option price of Rs. 214.65 per share. Another call option agreement of the same date was executed between RRPR and Subhgami Trading Private Limited ("STPL" for convenience) in terms of which STPL had a right to purchase 14.99% equity shares of NDTV from RRPR at a call option price at Rs. 214.65 per share. Needless to say here, SEPL and STPL are associates of VCPL. Another loan was taken by the promoters from VCPL on January 25, 2010 for Rs. 53.85 crores.

8. The terms of the loan agreement are as follows:-

(i). The tenure of the loan is 10 years.

(ii). The loan shall not carry any interest.

(iii). RRPR will issue a convertible warrant to VCPL, convertible into equity shares aggregating to 99.99% of the fully diluted equity share capital of RRPR at the time

of conversion, convertible at any time during the tenure of the loan or thereafter.

(iv). VCPL shall have the right to purchase from the promoters all the equity shares of RRPR at par value.

(v). VCPL and its affiliates cannot purchase shares of NDTV which will increase their holding to more than 26% in NDTV without the consent of the promoters.

(vi). One of the conditions precedent to the execution of agreement was sale of 11,563,683 shares of NDTV from the promoters to RRPR such that RRPR holds 26% shares of NDTV.

(vii). Appointment of atleast one director (out of 3) nominated by VCPL on the Board of RRPR, whose presence is necessary to constitute quorum for any meeting of the Board.

(viii). VCPL shall not interfere with the editorial policies of NDTV.

(ix). Over the next 3 to 5 years, RRPR and VCPL will look for a stable and reliable buyer of RRPR who will maintain the brand and credibility of NDTV.

(x). The promoters together with their affiliates shall exercise their voting rights in RRPR and NDTV.

(xi). In terms of Schedule 3, the following matters relating to RRPR would require prior written consent of VCPL:

(a) Issue or agreement to issue any equity securities in RRPR.

(b) Buyback of equity securities, reduction or alteration of share capital of RRPR.

(c) Borrowing or raising money or issue of any debenture or assumption of debt.

(d) Amending the charter documents of RRPR

(e) Merger, amalgamation or consolidation of RRPR with any other entity or any entity with RRPR.

(f) Set up any subsidiary.

(g) Cause RRPR to take any steps towards bankruptcy, insolvency or reorganization, arrangement, adjustment, winding up, liquidation, dissolution, composition or other relief with respect to it or its debts or seeking appointment of a receiver, trustee, custodian or other similar official for it or all or any substantial part of its property.

(h) Sell or otherwise dispose of any asset of RRPR or transfer any equity securities of NDTV or create any encumbrance on the equity securities of NDTV.

(i) Sell, transfer or create any encumbrance on the equity securities of RRPR.

(j) Take any action to issue any equity securities or enter into any agreement as a result of which the promoters cease to be in sole control of RRPR.

(xii). The following matters relating to NDTV would require prior written consent of VCPL:-

(a) Issue any equity securities of NDTV which results in aggregate valuation of NDTV being less than Rs. 1346 Cr. (valuation at which lender has put money into the company).

(b) Merger, amalgamation or consolidation of NDTV with any other entity.

(c) Cause NDTV to take any steps towards bankruptcy, insolvency or reorganization, arrangement, adjustment, winding up, liquidation etc.

(d) Buyback of equity securities, reduction or alteration of share capital of NDTV.

(e) Take any action to issue any equity securities or enter into any agreement as a result of which the promoters cease to be in sole control of NDTV.

9. The terms of the call option agreements are as under:-

i) SEPL and STPL have a right to purchase either by themselves or through nominees 11.01.% and 14.99% equity shares of NDTV respectively from RRPR at a call option price of Rs. 214.65 per share.

ii) For a period of 5 years the promoters would only sell their shares after taking consent from the call option holders. If, the call option is exercised, the purchasers cannot sell those shares for a period of 5 years from the date of the loan agreement without prior consent of Prannoy Roy and Radhika Roy.

iii) There is a right of first refusal for the call option holders and the promoters with respect to the NDTV shares when they want to dispose of such shares of NDTV.

iv) Pronnoy Roy and Radhika Roy shall not engage in any business competing with NDTV.

10. After eight years a show cause notice dated December 20, 2016 was issued to show cause why suitable directions under Section 11(1) and 11(4) of the SEBI Act and Regulation 44 and 45 of the SAST Regulations, 1997 read with Regulation 32 and

35 of the SAST Regulations, 2011 should not be issued against VCPL for the alleged violations. The violations alleged were that VCPL had acquired veto rights in RRPR and NDTV indirectly over the 26% shareholding held by RRPR and NDTV which resulted in the acquisition of "control" in RRPR and indirect control in NDTV by VCPL. Further, VCPL on account of indirect acquisition failed to make a public announcement of an open offer in terms of Regulation 12 read with Regulation 14(3) of the SAST Regulations, 1997.

11. The WTM after considering the replies filed by VCPL and, after considering the material evidence on record, passed the impugned order issuing the following directions:-

> *"29. I, therefore, in exercise of powers conferred upon me under sections 11, 11B read with section 19 of the SEBI Act, 1992, regulation 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereby issue the following directions to the noticee acquirers :*
>
> *a) The noticee shall make a public announcement to acquire shares of the target company in accordance with the*

*provisions of the SAST Regulations, 1997, within a period of 45 days from the date of this order;*

*b) The noticee shall along with the offer price, pay interest at the rate of 10% per annum from the date when they incurred the liability to make the public announcement till the date of payment of consideration, to the shareholders who were holding shares in the target company on the date of violation and whose shares are accepted in the open offer, after adjustment of dividend paid, if any."*

12. The WTM held that the loan agreement was a façade in the form of a loan transaction and was executed in order to shroud the true nature of the transaction, namely, to acquire indirect control of NDTV. The WTM rejected the contention of VCPL that the loan transaction was an asset-recourse lending arrangement. The WTM contended that the loan had an inbuilt agreement to purchase the company's stock at a fixed price over and above the prevailing current market price. Further, a perusal of clause 6 of the loan agreement indicated that even without exercising the conversion option of equity share capital

of RRPR, VCPL had a right to purchase the shares of RRPR at par value. Further, the conversion of warrants even after the tenure of the loan indicated that VCPL had in fact acquired control over the company. The WTM held that the exercise of the right to convert warrants into the shares of RRPR was not dependent on the repayment of the loan and, whether or not the loan was repaid, VCPL could validly seek conversion of the warrants withheld with RRPR and, consequently, concluded that VCPL was indirectly holding 26% shares of NDTV. The WTM, thus, concluded that it was not a simple case of a secured loan or an instance of asset-recourse lending as contended by VCPL.

13. The WTM further held that the valuation of the collateral was very peculiar, namely, that the valuation of the shares at Rs. 214.65 per share which was above the market value of the NDTV shares could not be accepted and this unusual valuation reinforced the belief that the said convertible warrants could not be referred to as collateral and were independent elements independent of the whole transactions.

14. The WTM further held that the voting rights provided under clause 20 of the loan agreement unambiguously binds the promoters and in effect gives complete control to VCPL. Further, clause 20 of the loan agreement does not give any discretion to the promoters with respect to the voting rights in NDTV. In fact, through clause 20 of the loan agreement, the promoters have ceded their voting rights to the extent of 26% covered in the loan agreement and, therefore, the exercise of voting rights pursuant to the execution of the loan agreement, call option agreement are controlled by VCPL under the terms of the transaction documents.

15. The WTM found that there was no clause in the loan agreement for terminating the agreement upon repayment of the loan transaction. Further, the loan granted was without any interest which leads to an inference that it was not a commercial transaction and that the loan agreement was executed in order to acquire beneficial interest in the shares of NDTV. The WTM further concluded that the primary purpose that can be deciphered from the call option agreement was to acquire a stake or control in NDTV and that the option to exercise its rights under the call option agreements was not limited to any

contingent event which would trigger its exercise. The WTM further concluded that non-compete clause in the agreement is generally found in share purchase agreement and not under the loan agreement and, therefore, such non-compete clause points out to a controlling stake in NDTV. The WTM, therefore, concluded that the loan transaction was used to shroud the true nature of the transaction and the entire purpose was to acquire control.

16. We have heard Shri Dwarkadas, the learned senior counsel assisted by Shri Somasekhar Sundaresan, the learned counsel for the appellants and Shri Gaurav Joshi, the learned senior counsel assisted by Shri Abhiraj Arora, the learned counsel for the respondent.

17. It was urged and contended by the learned senior counsel for VCPL that Prannoy Roy and Radhika Roy required money to repay their borrowings availed from ICICI Bank Limited to the extent of Rs. 375 crores which carried an interest @ 19% per annum against which they had encumbered their entire shareholding and also provided personal guarantees. For the aforesaid purpose, a commercial loan was provided by VCPL.

While granting the loan, certain collateral securities and protective rights were taken, namely, exercise of the warrant conversion option to acquire 99.99% equity shares of RRPR resulting in indirect acquisition of 26% equity shares. The same would also result when VCPL exercises the purchase option to purchase all the equity shares of RRPR held by Radhika Roy and Prannoy Roy. In addition, VCPL through its affiliates could directly purchase 26% equity shares of NDTV at a price of Rs. 214.65 per shares by paying Rs. 350 crores to RRPR which amount could be utilized by RRPR to repay the loan to VCPL. If, VCPL was interested in the media business of NDTV it could acquire 26% equity shares of NDTV at Rs. 214.65 per share irrespective of the prevailing market price. This arrangement was beneficial to both the parties, namely, VCPL and the promoters of NDTV. It was further contended that the WTM committed a manifest error in analyzing various provisions of the loan agreement to come to a conclusion that the loan agreement was nothing else but an indirect method of acquisition of the shares of NDTV and/ or control over the management of NDTV. It was contended that the said finding is patently perverse as the loan agreement does not in any manner entail an acquisition of shares in NDTV, nor control over the

management or policy decisions in NDTV. It was contended that so long as the loan remained unpaid, VCPL continued to have warrant conversion option and the purchase option and the call option under the call option arrangement. It was contended that unless such options are exercised, the obligation to make an open offer is not triggered under Regulation 14 of SAST Regulations, 1997.

18. Shri Dwarkadas, the learned senior counsel contended that the essential ingredients as defined under Regulation 2(1)(c) are not satisfied in the present facts and circumstances of the case. The essential ingredients to constitute control are right to appoint majority of the directors, holding majority voting rights and/ or control over management and policy decisions of the company which in the instant case is non-existent nor any evidence has come on record to show that VCPL has control over NDTV through any of the aforesaid ingredients as per Regulation 2(1)(c) of the SAST Regulations.

19. It was urged that matters covered in the 3rd Schedule to the Loan Agreement are limited protected rights with a view to safeguard and protect the loan. The control or management and

policy decisions of NDTV and RRPR continued to remain with Prannoy Roy and Radhika Roy and such control at no point of time came to VCPL nor was it exercised. Further, the act of securing its loan through warrant conversion option, purchase option and call option over NDTV equity shares were limited protective rights and did not amount to acquisition of indirect control by VCPL over NDTV. It was contended that only if the options stated aforesaid were exercised by VCPL only then 26% shares would come under the control of VCPL and/ or its associates. It was urged, that the loan agreement was a commercial bargain which is required to be interpreted in a business like manner and that the WTM has committed a manifest error in reading between the lines and drawing conclusions that the loan transaction was nothing else but a facade in the form of a loan transaction in order to shroud the true nature of the transaction, namely, to acquire control of NDTV.

20. In support of his contention the learned counsel has placed reliance upon the decision of this Tribunal in ***Subhkam Ventures (India) Pvt. Ltd. vs. SEBI (2010) SCC Online SAT 35,*** the decision of the WTM in ***Victor Fernandes vs. Network***

***18, dated 15 November 2019*** which was affirmed by this Tribunal by its judgement dated September 28, 2021 in Appeal No. 618 of 2019 and, the decision of the Supreme Court in ***Arcelormittal India Private Limited vs. Satish Kumar Gupta & Ors. (2019) 2 SCC 1.***

21. On the other hand, Shri Gaurav Joshi, the learned senior counsel for the respondent contended that under the garb of a loan agreement, VCPL had acquired voting rights in NDTV in as much as the loan did not carry any interest and that the loan was repayable at the end of 10 years. It was further contended that the conversion of warrants was not dependent on the loan agreement and even after the loan was repaid the conversion warrants could be exercised. Much emphasis was laid on the use of the word 'thereafter'. It was contended that from a perusal of clause 7, 8 & 20 of the loan agreement, it was clear that VCPL had indirectly taken control over NDTV and, therefore, was required to make an open offer under the SAST Regulations which they failed to do so. It was urged that the call option agreements binds the borrower and the lender and restricts them from selling or transferring NDTV shares to any person for a period of 5 years from the date of the loan

agreement. It was also urged that because of this clause, VCPL through its associates had an enforceable right over NDTV shares that prevented RRPR from selling their shares without its permission. Not only this, the non-compete clause clearly shows the intention of VCPL to control the promoters of NDTV. It was contended that by exercising warrant conversion option and call option agreement, VCPL acquired 52% of the shares of NDTV indirectly. It was also urged, that clause 20 of the loan agreement does not give any discretion to the promoters with regard to the exercise of their voting rights in NDTV and, consequently, the promoters have in fact ceded their voting rights on the 26% equity shares covered in the loan agreement and another 26% equity shares covered in the call option agreements. It was thus urged, that the voting on 52% equity shares of NDTV is controlled under these agreements by VCPL.

22. Having the heard the learned counsel for the parties at some length and upon a perusal of the impugned order, we find that the finding in the impugned order is, that VCPL acquired indirect control over NDTV by entering into a loan agreement and call option agreements thereby obligating VCPL to make a public announcement of an open offer under Regulation 12 read

with Regulation 14(3) of the SAST Regulations. In our opinion, the matter is not one of acquisition of shares of voting rights of NDTV directly or indirectly or acquisition of control over NDVT directly. In fact, according to us, the limited issue for determination is, whether, the appellant acquired indirect control over NDTV by entering into these agreements. In this regard, before we proceed further, it would be appropriate to peruse Regulation 2(1)(b), 2(1)(c), 12 and 14(1),(2) and (3) of the SAST Regulations, 1997 which are extracted hereunder:-

> ***"acquirer"***
>
> ***2(1)(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;*
>
> ***"control"***
>
> ***Regulation 2(1)(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."*

***Acquisition of control***

***"Regulation 12.*** *Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations:*

*Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a special resolution passed by the shareholders in a general meeting:*

*Provided further that for passing of the special resolution facility of voting through postal ballot as specified under the Companies (Passing of the Resolutions by Postal Ballot) Rules, 2001 shall also be provided.*

*Explanation.— For the purposes of this regulation, acquisition shall include direct or indirect acquisition of control of target company by virtue of acquisition of companies, whether listed or unlisted and whether in India or abroad."*

***Timing of the public announcement of offer***

***"Regulation 14(1)*** *The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein:*

*Provided that in case of disinvestment of a Public Sector Undertaking, the public announcement shall be made by the merchant banker not later than 4 working days of the acquirer executing the Share Purchase Agreement or Shareholders Agreement with the Central Government or the State Government as the case may be, for the acquisition of shares or voting rights exceeding the percentage of shareholding referred to in regulation 10 or regulation 11 or the transfer of control over a target Public Sector Undertaking.*

***(2)*** *In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage*

*specified in regulation 10 or regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be.*

*Provided that in case of American Depository Receipts or Global Depository Receipts entitling the holder thereof to exercise voting rights in excess of percentage specified in regulation 10 or regulation 11, on the shares underlying such depository receipts, public announcement shall be made within four working days of acquisition of such depository receipts.*

***(3)*** *The public announcement referred to in regulation 12 shall be made by the merchant banker not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer."*

23. From a perusal of the aforesaid provisions, it is clear that an acquirer is a person who acquires control over the target company either directly or indirectly. The word "control" as

defined under Regulation 2(1)(c) includes the right to appoint majority of the directors or to control the management or policy decisions directly or indirectly, individually or in concert by virtue of the shareholding or management rights or shareholding agreements or voting agreements or in any other manner. Regulation 12 prescribes that no acquirer shall acquire control unless such person makes a public announcement to acquire shares. Regulation 14 prescribes that such public announcement should be made within four working days.

24. From the aforesaid, it is clear that the meaning and import of the term "control" as defined in Regulation 2(1)(c) of the SAST Regulations, 1997 is of vital importance. The term "control" was considered and explained by this Tribunal in the matter of ***M/s. Subhkam Ventures (I) Pvt. Ltd. vs. SEBI in Appeal No. 08 of 2009 decided on January 15, 2010.*** In this appeal, the question raised was whether the share subscription and shareholders agreement executed by Shubhkam gave control over the target company as per the Regulation 2(1)(c) of the SAST Regulations, 1997. This Tribunal examined and explained what the word "control" under Regulation 2(1)(c) means as under:-

*"6....The term control has been defined in Regulation 2(1)(c) of the takeover code to "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." This definition is an inclusive one and not exhaustive and it has two distinct and separate features: i) the right to appoint majority of directors or, ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary (Eighth Edition) at page 353 where this term has been defined as under:*

> *"Control – The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee."*

*Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the board of directors that is in control. If an acquirer were to have power to appoint majority of directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control the management or policy decisions of a company, he would be in control. This could happen by virtue of his shareholding or management rights or by reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these*

*questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."*

25. The Supreme Court while considering the expression "control" in Section 29(A)(c) of the Insolvency and Bankruptcy Code, 2016 ("IBC 2016" for convenience) held:-

*"49. The expression "control" is defined in Section 2(27) of the Companies Act, 2013 as follows:-*

*2(27)* ***"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;*

*50. The expression "control" is therefore defined in two parts. The first part refers to de jure control, which includes the right to appoint a*

*majority of the directors of a company. The second part refers to de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be "in control". A management decision is a decision to be taken as to how the corporate body is to be run in its day to day affairs. A policy decision would be a decision that would be beyond running day to day affairs, i.e., long term decisions. So long as management or policy decisions can be, or are in fact, taken by virtue of shareholding, management rights, shareholders agreements, voting agreements or otherwise, control can be said to exist.*

*51. Thus, the expression "control", in Section 29A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with "management", means de facto control of actual management or policy decisions that can be or are in fact taken. A judgment of the Securities Appellate Tribunal in M/s Subhkam Ventures (I) Private Limited v. The Securities and Exchange Board of India (Appeal No. 8 of 2009 decided on 15.1.2010), made the following observations qua "control" under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations,*

*1997, wherein "control" is defined in Regulation 2(1) (e) in similar terms as in Section 2(27) of the Companies Act, 2013. The Securities Appellate Tribunal held: (SCC OnLine SAT para 6)*

> *"6. ...The term control has been defined in Regulation 2(1)(c) of the takeover code to "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." This definition is an inclusive one and not exhaustive and it has two distinct and separate features: (i) the right to appoint majority of Directors or, ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary (Eighth Edition) at page 353 where this term has been defined as under:*
>
> > *"Control - The direct or indirect power to direct the management and policies of a*

*person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee."*

*Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the board of Directors that is in control. If an acquirer were to have power to appoint majority of Directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control the management or policy decisions of a company, he would be in control. This could happen by virtue of his shareholding or management rights or by reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is*

> *in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."*
>
> *52. We think that these observations are apposite, and apply to the expression "control" in Section 29A(c)."*

26. This Tribunal in Shubhkam held that the word "control" is a proactive and not a reactive power. That is to say, it is a positive power and not a negative power. The test of control was whether the acquirer was in the driving seat and whether the driver controlled the steering, accelerator, the gears and the brakes and, if the answer to these questions was in the affirmative, then alone would he be in control of the company. The Supreme Court while affirming the decision of this Tribunal in Shubhkam held that the expression "control" denotes only positive control and further the word "control" as contrasted with management means *de facto* control of actual management or de facto control of policy decisions.

27. Needless to say here, that the definition of the term "control" in the IBC 2016 is the same/ identical as defined under Section 2(27) of the Companies Act, 2013 and Regulation 2(1)(c) of the SAST Regulations, 1997.

28. The respondent contended that the definition of "control" under the SAST Regulations is an inclusive definition. Its wide sweep will bring within its ambit direct as well as indirect matters through which control can be acquired and exercised in a target company. It was urged, that in order to assess whether control has been acquired, the actual control that the acquirer is able to exercise in the indirectly acquired company through intermediary company is to be considered. It was urged, that the expression "control" in Justice P.N. Bhagwati Committee Report, 1997 found it prudent to define the word in an inclusive and wide sense in order for it to cover a wide array of real life situation where control of a listed company has changed. It was urged, that the legislative intent was not to provide a straitjacket definition of control keeping in mind the dynamics of the securities market and, therefore, the definition of control was kept open ended and SEBI was granted a discretion to determine change of control on a case to case basis. In support of his submission, reliance was made in the decision of ***Ashwin K.***

***Doshi vs. SEBI in Appeal No. 44 of 2001 decided on October 25, 2002*** wherein it was held that the expression "control" is not of a narrow magnitude and that the Justice P. N. Bhagwati Committee itself knew about the limitation and that is why it wanted SEBI to draw its own conclusion through investigation if necessary. It was further held that a narrow interpretation of the concept of control would frustrate the object of the Act and the Regulations. It was thus urged, that the expression "control" not only includes positive but also negative control and that the term "control" should be construed accordingly. Reliance was also made of a decision of the Delhi High Court in ***Future Retail Limited vs. Amazon .Com Investment Holdings LLC & Ors. 2020 SCC Online Delhi 1636*** wherein the Delhi High Court held in the context of certain negative rights prohibiting sale of assets of the listed company to certain specific entities holding that the conflation of the three agreements besides creating protective rights in favour of Amazon for its investment also transgressed to control over future Retail Ltd. ("FRL").

29. It was also urged, that reliance of the decision of the Supreme Court in Arcelormittal India Private Limited is misplaced in as much as the Supreme Court has interpreted the

word “control” in the context of Section 29(A)(c) of IBC 2016, i.e., the word “control” and “management”, as used in the said section, which would seem to suggest positive or proactive control as opposed to mere negative or reactive control. It was also urged, that the decision in Shubhkam was challenged by SEBI before the Supreme Court which appeal was disposed of with the clarification that the decision of the Tribunal in Shubhkam will not be treated as a precedent and that the question of law would remain open. It was thus urged, that the decision of this Tribunal in Shubhkam cannot be treated as a precedent nor can it be relied upon to test the definition of the expression “control”. It was further contended, that the Supreme Court while disposing of SEBI’s appeal in Shubhkam matter was passed by a three judge bench whereas the decision in Arcelormittal India Private Limited was passed by a two judge bench of the Supreme Court. It was suggested that the judgement of the Supreme Court in Arcelormittal India Private Limited has not overruled the order of the Supreme Court in ***SEBI vs. Shubhkam Ventures (I) P. Ltd. in Civil Appeal No(s). 3371 of 2010 dated November 16, 2011.***

30. It was thus urged, that the order of this Tribunal in Shubhkam cannot be treated as a binding precedent and that the question on the interpretation of the expression "control" was left open qua the SAST Regulations.

31. The submission of the respondent in this regard is patently erroneous and cannot be accepted. The definition of "control" as defined in Regulation 2(1)(c) of the SAST Regulations, 1997 has been held to be an inclusive one and not exhaustive in Shubhkam which has been approved by the Supreme Court in Arcelormittal India Private Limited. The extent of the expression "control" as given in Shubhkam, namely, positive and not negative has been approved by the Supreme Court in Arcelormittal India Private Limited meaning positive control. In short, the Supreme Court has concluded that the expression "control" means effective control.

32. No doubt, when SEBI challenged the order of Shubhkam before the Supreme Court, the Supreme Court while disposing of the appeal by its order dated November 16, 2011 had clarified that the order of this Tribunal in Shubhkam will not be treated as a precedent and the question of law would remain open. To this extent, there is no dispute but the interpretation of the

expression "control" as decided by this Tribunal in Shubhkam was approved by the Supreme Court in Acrelormittal's case. Once the decision of this Tribunal has been approved it can be considered as a precedent for subsequent cases. It can be considered as a precedent while considering the provision of Regulation 2(1)(c) of the SAST Regulations, 1997. The directions given by a three judge bench of the Supreme Court or a two judge bench of the Supreme Court has no relevance to the issue. There is no conflicting decision of the Supreme Court. The three judge bench of the Supreme Court only directed that the order of the Tribunal in Shubhkam will not be treated as a precedent and the question of law would remain open. This direction did not deter the two judge bench of the Supreme Court in approving the decision of this Tribunal in Shubhkam. Thus, this issue raised by the respondent is wholly misplaced.

33. The submission that an expansive meaning of the word "control" is required to be considered in view of the Justice P.N. Bhagwati Committee Report is patently erroneous. Considering the fact that the expression "control" has been considered and explained by this Tribunal in Shubhkam which has been duly affirmed by the Supreme Court in Arcelormittal's case, it

therefore, does not lie in the mouth of the respondent to agitate that notwithstanding the decision of the Supreme Court, it is still open for the respondent to contend that the expression "control" in Regulation 2(1)(c) should be given an expansive meaning considering the object and purpose of the Act and the Regulations. Even though, no judgments were placed during the course of arguments, certain judgments have crept in the written submissions filed by the respondent. In our opinion, these judgments on the issue as to how a meaning of a word is to be discerned through a process of construction is meaningless in view of the meaning of the expression "control" explained by the Supreme Court in Arcelormittal's case.

34. Reliance on the decision of the Delhi High Court in the case of Future Retail (Supra) is also misplaced. The said decision is on its own facts and is clearly distinguishable and not applicable in the instant case. The Delhi High Court was faced with the question as to whether it was a fit case to grant an injunction. The Delhi High Court after perusing various clauses of the agreement prima facie came to a conclusion that it was not a case for grant of an interim injunction. In our view, the observations made by the Delhi High Court are only prima facie

observations and, in any case, it is not helpful in view of the Supreme Court decision in Arcelormittal's case.

35. Consequently, we are of the opinion that it is not necessary for us to further analyse the term "control" beyond what has been laid down by the Supreme Court. In this background, we have to now examine whether the appellant in the facts and circumstances of the present case had acquired positive control over the target company so as to trigger Regulation 12 of the SAST Regulations, 1997.

36. We have carefully gone through each and every clause of the loan agreements and we find that there is a commercial rationale behind the entire arrangement. Admittedly, Prannoy Roy and Radhika Roy, being promoters of NDTV, required money to pay the loan availed from ICICI Bank Limited. Through this agreement, we find that if the share price of NDTV exceeds Rs. 214.65 per equity share, then VCPL could exercise any of the following option and acquire 26% of the equity shares of NDTV at a fixed price of Rs. 214.65 per share. The options that could be exercised were the warrant conversion option under which 99.99% equity shares of RRPR could be acquired which would result in indirect acquisition of 26% of

the equity shares of NDTV. The same would also result when VCPL exercises the purchase option to purchase all the equity shares of RRPR held by Prannoy Roy and Radhika Roy at par value for a nominal amount of Rs. 1 lakh. In addition, VCPL through its affiliates STPL and SEPL could directly purchase 26% of NDTV at a price of Rs. 214.65 by paying a consolidated amount of Rs. 350 crores to RRPR (namely, the loan amount) which amount would be utilized by RRPR to repay the loan to VCPL. VCPL if interested in the media business of NDTV could acquire 26% equity shares of NDTV at Rs. 214.65 per share irrespective of the then prevailing market price. VCPL risk was restricted to the loss of interest on the loan given. The contention that since no interest was charged on the loan given, it was not a loan but an indirect acquisition is erroneous. The bargain in the agreement has to be understood from a commercial point of view. This is the upshot of the commercial rationale in the loan agreement which suited all parties i.e. VCPL and the promoters of NDTV.

37. In our opinion, none of the aforesaid arrangement entails an acquisition of shares in NDTV, nor controls the management or policy decisions of NDTV. So long as the loan remains

unpaid, VCPL continues to have the warrant conversion option, the purchase option and the call option under the call option agreements. It is a settled position of law that when there are options with convertibility, unless such options are exercised, the obligation to make an open offer under Regulation 14 is not triggered. In the matter of ***Victor Fernandes vs. Network 18,*** the WTM passed an order dated 15 November 2019 holding that when there are options with convertibility unless such options are exercised, the obligation to make an open offer is not triggered. This finding was affirmed by this Tribunal in its order ***dated September 28, 2021 passed in Appeal 618 of 2019 Victor Fernandes & Anr. vs. SEBI & Ors.***

38. The finding that the price of Rs. 214.65 per share considered in the loan agreement and the call option agreements was higher than the prevailing market price at Rs. 130 per share and, therefore, it leads to a conclusion that the transaction was one of acquisition of control and was not a loan is misconceived and cannot be accepted. We find that at one stage the price of the share went high at Rs. 482 per share. The tenure of the loan was for a period of 10 years. There was a reasonable expectation that the price of NDTV shares would go up and, consequently, the value of the collateral would increase. The

bargain in the agreement indicates that if the share price exceeded the strike price of Rs. 214.65 per share, VCPL could exercise the option and release the loan. Thus, a shortfall in the collateral at the beginning of the loan tenure could not be a reason to conclude that the transaction was one for acquisition of control. In our opinion, the transaction has to be considered from a commercial rationale and has to be interpreted in a businesslike manner.

39. The finding that the warrant conversion option is not dependent on the repayment of the loan and that it does not lapse even on the repayment of the loan and, hence, it is a perpetual warrant conversion option is patently erroneous. In our opinion, the warrant conversion option, the purchase option and the call option under the call option agreement are in consideration for repayment of the loan. From a reading of the loan agreement and the call option agreements, it is clear that either the loan has to be repaid or the call option or the conversion option or the purchase option is exercised. Much reliance has been placed on the term “thereafter” appearing in clause (a) of Schedule 1. In our opinion, the word “thereafter” means that if the loan remains unpaid at the end of the tenure,

then VCPL could still be entitled to exercise the warrant conversion option. In our opinion, it does not mean that the warrant conversion option could be exercised even after the loan is extinguished.

40. Two kinds of rights has been acquired by VCPL, namely, (a) over matters relating to RRPR and (b) over matters relating to NDTV with certain obligations on the promoters of NDTV and not on NDTV directly. These rights are limited in nature which we have extracted in paragraph 8 of our order.

41. The rights relating to RRPR and to NDTV required prior written consent of VCPL. These rights are limited in nature. Having perused these clauses in the agreement, we are of the opinion that these rights are only to protect the interest of VCPL and the investment made by it. These protective rights under Schedule 3 are meant to ensure standards of good governance and to protect the interest not only of the shareholders but also the interest of VCPL. These limited rights are not in the nature of day to day operational control over the business of NDTV nor are in the nature of control over the management of NDTV or policy decisions. If VCPL desires that the particular scheme

of arrangement ought to be promulgated or that a particular acquisition of another company should be effected or that any suitable course of action ought to be adopted, VCPL has no right to have the same implemented and, therefore, VCPL does not have any control over NDTV. The mere fact that amendment to the memorandum or article of association of NDTV could not be carried out without the consent of NDTV does not become an indicator of having control over NDTV. It is a common practice. We are of the opinion that amendment of Article and Memorandum of Association of a company does not fall within the scope of its day to day corporate activity. The mere fact that an amendment requires an affirmative vote from the VCPL is only indicative of the fact that it wants to protect its investment and that the basic structure of the company (i.e. NDTV) is not altered without its knowledge and approval. By no stretch of logic, can such an affirmative vote confer positive or effective control over day to day working of the company. Similarly, issuance of equity securities, buyback of securities, reduction or alteration of share capital, creation of any encumbrance on equity share of RRPR could result in diluting the rights of VCPL in relation to the collateral and may hamper the ability of the promoters of NDTV to perform their

obligations under the loan agreement and call option agreements. Similarly, borrowing or raising funds may jeopardize RRPR's ability to repay the loan extended by VCPL. Similarly, setting up a subsidiary is not in the interest of VCPL as it may allow RRPR to divert its money. Therefore, previous approval is required from VCPL. Such fetters placed is only to protect the interest of VCPL and does not indicate any direct or indirect control.

42. The aforesaid clauses as spelt out in the previous paragraphs does not make VCPL in a position to influence major policy decisions of NDTV by virtue of its affirmative vote nor has any say in matters pertaining to policy decision which would confer control. All these provisions make it clear that it does not want NDTV to undergo any major shift from its present position without VCPL's knowledge and approval. In our opinion, these are protective rights which does not result in acquisition of control of NDTV. These protective provisions are meant to ensure standards of good corporate governance. The aforesaid provision does not in any way control the day to day operation of the business of the NDTV nor controls the management or policy decisions of NDTV. The object of each

of the above clause as extracted in the previous paragraphs is to ensure that the promoters of NDTV did not adversely affect the rights over the collateral or destroy the value of the equity shares of NDTV, in turn destroying the value of the collateral, i.e., 26% equity shares of NDTV. Similarly, non-compete rights, right of first refusal are commonly found in institutional loan agreements. Such clause, in our opinion does not amount to acquisition or control over NDTV by VCPL. These clause at best is an economic protection. If promoters engage in competing activity, the value of the shares of NDTV could get eroded. Similarly, non-disposal undertaking is to ensure that the promoters continue to manage NDTV and remain favoured to protect the collateral.

43. Similar provisions as stated aforesaid was also examined in Shubhkam (Supra). This Tribunal while dealing with similar provisions held that the provision does not result in control directly or indirectly of the company and that these provisions are protective provisions. For facility, paragraph 8 of the said judgment is extracted hereunder:-

> *"8. The Deputy General Manager in the impugned communication has also referred to sub-clauses (a) to (o) of this clause to hold that the appellant will be in a position to*

*influence major policy decisions of the target company by virtue of its 'affirmative vote'. She also holds that the appellant would be having veto rights on crucial matters pertaining to policy decisions which would confer control. In order to understand the implication of this clause, it is necessary to refer to its text which reads as under :*

> *"9. PROTECTIVE PROVISIONS:*
>
> *The parties hereby agree that until such time as the Investor equity shareholding in the Company does not fall below 10% of the paid equity share capital of the Company, the affirmative vote of the Investor Director shall be required in a meeting of the Board (or any committee thereof) in respect of any of the following matters:*
>
> *(a) any amendment of the Memorandum and/or Articles of the Company;*
> *(b) any consolidation, subdivision or alteration of any rights attached to any share capital of the Company or any of its subsidiaries, any capital calls onshareholders;*
>
> *(c) any redemption, retirement, purchase or other acquisition by the Company of any Shares of the Company;*
> *(d) approval of the Annual Business Plan and any deviation, revisions therefrom;*
> *(e) the sale or disposition by the Company of any its assets, except for sales of assets:*
>
> *(i) which are in the ordinary course of business; or*
>
> *(ii) if outside the ordinary course of business, which, during any Fiscal year of the Company,*

*have a fair market value of less than Rupees One Crore only;*

*(f) the making of any loan or advance by the Company to any Shareholder or any third party, or the entry by the Company into any guaranty, indemnity, or surety contract or any contract of a similar nature in favour of or for the benefit of any Shareholder or any third party outside the ordinary course of business, of a value in excess of Rupees Two Crores;*

*(g) the acquisition by the Company through subscription, purchase or otherwise, of the securities of any other body corporate;*

*(h) to create any lien or to lease, mortgage, charge, pledge, licence any assets, rights, titles, intellectual property etc. of the Company or its Subsidiaries valued in excess of 5% of the networth of the company;*

*(i) the conduct by the Company of any business other than the Business and/or the acquisition of any assets not related to the Business;*

*(j) any amalgamation, splitting, reorganization or consolidation of the company (or any Subsidiary thereof);*

*(k) to alter the composition and strength of the Board or to delegate the authority or any of the powers of the Board to any individual or committee;*

*(l) the winding up, liquidation or dissolution of the Company;*

*(m) incurrence of indebtedness in the Company in excess of 5% of the networth of the Company other than as approved in the Annual Business Plan;*

*(n) appointment of key officials of the Company e.g. CEO, COO, CFO, CS or of equivalent designation and the determination of their remuneration and powers;*

*(o) any capital expenditures in excess of 5% of the networth other than as approved in the Annual Business Plan;*

*(p) any authorization, creation, grant, issue, allotment redemption of any Shares or convertible instruments of any class, debentures or warrants, grants, options over Shares, or approval of the terms of a public issue by the Company, or approval or disapproval of any transfers thereof, except as provided under this Agreement;*

*(q) filing of all offering materials to be utilized in connection with any public offering of shares of the Company;*

*(r) any strategic alliance/joint venture proposal to be entered into by the Company;*

*(s) approval of the annual financial statements, distribution of profits and coverage of losses of the Company and its Subsidiaries;*

*(t) transactions with affiliates;*

*(u) incorporation of subsidiaries, the acquisition of interests in any company or business or to acquire or sell shares, debentures, bonds or other securities/instruments in any company;*

*(v) to settle, compromise or abandon any legal or arbitration proceedings, claims, actions or suits relating to the Company involving sums exceeding Rupees One Crore in respect of anyone such claim, action or suit or cumulatively exceeding Rupees One Crore in respect of claims, actions*

*and/or suits in a Fiscal Year;"*

*Having carefully gone through each and every sub-clause of clause 9, we are of the view that it means what it says. The various sub-clauses are meant only to protect the interest of the acquirer (appellant) and the investment made by it. When we look to the affirmative voting rights of the appellant as ensured by this clause, it becomes more than clear that it does not want the target company to undergo any paradigm shift from its present position without the appellant's knowledge and approval. We are in agreement with the learned counsel for the appellant that the protective provisions under clause 9 are meant to ensure standards of good corporate governance and to protect the interests of the shareholders including that of the appellant from the whims and fancies of the promoters of the target company. The list of matters provided in clauses 9(a) to 9(o) are not in the nature of day to day operational control over the business of the target company. So also, they are not in the nature of control over either the management or policy decisions of the target company. These provisions merely enable the acquirer to oppose a proposal and not carry any proposal on its bidding. For instance, if the appellant desires that a particular scheme of arrangement ought to be promulgated or that a particular acquisition of another company should be effected or that the Annual Business Plan should contain a particular strategy or that any suitable course of action ought to be adopted, the appellant has no right to have the same implemented. How then does the appellant have control over the target company? The learned counsel for the respondent laid great emphasis on clause 9(d) read with clause 15 of the agreement to contend that the affirmative vote of the investor director to the approval of the Annual Business Plan and to any modification therefrom gives a controlling right to the appellant. He also referred to clause 9(a) and emphatically urged*

*that since no amendment to the memorandum or articles of association of the target company could be made without the affirmative vote from the appellant, it is a sure indicator of its having control over the target company. We are unable to agree with the learned counsel. It is quite usual for any corporate entity to prepare an Annual Business Plan to be implemented in the coming fiscal year and have the same approved from its board of directors before the commencement of that year. In the case before us, the target company also prepares an Annual Business Plan which lays down broad contours of the corporate activity to be implemented in the coming year which is approved by its board of directors where the appellant is in a minority. This business plan has to be rolled out in the coming fiscal year and its day to day implementation is looked after by the board of directors. If after approving the plan, the target company wants to deviate from it or make any changes therein, the same would require an affirmative vote from the appellant. We do not think that this provision gives any control to the appellant. On the contrary, it only enables the appellant to safeguard its own investment and the interests of the shareholders in general. Amendment of articles and memorandum of association of a company does not fall within the scope of its day to day corporate activity. The mere fact that any such amendment requires an affirmative vote from the appellant is again indicative of the fact that it wants to protect its investment and that the basic structure of the company is not altered without its knowledge and approval. By no stretch of logic, can such an affirmative vote confer control over the day to day working of the company. Sh. Kumar Desai learned counsel laid great emphasis on sub-clause (n) to contend that no key officer of the target company like Chief Executive Officer, Chief Finance Officer, Company Secretary or of equivalent designation could be appointed*

*without the affirmative vote of the appellant and this, according to him, vests significant control in the appellant. Here again, we are unable to agree with Sh. Desai. It is true that the affirmative vote of the appellant is required for the appointment of any of these key officers but even this provision does not mean that the appellant can get its candidate appointed. Affirmative vote of the investor in these matters is necessary for protecting its investment. We cannot infer from this provision that the appellant has gained control over the target company.*

*9. Provisions of clause 9 do impose fetters on the target company for purposes of good governance and it is conventional for financial investors to protect their investment and, indeed, the target company itself from the whims and fancies of the promoters who manage the target company. Such fetters fall far short of the existence of "control" over the target company. It must be remembered that every fetter of any nature in the hands of any person over a listed company cannot result in "control" of that person over that company. We also cannot lose sight of the fact that in the instant case even if the entire open offer is accepted and 20 per cent shares are tendered, the appellant would be far short of a simple majority that is necessary for getting an ordinary resolution passed. In these circumstances, we cannot hold that the appellant has gained control over the target company.*

*10. Having gone through the agreement carefully with the help of the learned counsel for the parties, we are clearly of the view that none of the clauses therein taken individually or collectively demonstrates control in the hands of the appellant. In this view of the matter, Regulation 12 does not get triggered*

> *and the Board was not justified in making the appellant incorporate this regulation in the letter of offer. The question posed in the opening part of our order is, thus, answered in the negative.*

44. A contention was raised that Clause 8 of the loan agreement indicates that the call option will continue to remain valid even after the repayment of the loan and therefore it amounts to control. This interpretation is totally erroneous. The ambiguity created by the words "till the later of" can be cleared by a simple reading of clause 8 to mean that the agreement shall be binding on the parties till the loan is fully paid by the borrower or if the call option is exercised. The word "till the later of" has to be read "whichever is earlier" in order to bring out the correct meaning and object of the clause. In any case, the part relating to call option does not by itself result in indirect control of NDVT unless it is exercised.

45. The finding in the impugned order that Clause 20 of the loan agreement does not give any discretion to the promoters of NDTV with respect to exercise of their voting rights in NDTV as they would have exercised their voting rights prior to entering into the loan agreement and, therefore, Clause 20 of the loan agreement indicates indirect control over NDTV is patently

misconceived. In our opinion, Clause 20 is an assurance clause. It only means that the voting rights of the promoters of RRPR and NDTV should be exercised to enable VCPL and the option holders to exercise their rights in terms of the agreement. It is not a case through which VCPL has acquired voting rights or control over RRPR or NDTV. Clause 20 is only to protect VCPL rights under the agreements. In any case, we are of the firm view that this clause does not result in VCPL acquiring direct control over RRPR or indirect control over NDTV.

46. The finding in the impugned order that the borrowers and promoters have in fact ceded their voting rights atleast, by 26% covered in the loan agreement and another 26% covered in the call option agreement upon the execution of these agreements is patently erroneous. The finding that upon the execution of these agreements the exercise of voting rights in NDTV was controlled by the terms of the transaction documents is wholly erroneous. The finding that through these documents VCPL had acquired control over 52% of NDTV shares is nothing but a figment of its imagination and against the material evidence on record. These loan agreement/ call option agreements can only acquire 26% equity shares of NDTV by VCPL and the finding

that VCPL has acquired 52% of NDTV shares is not based on any cogent evidence nor does this transaction allow VCPL to acquire direct or indirect control over NDTV.

47. The learned senior counsel for the appellant placed heavy reliance on a decision of this Tribunal dated 28.09.2021 ***in Victor Fernandes vs. SEBI & Ors. in Appeal No. 618 of 2019*** contending that the controversy in squarely covered by the said decision. In this regard, the brief facts in the said matter is, that on 22.11.2011, a deed of Trust was executed under which Independent Media Trust ("IMD") was established as a Trust. Nirlab Consultancy Pvt. Ltd. (NCPL) (controlled by Raghav Bahl) was a trustee and Reliance Industries Ltd. (RIL) was the sole beneficiary. On 23.11.2011, IMT entered into a Single Unit Agreement (SUA) with Raghav Bahl, five entities controlled by Raghav Bahl and NW18. As per the SUA, the parties thereto were to act as the shareholders of NW18. On 27.02.2012, an Investment Agreement, namely, Zero Coupon, Optionally & Fully Convertible Debentures Agreement ('ZOCD') was executed between six private limited companies and holding companies owned by Raghav Bahl and IMT. Under this ZOCD Agreement, IMT was to invest funds received

from RIL by subscribing to the ZOCD of the holding companies and the holding companies were obliged to utilize ZOCD subscription amount for subscribing to the rights issue of NW18 and TV18.

48. In accordance with the terms of the ZOCD agreement, the holding company deployed Rs. 2076.34 crore from the proceeds of the ZOCD issuance to subscribe to 69,21,11,850 equity shares of NW18 and the balance of Rs. 135.46 crore were used to subscribe to 6,77,31,686 equity shares of TV18. In this way the holding companies represented 71.25% of the emerging voting capital of NW18.

49. A complaint was filed alleging that IMT which is for the benefit of RIL had acquired control over the holding companies and consequently acquired indirect control over NW18 and TV18. The complaint alleged that on the basis of SUA and ZOCD, RIL had failed to disclose various events relating to IMT under Clause 36 of the listing agreement.

50. The clauses of the agreements was analysed as under:-

(i) Under the terms and conditions of the ZOCD agreement, no interest was payable by the holding companies on the ZOCD subscribed by IMT. It was only an investment made IMT.

(ii) Clauses 5.5 and 5.6 - it appears that the ZOCD agreement was entered into by IMT to provide funds to the holding companies in the form of loan so that the holding companies may subscribe to the rights issue of NW18 and TV18. As on date of execution of the ZOCD agreement, IMT had only one trustee viz. Nirlab Consultancy Pvt. Ltd. The said trustee company was wholly owned and controlled by Raghav Bahl and his wife. The 6 holding companies were also wholly owned by Raghav Bahl and his wife. Therefore, IMT was ultimately controlled by Raghav Bahl who was also in control of NW18 at the time of ZOCD Agreement. In these circumstances, under the ZOCD agreement, there was no change in control of the 6 holding companies and even indirectly of the Target Co.

(iii) Clause 2.1 of the ZOCD agreement itself discloses that the purpose for infusion was to enable the 6 holding companies to subscribe to rights issue of NW18 and TV18. The provision stating that if the actual amount required by the six holding companies for subscribing to the rights issue is more than the amount estimated earlier by them, then IMT shall remit such difference to them and if it is less than the amount estimated earlier, then the holding companies will refund the difference to IMT, might have been on account of the fact that price at which rights issue had not been crystallized at the time of entering into the ZOCD agreement. It is customary for lenders to specify the object for which the loan amount is to be utilized.

(iv). Clause 6.1 is a stand still clause which is not unusual in such transactions. The object of the clause is to ensure that the holding companies conduct their business in the ordinary course of business for the limited period between the date of the agreement and the date on which ZOCDs are actually allotted and to prevent the affairs of the company from being managed in a manner

which would be detrimental to the interest of the investor in the interim period.

(v). Clauses 9, 11, 14.1 and 14.2 are in nature of conferring certain pre-emptive rights, restrictions on share transfer in favour of the person infusing the funds (IMT i.e. Respondent No. 2). It has consistently been held by this Hon'ble Tribunal and also SEBI that such clauses per se do not result in any change in control.

(vi). Clause 12.1 of the ZOCD dealing with confidentiality/non-disclosure is a usual clause in such loan agreements. In so far as disclosure to the Regulatory Authority is concerned, the execution of ZOCD was made known to the Exchanges and was in the public domain. Further, various documents referred to in draft Letter of offer for acquisition of shares of NW18, including the ZOCD agreement was submitted to SEBI. On receipt of the Complaint filed by Appellant, SEBI had re-examined its content and reached the conclusion similar as to those as set out herein.

(vii). Clauses 7.1, 13.1 and 14.3 of the ZOCD agreement are not in the nature of granting rights which enable IMT to proactively control the affairs and policies of the target Co. These are the provisions relating to 6 holding companies (not to the target Co.) and contain certain negative stipulations relating to conduct of business of 6 holding companies. Such clauses are used in regular loan agreement.

(viii). Further, as specified in Regulation 2(1)(e) of the SAST Regulations, SEBI has uniformly regarded the following 2 indicia to denote control: i. Right to appoint majority of directors; ii. Right to control policy of management decision of Target Co.

(ix). On analyzing various clauses of ZOCD and the nature of the rights granted to IMT, it is noted that the aforesaid indicia of control are absent. It is also found that the various clauses of ZOCD agreement are predominantly in the nature of granting protective rights for the investment made by IMT (Respondent No. 2).

(x). Pursuant to the examination of all the relevant documents, it had been concluded by SEBI that IMT had indirectly acquired joint control over NW18 not by way of the ZOCD Agreement dated February 27, 2012, but even before that by way of the Single Unit Agreement dated November 23, 2011 whereby IMT along with the holding companies of NW18 and other promoters of NW18 had agreed to act as a single unit in managing the matters of NW18 and acquired the right to appoint the majority of the board of directors of NW18. Thus IMT (Respondent No. 2) was part of the promoter group, however this fact was not included in any disclosure made under SAST Regulations/ clause 35 of the Listing agreement made to the exchanges."

51. After analyzing various clauses of the agreement, the WTM held:-

*"**7.7.** Independent of the assertions made as above in the affidavit of SEBI, I have examined the ZOCD agreement and the covenants therein. As such, in the case of convertible instruments with a freely exercisable option, it is necessary to examine the covenants of the Agreement, to determine whether it gives rise to a "control" trigger or not, from the SAST perspective. This is all the more so, because Regulation 13(2)(b) mandates, in the case of*

*convertible securities without a fixed date of maturity, an open offer to be made on the same date as the date of exercise of option to convert such securities into shares of the Target company. Thus, it is necessary to look at the covenants of the agreement to ascertain whether the Acquirer clandestinely exercised "control" over the Target company, right from the date of infusion of funds into the Promoter companies(the holding companies), even prior to the actual conversion. While the term "control" defies a sharp definition, some important parameters like participative rights in the management (by co-opting directors), exercise of voting rights, the extent of influence exercised on conduct of affairs of the company, etc. could be used as litmus test benchmarks to determine any change in control. On none of the above counts, I could find any direct or remote evidence of the control having been passed on to RIL, as a result of the ZOCD agreement and this is elaborated in the next two paragraphs.*

***7.9.*** *The question therefore is when IMT's shareholding in NW18 is in the control of the trustee (being NCPL or DCPL i.e. a Raghav Bahl entity), can it be said that the subscription to the ZOCDs of the holding companies of Raghav Bahl group entities by IMT confers RIL with the power to indirectly exercise control over the target company? I am of the view that even upon execution of the*

*ZOCD agreement, Raghav Bahl continued to be in control of NW18, both on behalf of his related companies as well as IMT. There was no semblance of a hold in the management of affairs of NW 18 by RIL arising out of the ZOCD. The underlying (existing) shareholding based on which the rights issue subscription took place continued to be in the hands of Raghav Bahl and related entities, as on date of the ZOCD. Moreover, the ZOCDs did not carry any voting rights and the ZOCD agreement did not stifle the voting rights of the Raghav Bahl entities in any manner with respect to the conduct of the affairs of NW18. It can thus be asserted that there was no effective change in control of NW18 as a result of the execution of the ZOCD agreement. In the background of the facts and circumstances of this case, I am not inclined to accept the argument of the complainant that the option of conversion available with IMT entitled it to exercise indirect control over the target company to the exclusion of Raghav Bahl group of companies, on the strength of its holding extending to 1.89%, at the time of allotment of ZOCDs. It is relevant to mention that in the case of IMT, any conversion of ZOCDs would require the concurrence of Raghav Bahl of NMPL/DCPL as its Trustee. Hence, as affirmed in the affidavit referred to above, IMT was ultimately under the control of Raghav Bahl, at the time of ZOCD agreement. I therefore find no reason brought forth by the Appellant that negates the*

*observations made in the said Affidavit. It is also an undisputed fact that IMT had not, during the period between the ZOCD agreement and the SPA, independently implemented or exercised any rights that are indicative of exercise of control, as enlisted under regulation 2(1)(e) of the SAST Regulations.*

***8**... I am convinced that a control trigger cannot be attributed to the acquirer at the point of time of execution of ZOCD, in the facts and circumstances of this case.*

***16.** Thus, to sum up, the ZOCD Agreement read independently or combined with the SUA, it does not trigger an open offer. The trust deed does not confer the powers of a trustee to RIL."*

52. The order of the WTM was affirmed by this Tribunal in ***Appeal No. 618 of 2019 filed by Victor Fernandes and Anr. Vs. SEBI decided on 28.09.2021*** wherein this Tribunal held:-

*"12. The impugned order of the learned WTM would show that the learned WTM has gone through the terms and conditions of the ZOCD Agreement. The learned WTM has considered the plea of the respondent as to why ZOCD Agreement and SUA were required to be executed in view of the up linking guidelines of Ministry of Information and Broadcasting. The said guidelines*

*required that at least 51% of the total equity share capital of such a media company was required to be held by largest Indian shareholders. All those terms are put in the order. Further, the learned WTM had considered the report in form of an affidavit which was filed before this Tribunal in the earlier proceedings as well as the observation made by the CCI. Upon going through the terms and conditions of ZOCD Agreement, the learned WTM found that Mr. Raghav Bahl continued to be in control of TV 18, NW18 etc. on behalf of the holding companies. IMT and RIL did not had any say in the management affairs of TV 18, NW18 under the said ZOCD Agreement. The underlying existing shareholding continued to be in the hands of Mr. Raghav Bahl and the holding entities. It was found that ZOCD Agreement did not carry any voting rights. The voting rights of Mr. Raghav Bahl entities were not stifled by the said agreement. Thus, there was not any effective change in control of NW18 as a result of the execution of the ZOCD Agreement.*

***13.*** *CCI had observed that in view of the conversion option contained in ZOCD Agreement to receive equity shares of the target company, the said amounted to the indirect acquisition of shares of the target company. The learned WTM considered the same. He observed that the ZOCDs were in the nature of convertible into equity shares*

*at any time, and only upon conversion of the same IMT would have been able to hold more than 99.99% shares of the diluted equity of the promoter company of NW18 etc. This option however was not exercised at any time before making the public announcement as detailed (supra) and, thus, the ZOCD Agreement itself did not entail into any indirect control of IMT or RIL in NW18 and, therefore, no disclosure was required to be made.*

***14.*** *In our view, the reasoning of the learned WTM cannot be faulted with. The ZOCD Agreement was in the nature of investment by IMT in the holding companies ofTV18, NW18. Said ZOCD Agreement had given right to IMT, the subscriber of the ZOCDs to convert ZOCDs into equity in a given period. The control of TV18 and NW18, continued with Mr. Raghav Bahl and his entities. IT had no say in the voting rights etc. and, therefore, the conclusion of the learned WTM cannot be faulted with."*

53. We have perused the order of WTM in Victor Fernandes and we find that the terms and conditions in the ZOCD agreement is similar and more or less the same as given in the present loan agreement. The issue in Victor Fernandes was whether the ZOCD agreement triggered the open offer

obligation under the SAST Regulations. The WTM upon analyzing various provisions of the agreement (which is similar to the provisions in the loan agreement) held that upon execution of the ZOCD agreement, the control of NW18 remained with Raghav Bahl, nor the ZOCD agreement stifled the voting rights of Raghav Bahl and therefore there was no effective change in control of NW18 as a result of execution of the ZOCD agreement and therefore the ZOCD agreement does not trigger an open offer. We are of the opinion, that the controversy involved in the present appeal is squarely covered by the decision in Victor Fernandes case.

54. It may be stated here that no arguments were raised by the learned senior counsel for the respondent with regard to the effect of Victor Fernandes case. We however find that ten paragraphs has been devoted in the written submissions in making an attempt to distinguish Victor Fernanes case. In this regard, this Tribunal has issued a circular dated 19.04.2022 directing that all written submissions/ brief notes or any kind of submissions made on behalf of any parties filed after conclusion of the hearing shall be vetted by the arguing counsel and the same shall be disclosed in the written submissions. In the

instant case, the written submissions filed by the respondent has not been vetted by the arguing counsel. Consequently, it is not open nor worthwhile to deal with such contentions raised in the written submissions which were not argued. In any case, the order in Victor Fernandes, based on SAST Regulations, is fully applicable in the instant case.

55. We may also note that in the recent past, a tendency has arisen to file compilation of judgments which are not referred to in the arguments. Further contentions are raised for the first time in the written submissions which was never raised /argued by the counsel. Such practice adopted is depreciated and parties are advised to file the written submissions which contains only their oral submissions argued by their counsel.

56. Thus, upon a careful reading of various clauses in the agreements, we are of the opinion, that various clauses are meant to protect the interest of VCPL and the investment made by it. The transaction in the agreement is an amalgamation of rights. It is a loan transaction with an option to acquire 26% equity shares of NDTV as consideration for the provision of the loan. However, the transaction does not justify as being a control transaction. The transaction does not acquire direct or

indirect control of NDTV. The intent and language of the loan agreement and call option agreements read with the SAST Regulations makes it clear that there is no direct or indirect control of NDTV by VCPL. The transaction structure does not lead to a conclusion that VCPL has acquired direct or indirect control over NDTV.

57. We are further of the opinion that the impugned order does not establish how each of the rights, either individually or collectively have led VCPL to acquire indirect control over NDTV. No evidence has come to light to indicate that VCPL is exercising control over the management or policies of NDTV. In the absence of any evidence, the impugned order passed by the WTM cannot be sustained. In our view, the combined reading of the agreement, call option agreements, warrant conversion option and the purchase option does not in any way lead to a conclusion of VCPL acquiring indirect control over NDTV. Thus the direction to VCPL to make an open offer in terms of Regulation 44 of SAST Regulations, 1997 and Regulation 32 of SAST Regulations, 2011 does not arise.

58. Appeal Nos. 294 of 2019, 295 of 2019 and 296 of 2019 has been filed by Dr. Prannoy Roy, Radhika Roy and RRPR

respectively against the order dated June 14, 2019 passed by the WTM. In addition to the aforesaid, Appeal Nos. 77 of 2021, 78 of 2021 and 79 of 2021 has been filed by PR, RR and RRPR respectively against the order dated December 24, 2020 passed by the AO. All these six appeals raise a common issue and are being taken up together.

59. The facts leading to the filing of the aforesaid appeals is that a complaint dated August 26, 2017 and December 26, 2017 and representation dated December 24, 2017 was filed by Quantum Securities Private Limited who is a shareholder of NDTV alleging that PR, RR and RRPR have failed to disclose material information to the shareholders of NDTV regarding the loan agreement entered with VCPL and, consequently, have violated of the provisions to the Act, Rules and Regulations.

60. Based on the aforesaid complaint, an investigation was carried out in which it was revealed that PR, RR and RRPR did not disclose the loan agreement with ICICI Bank, and the loan agreement with VCPL, to the company, to the stock exchange and to the shareholders. Accordingly, a show cause notice was issued alleging that these persons, by concealing material evidence, have committed a fraud on the minority shareholders

and, therefore, violated Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations and Clause 49(I)(D) of the Listing Agreement read with Section 21 of the SCRA.

61. The appellants replied contending that the loan agreements were private loan agreements which was not required to be disclosed and that the board meeting of NDTV held on August 05, 2015 had clarified that there was no change in control of NDTV. Further at the relevant time, there was no requirement to make disclosure in respect of the loan agreement. It was also urged, that such alleged violation of non-disclosure cannot be raised after 10 years and, therefore there is an inordinate delay in the initiation of the proceedings. It was also contended that Clause 49(I)(D) of the Listing Agreement came into effect only in the year 2014 and, therefore there was no requirement to make a disclosure of an event happening before 2014. It was contended that at the relevant time the only requirement on the company was to have a Code of Conduct and that there was no requirement for the appellants to disclose the loan agreements to the Board of the company. The appellants vehemently denied that there was any fault on their part nor was any fraud committed by them.

62. The WTM, after considering the material evidence on record, held that the present proceedings were initiated on the basis of the complaint received on August 26, 2017 based on which the show cause notice was issued in the year 2018. Hence there is no delay, quite apart there is no period of limitation prescribed in initiating proceedings under the SEBI Act, Rules and Regulations. The WTM after considering various clauses of the loan agreement came to a conclusion that it was not a loan agreement but under the garb of the loan agreement the acts of the appellants amounted to commissions of a fraud upon the shareholders. The WTM held that upon a scrutiny of various clauses of the loan agreement, the appellants have effectively transferred 30% of the shares of NDTV to VCPL and that the transactions have been deliberately structured as a loan transaction so as to conceal the said sale of 30% stake in NDTV. The WTM further found that the loan agreement structure was material and very sensitive information which was concealed from the minority shareholders, thereby inducing the investors to trade in the shares of NDTV in ignorance regarding de facto control over NDTV by VCPL and, therefore such transaction has been made under Section 12A and Regulation 3(a) to (d) of the PFUTP Regulations. The

WTM further found that the appellants had violated the Code of Conduct. The disclosures were required to be made under the Code of Conduct and by not making disclosures the appellants conduct was not in accordance with the Code of Conduct.

63. On the basis of the aforesaid, the WTM accordingly restrained the appellants from accessing the securities market and further prohibited them to buy, sell or otherwise deal directly or indirectly or being associated with the securities market in any manner for a period of two years. The appellants PR and RR were also restrained from holding or occupying any position as Director or as Key Managerial Personnel in NDTV for a period of two years and further were restrained from holding or occupying any position as Director or as Key Managerial Personnel in any other listed company for a period of one year. On a similar finding, the AO in its order of December 24, 2020 imposed a maximum penalty of Rs. 25 crores under Section 15HA to be paid jointly and severally by the appellants and a further sum of Rs. 1 crore to be paid by PR and RR under Section 23H of the SCRA.

64. We have heard Ms. Fereshte Sethna, the learned counsel for the appellants and Shri Shyam Mehta, the learned senior counsel for the respondent.

65. In Appeal No. 293 of 2018 in the matter of VCPL, we have already held that the loan agreement did not in any manner transfer control of NDTV to VCPL either directly or indirectly. Thus, the findings given by the WTM upon reading the clauses of the loan agreement does not survive.

66. Further, the finding that the concealment of the loan agreement which gave de facto control to VCPL was concealed from the shareholders and, therefore, such arrangement deployed by the appellants to transfer their substantial stake in NDTV was fraudulent and was violative of 12A(a) to (b) of the SEBI Act read with Regulation 3(a) to (d) of the PFUTP Regulations also cannot survive since we have already held that there was no direct or indirect control over NDTV by VCPL. Further, the finding that the loan agreements were material and price sensitive information in nature on account of de facto control of VCPL is again erroneous as we have already held that there was no de facto control of VCPL on NDTV.

67. The only question that remains to be considered is, whether the appellants failed to disclose the loan agreement under Clause 49 of the listing agreement. It was contended by the appellants that Clause 49 (I)(D) of the listing agreement came into effect from the year 2014 and, therefore there was no requirement to make a disclosure in respect of the loan agreements made earlier in the year 2009. This contention is erroneous in as much as we find that vide SEBI Circular dated February 21, 2000 Clause 49 was introduced as under:-

> ***"Clause 49 - Corporate Governance***
>
> *The company agrees to comply with the following provisions:*
>
> ***I. Board of Directors***
>
> ***(D) Code of Conduct***
>
> *(i) The Board shall lay down a code of conduct for all Board members and senior management of the company. The code of conduct shall be posted on the website of the company.*
>
> *(ii) All Board members and senior management personnel shall affirm compliance with the code on an annual basis. The Annual Report of the company shall contain a declaration to this effect signed by the CEO.*

*Explanation: For this purpose, the term "senior management" shall mean personnel of the company who are members of its core management team excluding Board of Directors.. Normally, this would comprise all members of management one level below the executive directors, including all functional heads."*

Under Clause 49 of the listing agreement, the board was required to lay down the Code of Conduct for all Board members and senior management of the company. We find that NDTV had its Code of Conduct in place during the relevant period. Relevant extract of the said Code of Conduct is extracted hereunder:-

*"Applicability This Code of Conduct applies to the following (hereinafter referred to as "officers")*
- *All the members of the Board of NDTV and its subsidiaries*
- *Chief Finance Officer and Company Secretary*
- *Members of Senior Management*

***Compliance With Laws, Rules and Regulations***
*Ethical business conduct is critical to our business. Officers are expected to comply with all applicable laws, rules and regulations including all laws prohibiting insider trading, engage in and promote honest and ethical conduct and abide by the policies and procedures that govern the conduct of the Company's business. Officer's responsibilities*

*include helping to create and maintain culture of high ethical standards and commitment to compliance.*

***Prevent Conflicts of Interest***
*Officers should not make any investment, accept any position or benefits, participate in any transaction or business arrangement or otherwise act in a manner that creates or appears to create a conflict of interest unless they makes full disclosure of all facts and circumstances. A "conflict of interest" arises when you take actions or have interests that conflict in any way with the interests of the Company."*

68. As per the Code of Conduct, the Board members and senior management of NDTV were expected to comply with all applicable Laws, Rules and Regulations and engage in and promote honest and ethical conduct which is free from fraud or deception. Further, the Board members were required to make full disclosure of all facts and circumstances before making any investment or business arrangement which might create or appear to create a conflict of interest. Admittedly, the loan agreement is nothing else but an investment which was required to be disclosed under the Code of Conduct. Such non-disclosure, however, in our opinion is neither fraudulent nor found to be an unfair trade practice. Without going into the contention as to whether the loan agreement created a conflict of

personal interest with the interest of NDTV, we are satisfied that the appellants were required to disclose the loan agreement under the Code of Conduct in terms of Clause 49(I)(D) of the listing agreement especially when PR and RR were the Chairman and Managing Director of NDTV respectively.

69. Considering the aforesaid violation of the Code of Conduct, the order of the WTM restraining them from accessing the securities market or from accepting any position of a Director is totally out of context and does not commensurate with the alleged violation especially when no fraud has been committed nor does the loan agreement defraud the investors. The imposition of penalty of Rs. 25 crores by the AO is also high, excessive and disproportionate to the alleged violation. We find that the AO while considering the factors under Section 25J has noted that the quantifiable gain or unfair advantage accrued to NDTV or extent of loss suffered by the investors as a result of the default cannot be computed. In the absence of any quantification, we are of the opinion, that in the absence of any concealment or causing fraud to the investors or to the minority shareholders, the violation of Clause 49 of the listing agreement only invites a penalty. Considering the factors brought on

record, we reduce the penalty from Rs. 25 Crores to Rs. 5 Crores. Misc. Applications are disposed of accordingly.

70. Appeal No. 80 of 2021 has been filed by NDTV against the order dated December 29, 2020 passed by the AO imposing a penalty of Rs. 5 Crores under Section 23E of the SCRA for violation of Clause 36 of the listing agreement.

71. The brief facts leading to the filing of the present appeal is, that an article was published in Moneylife on June 09, 2015 which carried a headline "who really owns NDTV". Based on this article, the stock exchange sought clarification from NDTV on June 11, 2015. NDTV submitted a reply on June 12, 2015 contending that there was no change in the control of the management of NDTV and that the promoters continued to hold the majority shareholding. This information given to the stock exchange was disseminated by the stock exchange on its platform to all investors. Subsequently, the Board of Directors passed a resolution on August 05, 2015 recording the statement of Prannoy Roy that there was no change in the control of the management of NDTV.

72. A show cause notice was issued upon a prima facie satisfaction being arrived at that the loan agreement executed by RRPR with VCPL was a material and price sensitive information which fact was disclosed in the minutes of the Board of Directors on August 05, 2015 for the first time and such information ought to have been disclosed under Clause 36 of the listing agreement. NDTV contended that they are not party to the loan agreements and, therefore, there was no obligation on the part of NDTV to make a disclosure either in 2009-2010 when the loan agreement was executed or even in 2015 the when same was discussed in the Board's minutes of August 05, 2015. It was contended that the loan agreement executed by the promoters with VCPL was not a material event to be disclosed under Clause 36(7) of the listing agreement and that such requirement only became mandatory w.e.f. August 07, 2019.

73. The AO after analyzing various clauses of the loan agreement came to a conclusion that the loan agreement with VCPL transferred substantial stakes in NDTV owned by the promoter at a prenegotiated price as consideration and that the promoters gave up 30% of their voting rights which was a material as well as a price sensitive information which was

required to be disclosed to the stock exchange. The AO further found that NDTV became aware of this loan agreement on August 05, 2015 when the matter was discussed by the Board of Directors and such information was required to be disclosed under Clause 36 of the listing agreement.

74. We have heard Shri P.N. Modi, the learned senior counsel for the appellant and Shri Shyam Mehta, the learned senior counsel for the respondent.

75. As we have already held in Appeal No. 293 of 2018 the loan agreement executed by the promoters with VCPL did not transfer control of NDTV to VCPL either directly or indirectly and, therefore, the findings given by the AO on the issue that the loan agreement is structured in such a way that in fact it transfers control to VCPL indirectly cannot be sustained. The findings in this regard are set aside.

76. The question which needs to be decided is, whether the minutes and the contents of the minutes of August 05, 2015 of the Board of Directors of NDTV was required to be disclosed

under Clause 36 of the listing agreement. For facility, Clause 36 of the listing agreement is extracted hereunder.

> *"Apart from complying with all specific requirements, the Issuer will intimate to the Stock Exchanges, where the company is listed immediately of events such as strikes, lock outs, closure on account of power cuts, etc. and all events which will have a bearing on the performance / operations of the company as well as price sensitive information both at the time of occurrence of the event and subsequently after the cessation of the event in order to enable the security holders and the public to appraise the position of the Issuer and to avoid the establishment of a false market in its securities. In addition, the Issuer will furnish to stock exchange(s) on request such information concerning the Issuer as the stock exchange(s) may reasonably require. The material events may be events such as:*
>
> *a. Change in the general character or nature of business.*
>
> *b. Disruption of operations due to natural calamity.*
>
> *c. Commencement of Commercial Production/Commercial Operations.*
>
> *d. Developments with respect to pricing/realisation arising out of change in the regulatory framework.*
>
> *e. <u>Litigation /dispute with a material impact</u>*
>
> *The Company will promptly after the event inform the Exchange of the developments with respect to any dispute in conciliation proceedings, litigation, assessment, adjudication or arbitration to which it is a party or the outcome of*

*which can reasonably be expected to have a material impact on its present or future operations or its profitability or financials.*

*f. Revision in Ratings*

*g. Any other information having bearing on the operation/performance of the company as well as price sensitive information which includes but not restricted to;*

- *Issue of any class of securities.*
- *Acquisition, merger, de-merger, amalgamation, restructuring, scheme of arrangement, spin off of setting divisions of the company, etc.*
- *Change in market lot of the company's shares, sub-division of equity shares of the company.*
- *Voluntary delisting by the company from the stock exchange(s).*
- *Forfeiture of shares.*
- *Any action which will result in alteration in the terms regarding redemption/cancellation/retirement in whole or in part of any securities issued by the company.*
- *Information regarding opening, closing of status of ADR, GDR or any other class of securities to be issued abroad.*
- *Cancellation of dividend/rights/bonus, etc.*
- *The above information should be made public immediately."*

77. A perusal of Clause 36 of the listing agreement provides for a company to inform the exchange on immediate basis of all events which will have a bearing on the performance/ operations of the company as well as price sensitive information. In the instant case, the AO has found that the information relating to VCPL loan agreements were material and price sensitive in nature on account of de facto control by VCPL. We have already held that there was no de facto control of VCPL on NDTV and, therefore, on this short ground the finding that the contents of the loan agreements were price sensitive in nature cannot be sustained. However, considering the peculiar structure of the loan agreement, coupled with the fact that the exercise of the warrant option or the call option if invoked would have a bearing on the performance/ operations of the company and therefore, to that extent, when the matter was discussed in the minutes of the Boards' meeting on August 05, 2015, the said minutes should have been disclosed under Clause 36 of the listing agreement. Such disclosure would enable the shareholders and the public to take a informed decision on the investment or disinvestment in the securities of NDTV.

78. It was urged, that it was not a material event or information which required disclosure under Clause 36 of the listing agreement. This Tribunal in ***ICICI Bank Limited vs. SEBI decided on 08.07.2020 in Appeal No. 583 of 2019*** has held that when in doubt as to whether a particular event is material or not warranting disclosure under Clause 36 of the listing agreement the way out is to disclose in order to avoid any violation. This Tribunal held:-

> *"The purpose and spirit of disclosure in a disclosure-based regulatory regime is simple and clear; disclose all material and price sensitive events/information and disclose even when one is in doubt. It does not have to be tested with finer legal examination, hairsplitting arguments or semantics."*

79. In view of the aforesaid, we are of the view that NDTV by not disclosing the minutes of the meeting dated August 05, 2015 to the stock exchange violated Clause 36 of the listing agreement.

80. A penalty of Rs. 5 Crores have been imposed under Section 23E read with Section 23(I) of the SCRA. For facility, the said provisions are extracted hereunder:-

> *"**Penalty for failure to comply with provision of listing conditions or delisting conditions or grounds:-***

> *23E. If a company or any person managing collective investment scheme or mutual fund, fails to comply with the listing conditions or delisting conditions or grounds or commits a breach thereof, it or he shall be liable to a penalty not exceeding twenty-five crore rupees.*
>
> ***23-I** (1) For the purpose of adjudging under sections 23A, 23B, 23C, 23D, 23E, 23F, 23G and 23H, the Securities and Exchange Board of India shall appoint any officer not below the rank of a Division Chief of the Securities and Exchange Board of India to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty. (2) While holding an inquiry, the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document, which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.*

81. In Suzlon Energy Limited this Tribunal has held that Section 23E has nothing to do with the violation of Clause 36 of the listing agreement. This Tribunal held:-

> *"18. Section 23E has nothing to do with the violation of the provisions of the Listing*

> *Agreement especially Clause 36. Section 23E provides that where a Company fails to comply with the listing conditions or delisting conditions or grounds or commits a breach thereof then penalty would be a minimum of Rs. 5 lakh upto maximum of Rs. 25 crore. The words "fails to comply with the listing conditions" cannot mean failure to comply with the conditions in the Listing Agreement. One of the requirements in the Listing Agreement which is required to be complied with is Clause 36 whereas Section 23E refers to the conditions which are imposed upon a Company when it is applying for its shares to be listed on the stock exchange platform. Section 23E has to be read along with Rule 19 of the Securities Contracts (Regulation) Rules, 1957 ('SCRR' for short). Rule 19 of the SCRR provides certain requirements with respect to a listing of securities on a recognized stock exchange. Rule 19A provides that a Company has to continuously maintain listing requirements. Rule 21 provides conditions for delisting of securities. Failure to comply with the listing conditions which are stated in Rule 19 would entail a penalty as provided under Section 23E. Thus, in our view violation of Clause 36 of the Listing Agreement will attract Section 23A(a) of the SCRA and will not attract Section 23E. The AO has made an error.*

82. The penalty that can be imposed for violation of Clause 36 of the listing agreement is under Section 23A(a). For facility, the said provision is also extracted hereunder:-

> ***"Penalty for failure to furnish information, return, etc.-***
>
> *23A. Any person, who is required under this Act or any rules made thereunder,*

> *(a) to furnish any information, document, books, returns or report to a recognised stock exchange, fails to furnish the same within the time specified therefor in the listing agreement or conditions or bye-laws of the recognised stock exchange, shall be liable to a penalty [which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees] for each such failure;*

83. Thus, while confirming the order of the AO only with regard to the violation of the Clause 36 of the listing agreement we find that the penalty of Rs. 5 Crores is excessive. A maximum penalty of Rs. 1 Crore could be imposed under Section 23A(a). In the given facts and circumstances of the case, and considering the factors involved under Section 23J of the SCRA is concerned, we find that the AO himself has held that the quantifiable gain or unfair advantage accrued to NDTV or extent of loss suffered by the investors as a result of the default cannot be computed. Consequently, the penalty for mere violation of non-disclosure under Clause 36 of the listing agreement cannot be penalized to the maximum amount quoted in the provision. Considering the facts and circumstances, we are of the opinion that the penalty of Rs. 5 Crores is reduced to Rs. 10 lakhs under Section 23A(a) of the SCRA.

84. In view of the aforesaid, the impugned order dated June 26, 2018 passed by the WTM in Appeal No. 293 of 2018 VCPL vs. SEBI cannot be sustained and is quashed. The appeal is allowed with no order as to costs.

85. While affirming the finding of violation of Clause 49(I)(D) of the listing agreement in the impugned order dated June 14, 2019 passed by the WTM in Appeal Nos. 294 of 2019, 295 of 2019 and 296 of 2019 and order dated December 24, 2020 passed by the AO in Appeal Nos. 77 of 2021, 78 of 2021 and 79 of 2021 the penalty of Rs. 25 Crores is reduced to Rs. 5 Crores. Accordingly, the directions given by the WTM being excessive is set aside. Since a penalty has been imposed, we do not see any reason to issue any further direction under Section 11, 11B of the SEBI Act. The appeals are partly allowed with no order as to costs.

86. Appeal No. 80 of 2021 NDTV vs. SEBI against the order dated December 29, 2020 passed by the AO is partly allowed. The violation of Clause 36 of the listing agreement is upheld. However, the penalty of Rs. 5 Crores is reduced to Rs. 10 lakhs. In the circumstances of the case, all parties shall

bear their own costs. All the Misc. Applications are disposed of accordingly.

87. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

**20.07.2022**
**PK**