

BEFORE THE SECURITIES APPELLATE TRIBUNAL  
MUMBAI

**Date of Hearing : 09.01.2019**

**Date of Decision : 04.06.2019**

**Appeal No. 95 of 2016**

Metex Marketing Pvt. Ltd.  
357, Kothari Mansion,  
SVP Road, Mumbai - 400 004.

...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 Mr. Jaikishan Lakhwani,  
Mr. Kunal Katariya, Advocate i/b Mr. Jaikishan Lakhwani, Advocate  
for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Kaushal Parsekar, Advocate  
i/b Legasis Partners for the Respondent.

**With**  
**Appeal No. 92 of 2016**

1. Apurva M. Shah
2. Ms. Ashni Shah
3. Ms. Bhavna M. Shah
4. Manish L. Shah
5. Manish L. Shah HUF

4A, Sambhav Tirth,  
2A, Bhulabhai Desai Road,  
Hajiali, Mumbai - 400 026.

...Appellants

Versus

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

...Respondent

Mr. Ankit Lohiya, Advocate with Mr. Rohit Patil, Advocate i/b Juris  
Link for the Appellants.

Mr. Kumar Desai, Advocate with Mr. Kaushal Parsekar, Advocate  
i/b Legasis Partners for the Respondent.

**With  
Appeal No. 93 of 2016**

Ms. Chanchal Jain  
1/B, Nagindas Building,  
Prathna Samaj, Mumbai - 400 004.

...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. Saurabh Bachhawat, Advocate with Mr. Aagam Doshi, Ms. Ria  
Jain, Advocates i/b Aagam Doshi for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Kaushal Parsekar, Advocate  
i/b Legasis Partners for the Respondent.

**With  
Appeal No. 94 of 2016**

1. Mr. Lalitchandra Shah
2. Ms. Sumitra Lalitchandra Shah

203, Rajmohan Society, Asurvav,  
Dharampur, Valsad - 396050.

...Appellants

Versus

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

...Respondent

Mr. Aditya H. Mehta, Advocate i/b Haresh Mehta & Co. for the  
Appellants.

Mr. Kumar Desai, Advocate with Mr. Kaushal Parsekar, Advocate  
i/b Legasis Partners for the Respondent.

**With**  
**Appeal No. 96 of 2016**

Rashi Jain  
601/602, Padmavati Heights,  
P B Marg, Tardeo, Mumbai - 400 007.

...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. Nikhil Shah, Advocate i/b Joby Mathew & Associates for the  
Appellant.

Mr. Kumar Desai, Advocate with Mr. Kaushal Parsekar, Advocate  
i/b Legasis Partners for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer  
Dr. C. K. G. Nair, Member

Per : Justice Tarun Agarwala, Presiding Officer

1. These appeals have been filed against a common order dated March 9, 2016 passed by the Whole Time Member (hereinafter referred to as, 'WTM') of Securities and Exchange Board of India (hereinafter referred to as, 'SEBI') and, therefore, all these appeals are being decided together. For facility, the facts stated in Appeal No. 95 of 2016 are being taken into consideration.

2. The WTM in its order found that the appellants who were the promoters of the target company, Koffee Break Pictures Ltd. (KBPL) subscribed to warrants in a preferential allotment with a common objective of acquisition of substantial shares and converted the warrants into equity shares which resulted in the collective increase in the shareholding from 12.77 % to 25.20% which was beyond the threshold of 15%, thus, triggering Regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'Takeover Regulations, 1997'). Since no public announcement was made under Chapter III of the Takeover Regulations, 1997, the WTM after considering the provision of Regulation 44 of the Takeover Regulations, 1997 directed the appellants jointly and severally to make a public announcement to acquire the shares in accordance with the provisions of the Takeover Regulations, 1997 and alongwith the consideration amount also pay interest @ 10% p.a. from March 23, 2010 to 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.

3. The facts leading to the filing of the appeals are that the target company was incorporated in 2004 as “My Fellow Fashions Ltd” and was engaged in Textiles. In 2005, Apurva Shah, one of the appellants in Appeal No. 92 of 2016 was inducted as a director. The target company diversified its business and recast its business model into movie making. In July 2005, the name of the target company became Koffee Break Pictures Ltd. (KBPL). Apurva Shah, appellant, acquired control of the Company and described himself as a promoter without any shareholding.

4. On June 14, 2008, the target company had its Extra Ordinary General Meeting and a resolution was passed for preferential allotment of one crore warrants of Rs. 10/- each at a value of Rs. 21/- to 47 allottees. On December 8, 2008, the shares were split in a ratio of 1:10. As per disclosures made by the target Company as on June 30, 2009, the promoter group held 28,90,810 shares constituting 4.51% of the share capital. As per disclosure made by the target company, Metex Marketing Pvt. Ltd. (‘Metex’ for short), and appellant in Appeal No. 95 of 2016 was shown as promoters. It is relevant to mention here that the lock in period for conversion of

warrants into equity shares was one year for non-promoters and three years for promoters.

5. Metex converted 10,00,000 warrants into shares on October 31, 2009 and again on December 12, 2009, 65,00,000 warrants were converted into shares. Other appellants also converted their warrants into shares on different dates. Thus, as on December 31, 2009, the promoter group held 3,27,63,440 shares which constituted 25.20% of the shares capital which resulted in the triggering of Regulation 10 of the Takeover Regulations, 1997.

6. In view of the increase in the shareholding of the promoter group, a show cause notice dated September 26, 2014 was issued to the promoter group to show cause as to why suitable directions should not be issued under Section 11 and 11B of the Securities and Exchange Board of India Act, 1992 and Regulations 44 and 45 of the Takeover Regulations, 1997 read with Regulations 32 and 35 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. After considering the replies, the WTM passed the impugned order.

7. The WTM found that the appellant was named as well as disclosed as a promoter on the BSE website. In the Extra Ordinary General Meeting (EOGM) notice dated April 22, 2008, the appellant was named and disclosed to the shareholders as a promoter. The

appellants were promoters at the time of preferential allotment as well as at the time of conversion of warrants into equity shares. The WTM also found that the appellant was aware of this fact, namely, that the appellant was shown as a promoter of the target company. The WTM also found that the appellant failed to take steps for rectification of its name being shown as a shareholder. The WTM consequently, held that the appellant was a “promoter” as defined under Regulation 2(1)(h), and was an “acquirer” under Regulation 2(1)(b) of the Takeover Regulations, 1997, and shared a common objective and also had a commonality of interest with other promoter’s group and, thus, were “acting in concert” as per Regulation 2(1)(e) of the Takeover Regulations, 1997. The WTM consequently, found that the total shareholding of the promoters group exceeded 15%, thus, triggering Regulation 10 of the Takeover Regulations. Since no public announcement was made within the stipulated period, action was taken under Regulation 44 as stated aforesaid. Similar findings have been given by the WTM against other appellants.

8. The WTM categorized the promoter group as under:
  1. Metex Marketing Pvt. Ltd. (MMPL) - Comprising of Jayesh Patel, Siddhartha Jain, Chanchal Jain, Priyanka Jain and Rashi Jain.

2. Shah Group - Comprising of Apurva Shah, Ashni Shah, Bhavna Shah, Manish Shah, Manish Shah HUF, Lalitchandra Shah and Sumitra Lalitchandra Shah.

9. The WTM found that the shareholding of Metex as under :

a) Siddhartha Jain – 50%

b) Chanchal Jain – 25%

c) Jayesh Patel – 25%

10. The WTM found that Siddhartha Jain was the brother-in-law of Apurva Shah, Chanchal Jain was the mother-in-law and Rashi Jain was wife of Siddhartha Jain and Ashni Jain was wife of Apurva Shah and was thus, closely connected with the Shah group.

11. The contention of the appellant Metex is, that there has been an inordinate delay in initiating the proceedings. The delay of six years is fatal and on this short ground, the impugned order was liable to be set aside. It was also urged that on account of passage of time, the direction given by the WTM to purchase shares at Rs. 33.50 per share has become unworkable and, in any case arbitrary, in as much as, currently the market rate is Rs. 0.138 per share. In support of his submissions, the learned counsel has relied upon two decisions of this Tribunal in the matters of :

**1) Shri S. K. Khaitan & Ors. vs. SEBI [2013 SCC OnLine SAT 25] and**



**2) Phiroze Sethna & Ors. vs. Adjudicating Officer, SEBI [2007  
SCC OnLine SAT 94]**

12. It was also contended that it is not known as to whether the price of Rs. 33.50 per share fixed by the WTM is for one share of face value of Rs. 10/- or face value of Re. 1/-. Further, the charging of interest @ 10% p.a. was wholly arbitrary and excessive in as much as the price of Rs. 33.50 includes the interest component and charging interest separately was wholly illegal.

13. It was also contended that Metex was never a promoter of the target company and that the target company unilaterally and without taking any consent had included Metex as a promoter of the target Company. It was further contended, in the alternative, that, in any case, the appellant was not acting in concert and was not an acquirer as it had no intention to take control of the target Company, nor at any moment of time exercised any voting rights.

14. Rashi Jain the appellant in Appeal No. 96 of 2016 is the wife of Siddhartha Jain and contended that she is not a promoter nor acting in concert nor participated in any meeting nor exercised any vote. The appellant adopted the stand taken by Metex.

15. Lalitchandra Shah and Sumitra Lalitchandra Shah, appellants in Appeal No. 94 of 2016 are the grandparents of Apurva Shah and

contended that they are not the promoters nor were acting in concert. It was contended that the appellants wrote a letter on October 9, 2015 to the company informing them that they were wrongly shown as promoters of the target Company. It was further contended that since his grandson Apurva Shah was the Managing Director, the appellant infused funds in the company by subscribing to the warrants issued by the target Company.

16. In Appeal No. 93 of 2016, the appellant Chanchal Jain, is the mother-in-law of Apurva Shah and contended that she is neither a promoter nor has any common objective with the other promoters.

17. Apurva Shah in Appeal No. 92 of 2016 contended that certain entities were erroneously shown as promoters of the company till September 2014 which was rectified in the disclosure shown in December 2014. The appellant contended that he never acquired any shares and was a dormant promoter without any common objective or purpose. The appellant contended that the direction to provide exit opportunity to the shareholders and to purchase the shares at this belated stage was wholly unfair, and that, in the given circumstances, other direction as provided under Regulation 44 could have been issued.

18. On the other hand, the learned counsel for the respondent submitted that there is no error in the impugned order and that the

appeal is required to be dismissed with costs. The Board of Directors of the target Company in its resolution dated April 22, 2008 had resolved that the proposed allottees were specifically being shown as promoters and that the company had been informed that the proposed allottees including corporate bodies had expressed their intention to subscribe to the offer. The resolution indicated the percentage of the proposed allotment and also indicated that the lock in period for promoters was three years and for non-promoters, the lock in period was one year. It was contended that the appellants were 'promoters' as per the definition in Regulation 2(h) of the Takeover Regulations. Further, the appellants were also 'acquirer' as per Regulation 2(b) and were 'persons acting in concert' as per Regulation 2(e)(i) as a homogenous unit, with a common objective and commonality of interest.

19. The learned counsel for the respondent further contended that the target Company / Apurva Shah was specifically called upon to provide information with regard to increase in the shareholdings of the promoter group inspite of which no information was supplied. It was contended that after the issuance of the SCN, some of the appellants, namely, Lalitchandra Shah, Sumitra Shah, Rashi Jain and Metex protested with regard to inclusion of their names as promoters. It was urged that this protest was only an afterthought and, in any case, the evidence was clear that the appellants were acting in concert

with a common object and had grossly violated Regulation 10 of the Takeover Regulations. It was further contended that as per the disclosures made by the Target Company in March 2010, June 2010 and September 2010, the appellants were shown as promoters and no objection was raised by any of the promoters.

20. In support of his submissions the learned counsel place reliance to the following decisions :-

- 1) Rajesh Toshniwal vs. SEBI & Ors. decided by SAT on June 1, 2012 in Appeal No. 139 of 2011,**
- 2) Technip S. A. vs. SMS Holding (P) Ltd. & Ors. [(2005) 5 SCC 465],**
- 3) Naagraj Ganeshmal Jain vs. P. Sri Sai Ram decided by SAT on August 17, 2001 in Appeal No. 12 of 2001.**

21. We have heard Mr. P. N. Modi, Mr. Ankit Lohia, Mr. Saurabh Bachhawat, Mr. Aditya Mehta, Mr. Nikhil Shah, the learned counsel for the appellants and Mr. Kumar Desai, learned counsel for the respondent at some length.

22. On the issue of delay, it was contended that there is no provision either under the SEBI's Act or under the Takeover Regulations for providing a period of limitation and contended that action was taken as soon as the respondent became aware of the

violation. In support of his submission, the learned counsel placed reliance on the following decisions of this Tribunal in :-

- 1) **Vaman Madhav Apte & Ors. vs. SEBI decided on March 4, 2016 in Appeal No. 449 of 2014,**
- 2) **Sudarshan Walia & Ors. vs. SEBI decided on October 14, 2016 in Appeal No. 470 of 2015.**

23. It is no doubt true that no period of limitation is prescribed in the SEBI's Act or the Regulations for issuance of a show cause notice or for completion of the adjudication proceedings. **The Supreme Court in Government of India vs, Citedal Fine Pharmaceuticals, Madras and Others, [AIR (1989) SC 1771]** held that in the absence of any period of limitation, the authority is required to exercise its powers within a reasonable period. What would be the reasonable period would depend on the facts of each case and that no hard and fast rule can be laid down in this regard as the determination of this question would depend on the facts of each case. This proposition of law has been consistently reiterated by the Supreme Court in **Bhavnagar University v. Palitana Sugar Mill (2004) Vol.12 SCC 670, State of Punjab vs. Bhatinda District Coop. Milk P. Union Ltd (2007) Vol.11 SCC 363 and Joint Collector Ranga Reddy Dist. & Anr. vs. D. Narsing Rao & Ors. (2015) Vol. 3 SCC 695.** The Supreme Court recently in the case of

**Adjudicating Officer, SEBI vs. Bhavesh Pabari (2019) SCC**

**Online SC 294** held:

*“There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc.”*

24. This Tribunal has consistently held that in the absence of any specific provision in the SEBI Act or in the Takeover Regulations, the fact that there was a delay on the part of SEBI in initiating proceedings for violation of any provision of the Act cannot be a ground to quash the penalty imposed for such violation.

25. In the instant case, we find that as on December 31, 2009 the promoter group held 25.20% of the total shareholding of the target company and, therefore, triggered Regulation 10 of the Takeover Regulations. When SEBI came to know about the violation, it issued a letter dated November 27, 2013 directing the target company and the appellants to furnish the details of the shareholding of the promoter's group. A reminder was also sent on March 19, 2014. The appellants inspite of furnishing the information kept on filing application after application seeking further time to furnish the information. Apparently no information was forthcoming, and consequently, the show cause notice was eventually issued on

September 24, 2014. After providing ample opportunity of hearing, the impugned order was passed on March 9, 2016.

26. Considering the aforesaid, even though no period of limitation is prescribed, such powers must be exercised within a stipulated period. In the instant case, the aforesaid sequence of events clearly indicates that in the given circumstances the respondent exercised its power within a reasonable period. We find that there is no inordinate delay either in initiation of the proceedings or in passing the impugned order after issuance of the show cause notice. The contention raised by the appellants that there has been an inordinate delay in the initiation of the proceedings cannot be accepted.

27. The admitted facts as culled out is that the target company made preferential allotment of one crore warrants of Rs. 10/- face value with Rs. 11/- premium on June 14, 2008 to 47 allottees including the appellants except the appellant Apurva Shah. It is also admitted that all the appellants converted their warrants into equity shares on several dates between July 2009 to December 2009. Admittedly, as on June 30, 2009 the total shareholding of the promoters group was 4.51% of its shareholding which was equivalent to 28,90,810 shares which rose to 3,27,63,440 shares or 25.20% of the total shareholding of the target company as on December 31, 2009. The increase in the total shareholding of the promoters group

to 25.20% triggered Regulation 10 of the Takeover Regulations as it exceeded the threshold of 15%.

28. The contention of the appellants that they were not promoters of the target company and the disclosures made by the target company either in the EOGM or in the open offer was without their consent and knowledge cannot be accepted. The contention that the appellants were wrongly branded as promoters is patently incorrect. The contention of the appellant Metex that the target company had made them a promoter group entity unilaterally without their consent cannot be accepted. The contention that they were not aware of this fact that they were being treated as a promoter group entity cannot be believed. The contention that there was no agreement or understanding between the appellants *inter se* and, therefore, they were not persons acting in concert also cannot be believed. The contention that there was no intention to acquire control on the target company or there was no commonality of interest or commonality of objective also cannot be accepted. The contention that the appellant Metex never attended any general meeting of the target Company or exercised of any voting rights at any stage is immaterial and has no relevance to the violation that they had committed.



29. In order to appreciate the submissions of the parties, it would be relevant to consider a few provisions of the Takeover Regulations.

Regulation 2(h) defines ‘promoter’ as under:-

*“2(h). promoter means—*

- (a) any person who is in control of the target company;*
- (b) any person named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the Listing Agreement, whichever is later; and includes any person belonging to the promoter group as mentioned in.*

*Explanation I:*

*Provided that a director or officer of the target company or any other person shall not be a promoter, if he is acting as such merely in his professional capacity.*

*Explanation I.— For the purpose of this clause, “promoter group” shall include:*

- (a) in case promoter is a body corporate—*
  - (i) a subsidiary or holding company of that body corporate;*
  - (ii) any company in which the promoter holds 10 % or more of the equity capital or which holds 10 % or more of the equity capital of the promoter;*
  - (iii) any company in which a group of individuals or companies or combinations thereof who holds 20 % or more of the equity capital in that company also holds 20 % or more of the equity capital of the target company; and*
- (b) in case the promoter is an individual—*

- (i) *the spouse of that person, or any parent, brother, sister or child of that person or of his spouse;*
- (ii) *any company in which 10 % or more of the share capital is held by the promoter or an immediate relative of the promoter or a firm or HUF in which the promoter or any one or more of his immediate relative is a member;*
- (iii) *any company in which a company specified in (i) above, holds 10 % or more, of the share capital; and*
- (iv) *any HUF or firm in which the aggregate share of the promoter and his immediate relatives is equal to or more than 10 per cent of the total.*

*Explanation II. — Financial Institutions, Scheduled Banks, Foreign Institutional Investors (FIIs) and Mutual Funds shall not be deemed to be a promoter or promoter group merely by virtue of their shareholding:*

*Provided that the Financial Institutions, Scheduled Banks and Foreign Institutional Investors (FIIs) shall be treated as promoters or promoter group for the subsidiaries or companies promoted by them or mutual funds sponsored by them.”*

30. From the aforesaid provision, it is apparently clear that the definition of promoter is very wide and, in the instant case, for the limited purpose, a promoter is a person who is named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the listing agreement.

31. In the instant case, the appellants were shown as promoters in the open offer by the target company. The appellants were shown as prospective promoters in the resolution of the target company dated April 22, 2008 wherein the appellants were specifically shown as a part of the promoter group. The resolution of the Board of Directors dated April 22, 2008 clearly indicated that the appellants had expressed their intention to subscribe to the offer which facts have not been denied by them. Thus, it is clear that some of the appellants were proposed allottees of the preferential warrants were shown as a homogenous group of promoters. Further, the target company had shown the appellants as promoters while making the disclosures on the stock exchanges from time to time. Thus, we are of the opinion that the appellants were part of the promoters group.

32. Regulation 2(b) defines 'an acquirer' as follows :-

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

33. From the aforesaid definition, any person who acquired shares or voting rights either himself or with any person acting in concert is an acquirer. In the instant case, admittedly, the appellants acquired substantial shares in the target company and, therefore, are the acquirers.

34. The question next is whether the acquirer defined under Regulation 2(b) were acting in concert or not? In this regard, Regulation 2(e) defines ‘person acting in concert’ as follows :-

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

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

(2) *Without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established :*

- (i) *a company, its holding company, or subsidiary or such company or company under the same management either individually or together with each other;*
- (ii) *a company with any of its directors, or any person entrusted with the management of the funds of the company;*
- (iii) *directors of companies referred to in sub-clause (i) of clause (2) and their associates;*
- (iv) *mutual fund with sponsor or trustee or asset management company;*
- (v) *foreign institutional investors with sub-account(s);*
- (vi) *merchant bankers with their client(s) as acquirer;*
- (vii) *portfolio managers with their client(s) as acquirer;*
- (viii) *venture capital funds with sponsors;*
- (ix) *banks with financial advisers, stock brokers of the acquirer, or any company which is a holding company, subsidiary or relative of the acquirer :*

*Provided that sub-clause shall not apply to a bank whose sole relationship with the acquirer or with any company, which is a holding company or a subsidiary of the acquirer or with a relative of the acquirer, is by way of providing normal commercial banking services or such activities in connection with the offer such as confirming availability of funds, handling acceptances and other registration work;*

*(x) any investment company with any person who has an interest as director, fund manager, trustee, or as a shareholder having not less than 2 per cent of the paid-up capital of that company or with any other investment company in which such person or his associate holds not less than 2 per cent of the paid-up capital of the latter company.*

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

*(a) any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and*

*(b) family trusts and Hindu undivided families.”*

35. The aforesaid provision is very wide and, in the nutshell, for the purpose of this appeal, a person who acquires shares or voting rights or gains control over the target company pursuant to an agreement or understanding with a common objective or purpose would be a person acting in concert. We find that the appellants had a common objective of acquisition of substantial shares when they subscribed to warrants in the preferential allotment. It is not denied that the appellants did not express their intention to subscribe to the

offer when preferential warrants were given to them. Such intention has been specifically recorded in the resolution of the Board of Directors of the target company dated April 22, 2008. This common objective of acquisition of substantial shares of the appellants is writ large. Further, all the warrants were converted into equity shares after holding them during the lock in period of three years and beyond. Such action and conduct demonstrate the common objective as well as commonality of interest. It also indicates that the appellants, as promoters, were a homogenous unit and that the appellant Apurva Shah was the kingpin and was responsible for the conduct of the business and management of the target company. Thus, we are of the opinion that the appellants having consciously acquired the warrants and then converted the same into shares. The appellants had a commonality of objective and commonality of interest with the promoter group and were thus, persons acting in concert with regard to the acquisition of shares.

36. From the aforesaid, it is apparently clear that the appellants were not only promoters but were also acquirers and worked as a homogenous unit for the ultimate purpose of acquiring substantial shares in the target company. By such acquisition the total shareholding of the target company became 25.20%. It exceeded the threshold of 15%, thus triggering the applicability of Regulations 10 and 14 of the Takeover Regulations. For facility, provision of

Regulations 10 and 14 of the Takeover Regulations are extracted hereunder :-

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

*“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.*

*(4) In case of indirect acquisition or change in control, a public announcement shall be made by the acquirer within three months of consummation of such acquisition or change in control or restructuring of the parent or the company holding shares of or control over the target company in India.”*

37. From the aforesaid provisions an acquirer who acquires more than 15% of the shares or the voting rights of the target company will be required to make a public announcement in accordance with Regulation 14. In the instant case, apparently, it was not done and, therefore, the consequence of violation of Regulations 10 and 14 was imposed by the impugned order.

38. It was contended by the appellants that they had not given their consent for being made promoters and that the target company had unilaterally placed them in the promoters group without their consent. It was contended that when they had protested and directed



the target company by the letter dated October 9, 2015 to rectify the error and delete their names as promoters. Such contention cannot be accepted. In the first instance, we find that the appellants had themselves expressed their desire to be preferential allottees to the warrants which was indicated in the resolution of the Board of Directors. Subsequent disclosures were made by the target company on the platform of the exchange from time to time showing the appellants as a homogenous unit as a promoter group. Further, we find that no steps were taken by the appellants at any stage prior to the issuance of the show cause notice dated September 26, 2014 and much later filed a letter dated August 17, 2015. Such letter, in our opinion, is clearly an afterthought and cannot be given any cognizance. The fact that the appellants gave their consent to acquire the warrants on a preferential basis was based on a common objective or purpose to acquire substantial shares or voting rights. This alone, makes the appellants as persons acting in concert and, thus, comes under the umbrella of promoters. The fact that they continued to hold the warrants during the lock in period demonstrates the common objective to acquire substantial shares in the target company. The element of co-operation between the appellants were implicit by their actions and conduct. Apurva Shah was the Managing Director and was the brain behind the issuance of the convertible preferential warrants. All the appellants were admittedly

close relatives or were connected entities. Apurva Shah had actively co-operated in the acquisition for the other appellants and thus, shared a commonality of objective and commonality of interest and were thus, persons acting in concert. It is a matter of common knowledge that a preferential allotment is made to the person / entities on a one to one basis who are acquainted with the Company and/or its promoters/directors. Thus, the preferential allotment envisage a common objective of acquiring shares. In any case, even if the contention is accepted for a moment that the appellants are not part of the promoter group, nonetheless, the appellants are acquirers. Such acquisition of shares exceeded 15% which triggered the mechanism of the Regulations 10 and 14 which apparently had not been complied with. Thus, there was a clear breach of Regulations 10 and 14 of the Takeover Regulations.

39. For the breach committed by the appellants, the WTM has considered the provision of Regulation 44. In the circumstances of the case, the WTM after considering the breach of Regulations 10 and 14 found that there was no reason to deviate from the normal rule of directing the appellants to make the public announcement to acquire shares of the target company in accordance with the provisions of the Takeover Regulations which was with a view to provide a delayed exit opportunity to the shareholders of the target company. In our opinion, such direction is in accordance with

Regulation 44(f) and (i). For facility the said provisions are extracted hereunder :-

*“44(f). directing the person concerned to make public offer to the shareholders of the target company to acquire such number of shares at such offer price as determined by the Board;*

*(g) .....*

*(h) .....*

*(i) directing the person concerned, who has failed to make a public offer or delayed the making of a public offer in terms of these regulations, to pay to the shareholders, whose shares have been accepted in the public offer made after the delay, the consideration amount along with interest at the rate not less than the applicable rate of interest payable by banks on fixed deposits.”*

Thus, the direction of the WTM to make a public announcement does not suffer from any error of law.

40. The WTM has directed the appellants to make an open offer at a price of Rs. 33.50 per share, which has been calculated in terms of Regulation 20 of the Takeover Regulations, alongwith interest. We are unable to agree with the calculation or the rate fixed by the WTM, namely, Rs. 33.50 per share. In the first instance, we find that the WTM has fixed Rs. 33.50 per share on the basis of approximation. This price has been calculated in terms of Regulation 20. How and in what manner the calculation of Rs. 33.50 has been

arrived at is not known. Admittedly, at the time of allotment of the warrants, the price per warrant was Rs. 21/-. Does the price of Rs. 33.50 per share includes the interest component is not known. If interest has been added in the fixation of the price per share in which case further directions for payment of interest under Regulation 44(i) would become unwarranted.

41. We also find that the price of one warrant was Rs. 21/- on a face value of Rs. 10 per warrant. Subsequently, after conversion of the shares, the shares were split in the ratio of 1:10 i. e. to say one share of Rs. 10 became 10 shares of Re. 1/- each. The impugned order does not indicate as to whether the rate fixed, namely, Rs. 33.50 per share is for 10 rupees share or for one rupee share. In the light of the aforesaid, the fixation of price of Rs. 33.50 per share cannot be sustained.

42. We, accordingly, affirm the order of the WTM except that part which relates to the fixation of the price of Rs. 33.50 per share and to that limited extent, we remit the matter to SEBI to appoint a merchant banker who will fix the price per share keeping in mind that the face value per share is Re. 1/-. The determination of the price per share will be approved by SEBI and thereafter SEBI will give such directions to the merchant banker and/or the appellants for compliance for making public announcement within a stipulated

period in order to provide a delayed exit opportunity to the shareholders of the target company.

43. If the price fixed by the merchant banker does not include the component of interest, in that case, SEBI will also pass orders for payment of interest under Regulation 44(i) of the Takeover Regulations. Such exercise shall be carried out by SEBI within three months from today.

44. In the light of the aforesaid, the appeals are partly allowed. Parties shall bear their own costs.

Sd/-  
Justice Tarun Agarwala  
Presiding Officer

Sd/-  
Dr. C. K. G. Nair  
Member

04.06.2019  
Prepared & Compared by  
PTM