REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8249 OF 2013

SECURITIES AND EXCHANGE BOARD OF INDIA ... APPELLANT

VERSUS

SUNIL KRISHNA KHAITAN AND OTHERS ... RESPONDENTS

W I T H

CIVIL APPEAL NO. 1762 OF 2014

J U D G M E N T

SANJIV KHANNA, J.

This common judgment would decide the aforesaid two appeals preferred by the Securities and Exchange Board of India[1], whereby it has challenged the order of the Securities Appellate Tribunal[2] dated 19th June 2013 in Appeal No. 23 of 2013 titled '*Sunil Krishna Khaitan and Others v. Securities and Exchange Board of India'*; and the order dated 31st October 2013 in Appeal No. 2 of 2013 titled '*Smt. Madhuri S. Pitti and Others v. Securities and Exchange Board of India'*.

[1] The 'Board', for short.
[2] The 'Appellate Tribunal', for short.

2. Primary questions of law raised in these appeals relates to the interpretation of Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997;[3] the power and exercise of the power by the Board under Regulations 44 read with 45 of the Takeover Regulations, 1997; and the power and jurisdiction of the Appellate Tribunal under Section 15T of the Securities and Exchange Board of India Act, 1992.[4]

A. Background facts:

I) Appeal No. 23 of 2013 (Sunil Krishna Khaitan's case)

3. Khaitan Electrical Limited,[5] a company incorporated in 1975, listed on BSE Limited and National Stock Exchange Limited, is engaged in the business of manufacturing and marketing of electrical goods.

4. KEL was founded by late Shri Krishna Khaitan ($R_1$2 in the appeal), who had passed away on 04th November 2012 and is represented by his legal representatives. The promoter group consists of his family member/relative and associate entities, which include other respondents in the appeal, namely Sunil Krishna Khaitan, M/s.

[3] Hereinafter referred to as 'Takeover Regulations 1997'.
[4] For short, the 'Act'.
[5] For short, 'KEL'.

Khaitan Lefin Limited and M/s. The Oriental Mercantile Company Limited ($R_1$1st, $R_1$3rd and $R_1$4th respectively).

5. In the Extraordinary General Meeting held on 23rd March 2006, the shareholders of KEL had approved issuance of 10,00,000 equity share warrants with the face value of Rs. 10/- each at a premium of Rs. 50/- each on preferential basis to the respondents. The warrants were to be converted into equity shares within a period of eighteen months from the date of allotment.

6. In the Extraordinary General Meeting held on 29th November 2006, the shareholders had approved issuance of 10,00,000 warrants with face value of Rs. 10/- each with premium of Rs. 121/- each on preferential basis to M/s. Khaitan Lefin Limited ($R_1$3),[6] an identified member of the promoter group, to be converted into equity shares within a period of eighteen months. This Extraordinary General Meeting had also approved issuance of 25,00,000 equity shares of face value of Rs. 10/- each at a premium of Rs. 125/- each on preferential basis to strategic investors. However, in this appeal, we are not concerned with the issue of shares to the strategic investors.

[6] For short, 'KLL'.

7. On 12th March 2007, the respondents acquired 13,00,000 shares in KEL in two tranches i.e., 5,00,000 in one transaction and 8,00,000 shares in the other. Upon receipt of the full consideration in terms of the warrants, KEL had issued shares to the respondents consequent to which the shareholdings of the respondents and the promoter group underwent a change, which are required to be noted and are reproduced :

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

8. The respondents were served with the show-cause notice dated 26th March 2012 issued by the Board with respect to violation of Regulations 10 and 11(1) of the Takeover Regulations 1997, calling upon them to show cause why suitable directions under Sections 11 and 11B of the Act and Regulations 44 and 45 of the Takeover Regulations 1997 read with corresponding provisions of Regulations 33 and 35 of the SEBI (Substantial Acquisition of

Shares and Takeover) Regulations, 2011[7] should not be issued against them. Violation of Regulation 10 was predicated on the ground that on 12th March 2007, shareholding of KLL ($R_1$3) had individually increased from 10.52% to 17.16% and thereby it was mandatory for KLL to make a public announcement in accordance with the provisions of Regulation 10 read with Regulation 14(1) of the Takeover Regulations 1997 within four working days from 12th March 2007. Further, on 12th March 2007, the collective shareholding of the promoter group, including the acquirers, had increased from 25.83% to 34.21% and, therefore, the acquirers collectively were required to make a public announcement in accordance with the provisions of Regulation 11(1) read with Regulations 14(1) of the Takeover Regulations 1997 within four working days from 12th March 2007.

9. The respondents contested the show-cause notice on various grounds, which we will be canvassing subsequently.

10. The Whole Time Member[8] of the Board did not agree with the submissions made by the respondents and *vide* his order dated 31st December 2012 held that there was violation of Regulations 10 and

[7] Hereinafter referred to as the 'Takeover Regulations 2011'.
[8] See Section 4(1)(d) of the Act:
"The Board shall consist of the following members, namely:
(d) five other members of whom at least three shall be the whole-time members."

11(1) of the Takeover Regulations 1997 and, therefore, the respondents shall make a combined public announcement to acquire shares of the target company,[9] namely KEL, in terms of Regulations 10 and 11(1) of the Takeover Regulations 1997 within forty-five days of the order. Further the respondent, along with the consideration amount, shall pay interest @ 10% per annum from 16th June 2007 till the date of payment to the shareholders who were holding shares in KEL on the date of violation, and whose shares shall be accepted in the open offer, *albeit* after adjustment of dividend, if any, paid. The effect of the aforesaid direction in the order dated 31st December 2012 would be examined by us subsequently.

11. The respondents preferred an appeal before the Appellate Tribunal, which by the impugned order has been partly allowed. The Appellate Tribunal has held that Regulation 10 was not violated, but Regulation 11(1) was violated *albeit* the direction with regard to issue of public announcement and open offer was not sustainable at a belated stage. There was a delay of about 5 years in issuing show-cause notice relating to acquisition/incidents which pertain to the year 2006-07, and as the impugned order came to be passed

[9] Regulation 2(1)(o): "target company" means a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired.

only on 31st December 2012, the directions of the Whole Time Member for issue of public announcement and open offer were set aside. However, monetary penalty of Rs. 25,000,00/- has been imposed.

II) <u>Appeal No. 2 of 2013 (Madhuri S. Pitti's case)</u>

12. Pitti Laminations Ltd.[10] was incorporated in the year 1983 under the Companies Act, 1956 and its six promoters, namely, Mr. Sharad B. Pitti, Ms. Madhuri Pitti ($R_2$1), Mr. Akshay S. Pitti ($R_2$3), Pitti Electrical Equipment Pvt. Ltd ($R_2$2), Mrs. Shanti B. Pitti and Mr. Sharad B. Pitti have been controlling the affairs of PLL since its inception.

13. On 22nd June 2005, PLL allotted 3,90,000 shares and 4,10,000 warrants convertible into equity shares to $R_2$3. On 26th April 2006, $R_2$3 converted some warrants into equity shares which increased his individual shareholding in PLL from 11.87% to 16.25%.

14. On 11th April 2007, $R_2$3 converted the remaining warrants into equity shares of PLL, which again increased his individual shareholding in PLL from 14.88% to 15.77%.

15. At the Annual General Meeting of PLL on 11th August 2011, a preferential allotment of 40,50,000 equity shares to $R_2$1 and $R_2$2

[10] Hereinafter referred to as "PLL".

was authorised by the shareholders of PLL. This resulted in increase in the total shareholding of the three respondents ($R_2$1, $R_2$2 and $R_2$3) with that of Mr. Sharad Pitti from 41.70% to 59.21%.

16. Accordingly, a public announcement was made on 09th September 2011 and simultaneously, a Draft Letter of Offer was filed before the Board for its approval on 19th September 2011.

17. On a query by the Board, $R_2$3 on 28th November 2011, wrote a letter denying his failures to make public announcement at the time of acquisition of shares by him on 22nd June 2005, and 26th April 2006. Subsequently, on 19th March 2012 a hearing was afforded to him in this regard. Thereafter, $R_2$3 had submitted replies on three occasions on the respect of his purported failure to make public announcement at the time of acquisition of the shares in 2005 and 2006.

18. After a lapse of more than one year, the Board through Assistant General Manager, Corporate Finance Department, Division of Corporate Restructuring issued the letter dated 17th December 2012, mandating the Merchant Banker of the respondents to *inter alia* revise the schedule of the offer by taking into account the acquisitions made by $R_2$3 on 26th April, 2006 and 11th April, 2007 and thereby, revise the offer price to the shareholders.

19. The respondents challenged the letter before the Appellate Tribunal, which *vide* impugned order dated 31st October 2013 allowed the appeal and permitted the respondents to continue with their offer excluding the Board's directions relating to the acquisitions by $R_2$3 in the years 2006 and 2007. The impugned order observes that the Board by such letters could not issue directions to listed companies, by terming it as a mere advice without giving any choice in the matter. Further, placing reliance on the impugned order herein in *Sunil Khaitan v. SEBI*, Appeal No. 23 of 2013 decided on 19th June 2013, the Appellate Tribunal observed that to determine whether or not the limit under Regulation 10 has been crossed, shareholdings of all members of the group of persons acting in concert would have to be reckoned as a whole.[11]

B. <u>Contentions of the appellant/Board</u>:

20. On 12th March 2007, individual shareholding of KLL ($R_1$3) in KEL had increased from 10.52% to 17.16%, whereas shareholding of the promoter group had collectively increased from 25.83% to

[11] In Appeal No. 2 of 2013 (*Madhuri S. Pitti's* case), there is no specific order under Regulation 44 by the Whole Time Member, *albeit*, as noticed above, directions were issued by the Board to amend the draft letter of offer submitted by PLL for the Board's approval on 19th September 2011, *vide* the Board's letter dated 17th December 2012. The Appellate Tribunal has adversely commented on the Board's conduct in issuing the said direction by directing amendment of the draft letter of offer. During the course of arguments, the Board has not specifically challenged the observations and the adverse finding of the Appellate Tribunal that such directions could not have been issued by the Board *vide* letter dated 17th December 2012. We will not make any comments or give findings in this regard.

34.21%. Thus, there was a violation of both Regulation 10 and Regulation 11(1) of the Takeover Regulations 1997.

21. On 26th April 2006, shareholding of $R_2$3 in PLL had increased from 11.87% to 16.25%. Again, on 11th April 2007, shareholding of $R_2$3 had increased from 14.88% to 15.77%. However, no public announcement for open offer was made by $R_2$3 or by the acquirer group within the period of four days from the respective dates.

22. The objective of the Takeover Regulations 1997 is to bring to the knowledge of the shareholders of the company any change in substantial ownership of the company and to provide an exit opportunity through an open offer in case of such substantial change.

23. Regulations 10 and 11(1) have to be read accordingly and in line with the objective of the Takeover Regulations 1997.

24. Regulations 10, 11 and 12 operate in three distinct fields in which the acquirer of shares or voting rights of the company is required to make a public announcement and make an open offer to acquire shares of existing shareholders. These Regulations may overlap in some cases as in the present case, but are not mutually exclusive,

as has been held by this Court in ***Swedish Match AB and Another*** v. ***Securities & Exchange Board of India and Another***.[12]

25. Impugned judgment and reasoning given by the Appellate Tribunal is contrary to the objective of Regulation 10, which is to ensure that an exit option is provided to the existing shareholders once any person, whether individually, and or along with any another person acting in concert with each other, acquires shares that cross the 15% threshold. Such acquirer or group, as the case may be, would be able to exercise sufficient degree of control over the management of the company, which may not be in the interest of the company and, therefore, exit option should be given to the existing shareholders.

26. In contrast, the objective of Regulation 11 is to provide an opportunity to the shareholders to exit in case an acquirer of shares, having 15% or more but less than 55% of the shares or voting rights, either individually or with persons acting in concert, increases their shareholding or voting rights over 5% at any given point in a financial year. As such acquisition enables the individual or the person acting in concert with others to yield greater influence over management of the company, and Regulations 11(1) of the

[12] (2004) 11 SCC 641.

Takeover Regulations 1997 provides for an exit option to the existing shareholders.

27. Regulation 3(3) of the Takeover Regulations 2011 makes explicit what was already implicit in the Takeover Regulations 1997, that in a case an individual within the group crosses the stipulated minimum shareholding threshold, such an individual shall make a public offer even when there is no change in aggregate shareholdings of the group, that is, persons acting in concert. Reference is made to the report of the Takeover Regulation Advisory Committee headed by Mr. C. Achuthan, which exhibits that Regulation 3(3) is to clarify the requirement that was already existing in the Takeover Regulations 1997.

28. There is no estoppel against a statute and, therefore, the respondents in appeals herein cannot take any advantage and plead that the Board is deviating from its earlier stance. Reference is made to ***Sanjiv Coke Manufacturing Company*** v. ***M/s. Bharat Coking Coal Limited and Another***.[13] In fact, the interpretation given by the Board in these appeals has been accepted by the Appellate Tribunal in certain cases.

[13] (1983) 1 SCC 147

29. The Board has been conferred with powers under the Act in terms of Section 11 thereof to issue appropriate direction for protection of interest of the shareholders; under Section 15-H read with Section 15-I to impose monetary penalty on the defaulter; and under Section 24 to criminally prosecute the defaulter for contravention of the provisions of the Act or regulations thereunder. These are separate powers vested with the Board with distinct objectives, which can sometimes be overlapping but are not identical, as has been held by this Court in ***Prakash Gupta*** v. ***Securities & Exchange Board of India***.[14] The Board being an expert body is entitled to exercise the aforesaid powers to subserve the interest of the investors as well as to promote orderly and healthy growth of the securities market.

30. The Appellate Tribunal should not have interfered with the directions to make an open offer, which are in line with the objective of Sections 11 and 11-B of the Act read with Regulation 44 of the Takeover Regulations 1997. The order passed by the Whole Time Member directing making of public announcement for open offer along with paying interest to the shareholders of the target company, was made with the larger objective of protecting interests

[14] 2021 SCC OnLine SC 485.

of the shareholders who have a right and expectation to be provided with the opportunity to exit the company in case the shareholding/voting rights of a person and/or persons acting in concert crosses the stipulated threshold at any point of time.

31. Scope of power of the Appellate Tribunal enumerated in Section 15-T does not extend to substituting directions issued under Sections 11 and 11B of the Act with monetary penalty under Section 15-H of the Act. The scope of power of the Appellate Tribunal is wide but cannot be exercised in a manner which is inconsistent with the scheme of the Act. Further, the directions issued for public announcement and open offer are in line with the objectives of the Act which states that as soon as the contravention of the statutory obligation is established, penalties must follow. This is a distinct objective envisaged in Sections 11 and 11B of the Act read with Regulation 44 of the Takeover Regulations 1997, as has been held in several decisions of this Court in ***Zile Singh*** v. ***State of Haryana and Others***,[15] ***Chairman, SEBI*** v. ***Shriram Mutual Funds and Another***[16] and ***Securities and Exchange Board of India*** v. ***Saikala Associates Limited***.[17]

[15] (2004) 8 SCC 1
[16] (2006) 5 SCC 361
[17] (2009) 7 SCC 432

32. The Appellate Tribunal does not exercise jurisdiction under Article 226 of the Constitution of India and is a creation of the statute and, therefore, cannot pass any order inconsistent with the scheme of the Act. Thus, imposition of monetary penalty for violation of Regulation 11(1) of the Takeover Regulations 1997, as directed by the Appellate Tribunal, is contrary to law and would also result in weakening of investor confidence in securities market as defaulters would be able to escape the obligation.

33. Lastly, the delay in issue of show-cause notice itself would not exonerate the defaulters under the Act and the relevant Regulations, as has been held in ***Adjudicating Officer, Securities and Exchange Board of India*** v. ***Bhavesh Pabari***.[18]

34. For brevity, we are not reproducing the submissions made by the respondents as they would be noticed subsequently and are inferable from our reasoning, which upholds the orders by the Appellate Tribunal on the interpretation of Regulation 10 of the Takeover Regulations 1997. Secondly, we have upheld the order of the Appellate Tribunal setting aside the directions of public announcement with open offer given by the Whole Time Member under Regulation 44 for violation of Regulation 11(1) of the

[18] (2019) 5 SCC 90

Takeover Regulation,1997 in the case of Sunil Kumar Khaitan in Appeal No. 8249 of 2013. However on the aspect of the power of Appellate Tribunal under Section 15T of the Act, we have expressed our reservation and disagreed with the Appellate Tribunal for the reasons set out below.

C. Relevant Provisions:

35. We begin by reproducing the relevant provisions of the Takeover Regulations 1997 which are as under:

> "**2. Definitions.**
>
> 2. (1) In these Regulations, unless the context otherwise requires:
>
> xx xx xx
>
> (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;
>
> xx xx xx
>
> (e) "**person acting in concert"** comprises—
>
> (1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.

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

(i) a company, its holding company, or subsidiary or such company or company under the same management either individually or together with each other;

(ii) a company with any of its directors, or any person entrusted with the management of the funds of the company;

(iii) directors of companies referred to in sub-clause (i) of clause (2) and their associates;

(iv)mutual fund with sponsor or trustee or asset management company;

(v) foreign institutional investors with sub-account(s);

(vi) merchant bankers with their client(s) as acquirer;

(vii) portfolio managers with their client(s) as acquirer;

(viii) venture capital funds with sponsors;

(ix) banks with financial advisers, stock brokers of the acquirer, or any company which is a holding company, subsidiary or relative of the acquirer :

Provided that sub-clause (ix) shall not apply to a bank whose sole relationship with the acquirer or with any company, which is a holding company or a subsidiary of the acquirer or with a relative of the acquirer, is by way of providing normal commercial banking services or such activities in connection with the offer such 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;

xx xx xx

6. Transitional provision.

(1) Any person, who holds more than five per cent shares or voting rights in any company, shall within two months of notification of these regulations disclose his aggregate shareholding in that company, to the company.

(2) Every company whose shares are held by the persons referred to in subregulation (1) shall, within three months from the date of notification of these regulations, disclose to all the stock exchanges on which the shares of the company are listed, the aggregate number of shares held by each person.

(3) A promoter or any person having control over a company shall within two months of notification of these regulations disclose the number and percentage of shares or voting rights held by him and by person(s) acting in concert with him in that company, to the company.

(4) Every company, whose shares are listed on a stock exchange shall within three months of notification of these regulations, disclose to all the stock exchanges on which the shares of the company are listed, the names and addresses of promoters and/or person(s)

having control over the company, and the number and percentage of shares or voting rights held by each such person.

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

(1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen per cent 2 [or fifty four per cent or seventy four per cent] shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.

(1A) Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, 1 [or under second proviso to sub-regulation (2) of regulation 11] shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.

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

(2) The disclosures mentioned in sub-regulations (1) and (1A) shall be made within two days of — (a) the receipt of intimation of allotment of shares; or (b) the acquisition of shares or voting rights, as the case may be.

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

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

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

8. Continual disclosures.

(1) Every person, including a person mentioned in regulation 6 who holds more than fifteen per cent shares or voting rights in any company, shall, within 21 days from the financial year ending March 31, make yearly disclosures to the company, in respect of his holdings as on 31st March.

(2) A promoter or every person having control over a company shall, within 21 days from the financial year ending March 31, as well as the record date of the company for the purposes of declaration of dividend, disclose the number and percentage of shares or voting rights held by him and by persons acting in concert with him, in that company to the company.

(3) Every company whose shares are listed on a stock exchange, shall within 30 days from the financial year ending March 31, as well as the record date of the company for the purposes of declaration of dividend, make yearly disclosures to all the stock exchanges on which the shares of the company are listed, the changes, if any, in respect of the holdings of the persons referred to under subregulation (1) and also holdings of promoters or person(s) having control over the company as on 31st March.

(4) Every company whose shares are listed on a stock exchange shall maintain a register in the specified format to record the information received under subregulation (3) of regulation 6, sub-regulation (1) of regulation 7 and subregulation (2) of regulation 8.

xx xx xx

10. Acquisition of fifteen per cent or more of the shares or voting rights of any company.

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.

11. **Consolidation of holdings.**

(1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, with post acquisition shareholding or voting rights not exceeding fifty five per cent., in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.

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

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

terms of any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures seventy-five per cent (75%), the words and figures ninety per cent (90%) were substituted.

Provided further that such acquirer may, notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation 11, without making a public announcement under these Regulations, acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him upto five per cent. (5%) voting rights in the target company subject to the following:

(i) the acquisition is made through open market purchase in normal segment on the stock exchange but not through bulk deal /block deal/ negotiated deal/ preferential allotment; or the increase in the shareholding or voting rights of the acquirer is pursuant to a buyback of shares by the target company;

(ii) the post-acquisition shareholding of the acquirer together with persons acting in concert with him shall not increase beyond seventy five percent. (75%).

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

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

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

(3) Notwithstanding anything contained in regulations 10, 11 and 12, in case of disinvestment of a Public Sector Undertaking, an acquirer who together with persons acting in concert with him, has made a public announcement, shall not be required to make another public announcement at the subsequent stage of further acquisition of shares or voting rights or control of the Public Sector Undertaking provided:— (i) both the acquirer and the seller are the same at all the stages of acquisition, and (ii) disclosures regarding all the stages of acquisition, if any, are made in the letter of offer issued in terms of regulation 18 and in the first public announcement.

Explanation. — For the purposes of regulation 10 and regulation 11, acquisition shall mean and include — (a) direct acquisition in a listed company to which the regulations apply; (b) indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad.

12. Acquisition of control over a company.

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."

D. Interpretation of Regulation 10 of the Takeover Regulations, 1997:

36. Regulation 6, a transitional provision, states that any person who holds more than 5% shares or voting rights in a company shall, within two months of the notification of the Takeover Regulations 1997, disclose the aggregate shareholding to the company.[19] Every company is required to, within three months of the notification of the Takeover Regulations 1997, disclose, to all stock exchanges in which the shares of the company are listed, the aggregate number of shares held by such person.[20] A promoter or person having control over the company is required to, within two months, disclose the number and percentage of voting rights held by him and the persons acting in concert with him to the company.[21] In turn, the company is, within three months, required to disclose to all stock exchanges in which the shares of the company are listed, the names and addresses of the promoters or the persons having

[19] Regulation 6(1) of the Takeover Regulations, 1997.
[20] *Ibid* Regulation 6(2).
[21] *Ibid* Regulation 6(3).

control of the company, the number and percentage of shares or voting rights held by each such person.[22]

37. Regulation 7 states that any acquirer who acquires shares or voting rights, taken together with the shares or voting rights already held by him, which would entitle him to more than 5% or 10% or 14% or 54% or 74% shares or voting rights of the company in any manner whatsoever, disclose at every stage, aggregate of his shareholding or voting rights to the company and to the stock exchanges where the shares are listed.[23] Sub-regulation 1A to Regulation 7 states that any acquirer who has acquired shares or voting rights of the company, under sub-regulation 1 to Regulation 11 or under second proviso to sub-regulation 2 to Regulation 11, shall disclose the purchase or sale aggregating 2% or more of the share capital of the target company to the target company, and to the stock exchanges where the shares of the target company are listed within two days of such purchase or sale along with aggregate of shareholding after such acquisition or sale. The explanation to Regulation 7(1) and (1A) states that the term 'acquirer' for sub-regulation (1) and (1A) shall include a pledgee, other than a bank or financial institution. Such pledgee shall make a disclosure to the target company and

[22] *Ibid* Regulation 6(4).
[23] *Ibid* Regulation 7(1).

the stock exchange within two days of creation of the pledge. Sub-regulation (2A) to Regulation 7 states that the stock exchange shall immediately display the information received from the acquirer under sub-regulation (1) and (1A) on the trading screen, the notice board and also on its website. Sub-regulation (3) requires every company whose shares are acquired in the manner referred to in sub-regulation (1) and (1A) to disclose to all stock exchanges, on which the shares of the said company are listed, the aggregate number of shares held by such persons referred above, within seven days of receipt of information under sub-regulation (1) and (1A) of Regulation 7 of the Takeover Regulations 1997.

38. Regulation 6 exposits transparency and openness which is required in the form of disclosure to be made by the shareholders, promoters or a person having control over the company, as well as the company in which they hold the shares. The information is not only given to the stock exchanges where the shares of the company are listed but are also put in the public domain so as to inform the shareholders and others. Similar transparency and openness is mandated by Regulation 7 which uses the expression ‘acquirer’, and applies when the ‘acquirer’ acquires shares or voting rights of the specified percentage in the company. Regulation 6 consciously uses the terms ‘person’, ‘promoter’, or ‘a person having control over

the company', and does not use the term 'acquirer', as the term 'acquirer' has been given, as noticed below, a specific legal meaning by the Takeover Regulations 1997. Regulation 7, on the other hand, expressly uses the term 'acquirer'.

39. When we turn to Regulation 8 which deals with 'continuous disclosures', the regulation uses the term 'person', 'promoter', and 'every person having control over the company', which are the terms used in Regulation 6. Regulation 8 stipulates every person, which includes the person mentioned in Regulation 6, who hold more than 15% shares of voting rights as on 31st March shall make a disclosure to the company within 21 days from the end of the financial year. There is a similar stipulation in sub-regulation (2) to regulation 8 which requires a promoter or every person having control over a company to make a disclosure within 21 days from the end of the financial year, as well as the record date of the company for declaration of dividend, to make a disclosure of the number and percentage of shares or voting rights held by him and by persons acting in concert with him in that company to the company. The expression 'person acting in concert' has been defined in clause (e) to Section 2(1) of the Regulation, which clause has been examined and interpreted by us subsequently, also finds reference in the expression 'acquirer' defined by clause (b) in

Regulation 2 to the Takeover Regulations 1997. Every company whose shares are listed in the stock exchange is mandated by Regulation 8(3) to make a disclosure to all stock exchanges where their shares are listed, within 30 days of the end of the financial year as well as the record date for the purpose of declaration of dividend as to the holdings of the persons covered by sub-regulations (1) and (2) of Regulation 8. Regulation 8(4) states that every company, whose shares are listed, shall maintain a register in the specified format to record the information received under sub-regulation (3) to Regulation 6, sub-regulation (1) to Regulation 7 and sub-regulation (2) to Regulation 8.

40. The expression ‘acquirer’, as defined in the Takeover Regulations 1997, is broad, wide and is given an expansive definition. An ‘acquirer’ is a person who directly or indirectly acquires or agrees to acquire shares or control over the target company by himself or with any person acting in concert with him. The phrase ‘directly or indirectly’ as well as the expressions ‘acquired shares or voting rights’ and ‘with any person acting in concert with the acquirer’ underlines the extensive and widespread ambit of the term ‘acquirer’. The term ‘acquirer’ is not restricted to the person or individual shareholder as it encompasses any other person acting in concert with the ‘acquirer’.

41. The expression ‘person acting in concert’ as defined in clause (e) to Section 2(1) is again broad and expansive. The expression ‘person acting in concert’ as per sub-clause (1) to Clause (e) includes a person, who for a common object or for purpose of substantial acquisition of shares, voting rights, gaining control over the company, pursuant to an agreement or understanding formal or informal, directly or indirectly, cooperate by acquiring or agreeing to acquire shares or voting rights in a target company or to take control over a target company. Sub-clause 2 to clause (e) to Section 2(1) incorporates legal fiction as it states that the persons enumerated in clauses (i) to (x) shall be deemed to be persons acting in concert with other persons in the same category. The note to sub-clause (e) to Clause 2(1) explains the expression ‘associate’ as a relative of the person within the meaning of Section 6 of the Companies Act, 1956, family trust and Hindu Undivided Families. However, the presumption raised *vide* sub-clause (2) to Regulation 2(1)(e) is qualified and subject to - ‘unless the contrary is established’. Therefore, if the contrary is established, the presumption raised *vide* clauses (i) to (x) may not apply in enterity or only apply in part limited to specific shareholder(s) or the persons mentioned in clauses (i) to (x) who in concert acquire shares or voting rights of a target company. The factual matrix is determinative as clause (e)

vide sub-clause (1) to Regulation 2(1) of the Takeover Regulations 1997 lays down a derivative or spin-off rule of interpretation, and even when the presumption under sub-clause (2) arises, the adjudicator will not apply the presumption when the fact to the contrary are established. The presumption is to be looked as "the bats of law, flitting in the sunlight but disappearing in the sunshine of fact".[24]

42. The object of the aforesaid wide definitions is to ensure that no one is able to dribble past and defeat the Takeover Regulations 1997 by resorting to camouflage and subterfuge.

43. Interpreting Regulation 10 the Appellate Tribunal in the case of *Madhuri S. Pitti,* by referring to their earlier decision in the case of *Sunil Krishna Khaitan*, has opined:

> "21. The first ingredient of the regulation in question is "acquirer", the second is "shares or voting rights, if any, held by him or by persons acting in concert with him"; and the third is "entitle such acquire to exercise fifteen percent or more of the voting rights in a company". The definitions of "acquirer" and "persons acting in concert" as given in the Code of Conduct, 1997 are reproduced below for the sake of convenience":
>
> > *"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,*

[24] Words from the Full Bench decision of the Andhra Pradesh High Court in *G. Vasu v. Syed Yaseen Sifuddin Quadri*, AIR 1987 AP 139.

either by himself or with any person acting in concert with the acquirer;

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 cooperate 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:……"

22. A simple reading of the definition of the word "acquirer" makes it clear that an acquirer may act alone or as part of a group of persons acting in concert. On the other hand, the definition of "persons acting in concert" reveals that people who cooperate with each other in order to acquire substantial voting rights in a particular company would be considered persons acting in concert. At this point, we find it necessary to quote paragraph 31 from Sunil Khaitan vs SEBI (Appeal No. 23 of 2013 decided on 19.06. 2013) mentioned herein below:

"31. In this connection, it may also be pertinently noted that the SAST Regulations, 1997 allow certain persons/ entities to act in concert for the purpose of acquisition. Even the definition of "persons acting in concert" as provided in Regulation 2 (e)(1) clearly provides that this expression includes persons who agree to cooperate with each other to acquire shares/voting rights in a target company or control over the target company pursuant to a formal or informal understanding between them, directly or indirectly. Thus, the definition is wide enough and gives ample scope to persons to act in concert as one unit for the purpose of acquisition of shares/voting rights.

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

23. Therefore, it is evident that the framers of the Takeover Regulation, 1997 intended to bring out a clear distinction between individual acquiring of shares on one hand and shares acquired by persons acting in concert on the other. The benchmark of 15% would, thus, apply to an individual when the individual is acquiring shares/voting rights on his behalf alone. Similarly, when we attempt to determine whether or not the said limit has been crossed, shareholdings of all members of the group of persons acting in concert would have to be reckoned as a whole. Any other

> interpretation which would serve to dilute the distinction between an individual acquirer and a group of "persons acting in concert" as an acquirer. It would, indeed, make the concept of "persons acting in concert" nugatory, which could never have been the intention of the law makers. We, therefore, find Appellant No. 3 free of any blame with respect to provisions of regulation 10 of the SAST Regulations, 1997 regarding his acquisitions in the years 2006 and 2007."
>
> (**Emphasis Added**)

44. We agree with the interpretation. Regulation 10 states that no 'acquirer' shall acquire voting rights, which taken together with the shares or voting rights held by him or by a 'person acting in concert' would entitle the 'acquirer' to exercise 15% or more of the voting rights in the company, unless such 'acquirer' makes public announcement to acquire shares in accordance with the regulations. The word 'acquirer' used in Regulation 10 takes its meaning from the definition clause (b) to Regulation 2(1), which refers to the shareholder as an individual and also 'person acting in concert' with the him, which expression has been very widely defined *vide* clause (e) to Regulation 2(1) of the Takeover Regulations 1997. The Appellate Tribunal has, therefore, rightly held that the word 'acquirer', which is a term of art,[25] should not be restricted to shares or voting rights of the individual shareholder as the term as defined includes the 'person acting in concert' with the

[25] Lord Nicholls has defined the phrase 'term of art' in a legal sense as a term with one specific and precise meaning for the purposes of the enactment- see *Brooks Vs. Brooks (1995) 3 All ER 257*.

shareholder. The shareholding/voting rights of the 'acquirer', that is the individual shareholder together with the 'person acting in concert' decides whether the 'acquirer' is required to make a public offer/announcement in terms of Regulation 10, which applies when the voting rights of the 'acquirer' before acquisition were less than 15 %, but on fresh acquisition exceed 15% of the voting rights in the company. Regulation 10 does not apply when the collective voting rights of the individual shareholder and the 'person acting in concert', taken together is 15% or more on the date when fresh shares or voting rights are acquired. The bracketed portion of Regulation 10, namely "taken together with shares or voting rights, if any, held by him or by persons acting in concert with him" affirms and endorses this interpretation.

45. When a word/term has been defined in a statute in a particular manner then the interpreter can assume the word/term must be understood in the stipulated sense. The principle applies with greater vigour when the definition of the word/term is given a legal and substantive meaning, different from the common meaning, as then the writer demands that the reader should understand the term/word in the sense defined. When the content and meaning given is technical, the interpreter is entitled to infer that the intention of the draftsmen is to deviate and depart from the ordinary, literal

or customary meaning. Therefore, when a statutory enactment consciously defines a word or expression by enlarging or restricting the ordinary meaning, in the absence of clear indication to the contrary, the term as defined shall cover what is proposed, authorised, done or referred to in the enactment.[26] This principle can be also discarded when the definition read and applied would not agree with the subject and context thereby making the provision unworkable or otiose.

46. In the context of Regulation 10, we do not think that the draftsmen had committed a mistake or had forgotten the definition clauses while wording Regulation 10, wherein they have consciously used the expression 'acquirer', after having defined the same, instead of the word a 'person', which word has been used in Regulations 6 and 8 of the Takeover Regulations 1997. To accept the interpretation given by the Board, we would have to stretch the language of Regulation 10 and not read it as it reads, by assuming that the intent is to apply Regulation 10 in two situations (i) when the acquirer as a single entity, without taking into consideration the shareholding or voting rights of the person(s) acting in concert; as well as (ii) when the single entity together with the person(s) acting

[26] Lord Lowry, *Wyre Forest District Council v. The Secretary of State for Environment, 1990 2 AC 357*.

in concert, acquire voting rights, and in either case to cross the stipulation of 15% of the voting rights. But this would require us to ignore or rewrite the word 'acquirer' which as defined includes the 'person(s) acting in concert'. It defeats the object and purpose behind the 'term of art' definition. Regulation 10 applies to the 'acquirer' acquiring voting rights, with reference to the existing holding as a person and in concert with other persons, because the acquisition is to be "taken together with shares or voting rights held by the acquirer himself or by person acting in concert with him". The combined holding of the person and the 'person acting in concert' determines application of Regulation 10. If an 'acquirer' already holds more than 15 % shares or voting rights in concert with other persons, such holding is not be fragmented to calculate the shares or voting rights of the 'acquirer' in his personal capacity under Regulation 10.

47. The language and the wording of Regulation 10 clearly differs from the language and wording of Regulation 11(1) of the Takeover Regulations 1997. In Regulation 11(1), an acquirer, either himself or through or with any person acting in concert with him, has 15% or more but less than 55% shares/voting rights, is required to make a public announcement in accordance with the Regulation when he, either by himself or through or with persons acting in concert with

him, acquire additional shares or voting rights entitling him to exercise more than 5% of the voting shares in addition to already acquired shares/voting rights.

48. Thus Regulation 10 does not apply when the ‘acquirer’ already holds more than 15% shares or voting rights in the target company. The ‘acquirer’, for the purpose of the said Regulation, not only means the individual person but also the ‘person acting in concert’ with the individual person. In such cases, Regulation 11(1) may apply when the ‘acquirer’ who hold between 15% to 55% of shares or voting rights, post the acquisition of the additional shares or voting rights is entitled to exercise more than 5% of the voting rights.

49. The contention of the Board that the interpretation by the Appellate Tribunal defeats the object and purpose of the Takeover Regulations 1997 is a feeble and evanescent argument. The interpretation, does not render Regulation 10 ineffective to deal with cases where an individual, parts ways with the ‘person(s) acting in concert’ to acquire shares beyond the threshold of 15% with the intend to gain control or stake in the target company. The argument overlooks the wording of Regulations 2(1)(b) and (e). A ‘person acting in concert’ as defined in clause (e) to Regulation 2(1) is a fluctuating and not a fixed body of persons. When there are

divisions and differences between or amongst the 'person acting in concert', or even otherwise, an acquirer acts at his own behest or in concert with a different persons or group, Regulation 10 may catch up. Definitions of the terms, 'acquirer' and 'person acting in concert' are situation and fact specific. The legal fiction *vide* sub-clause 2 to Section 2(1)(e), specifically stipulates - unless contrary is established. Yes, there could be situations when the 'person(s) acting in concert' holding more than 15% voting rights post the said acquisition may part ways, but Regulation 10 is not attracted and applicable to such situations. To argue that public shareholders can predict such events and therefore the Board's interpretation is more acceptable is imaginative but an uncompelling and a weak argument. Risk taking is essential to an an active market, and in fact the secruties market thrives on legitimate changes in management, flexibility and willingness to accept change, which may not predicitable. Good regulation, it is said, should promote and allow for the effective management of risk and not striffle risk taking. Regulator should ensure that capital and other prudential requirements are sufficient to address appropriate risk taking, and check excessive risk taking.[27] Therefore, the apprehension of the

[27] See Objectives and Principles of Securties Regulation- Objectives of Securities Regulation 4.2.3 International Organisation of Securities Commissions,- May,2003.

Board, which is more in the nature of skepticism and qualm, is misconceived and should be rejected.

50. There is ample material, and it is accepted by the Board that they had read the expression 'acquirer' in Regulation 10 to mean and include the shareholder along with 'person acting in concert'. Meaning thereby, there would not be any violation of Regulation 10 if the 'acquirer', which would include the 'person acting in concert', acquires new shares or voting rights when he individually or along with the 'person in concert', already hold more than 15% shares in the target company. This interpretation was accepted and even communicated by the Board to third parties. Adjudicating Officer(s) have accepted this interpretation and dropped penalty proceedings, which orders have attained finality and accepted by the Board. Relevant portions of some communications/orders passed are reproduced below:

1.	Letter dated 22nd February 2006 to Nagreeka Exports Ltd. (CFD/DCR/AK/IG/60950/2006)	"*3.0 Without necessarily agreeing with your analysis, our views on the proposed transactions as mentioned in para 2.0 above are as under –* *……* *(iii) Regulation 10 of the Takeover Regulations applies in case of acquisition of shares or voting rights which taken together with shares rights, if any, held by the acquirer or by persons acting in concert with him, entitle such acquirer to exercise 15°/o or more of the voting target company. Where the shareholding of the promoters is already more than 15°/o, this regulation will not be triggered by acq (sic.) additional shares by such promoters. In your case, the promoters' shareholding in the company is stated to be 41.95°/o. Therefore, if a*

		of conversion of warrants into equity shares by promoters of the company, regulation 10 as it exists today prevails, it will not app (sic.) acquisition of additional equity shares."
2.	Letter dated 03rd December 2004 written to Kanishk Steel Industries Limited (CFD/DCR/AK/IG/2004)	*"4. Without necessarily agreeing with your analysis, the following is stated in response to your clarifications;* *a) Since the promoters of Kanishk Steel Industries Limited and persons acting in concert are already holding 69.55% shares regulation 10 of SEBI (Substantial Acquisition o (sic.) and Takeover) Regulations, 1997, (said Regulations) shall not be applicable. After the preferential allotment of 80,00,000 shares, the shareholding of the promoters and a (sic.) (who will also be Persons Acting in Concerts) shall increase to 74.02%, of the post paid capital of the said company, an increase of 4.47% which is less than the creep (sic.) specified under regulation 11(1) of the said Regulations. Hence, regulation 11(1) of the said Regulations shall also not be applicable."*
3.	Adjudication Order No. DSR/AO-19/2008 in the case of Jamnalal Sons Private Ltd. wherein the adjudicating authority had dropped proceedings for violation of Regulation 10 inter alia recording as under:	*"12. Further, upon careful examination of the definition of acquirer as provided under SAST, it is evident that acquisition of shares by the acquirer means acquisition by the acquirer along with other persons acting in concert. In the instant case, as the acquirer admittedly belongs to the promoter group, therefore, for determining the triggering of* *provisions of SAST, the acquisition made by the whole promoter group should be taken into consideration. I also note that the promoter group's total holding increased only by 4.45% (i.e from 40.56% to 45.01%) subsequent to the rights issue. This increase in the promoter group's holding is within the creeping acquisition limit (i.e 5%) as specified under* *Regulation 11(1) of SAST. Therefore, the question of claiming exemption by the acquirer from the applicability of Regulation 11(1) of SAST does not arise. Consequently, the question of filing of report by the acquirer, in the facts and· circumstances of this case, does not arise. Thus, the allegation that the acquirer had filed the report with a delay of 900 days is untenable and the allegation against the acquirer does not stand established."*
4.	In the case of Himmat S. Sonewal (HUF) the adjudicating officer vide order dated 4.2.2002 had held that the said acquirer was not guilty of violating Regulation 10 as the acquirer with the person acting in concert were already holding more than the prescribed percentage of shares/voting rights in the target company.	

51. Thus, the Board as well as the Adjudicating Officer have treated the expression ‘acquirer’, for the purpose of Regulation 10, to include a ‘person acting in concert’ and the combined shareholding were taken into consideration for deciding whether there was a breach of Regulation 10. Where the ‘acquirer’, including the ‘person acting in concert’, already had shares or voting rights in excess of the prescribed limit, they were not held guilty of violating Regulation 10[28].

52. It is important for the regulator to be consistent and predictable. Further regulations must be clear as ambiguous regulations cause confusion and uncertainty. Regularity and predictability, along with certainty, are hallmarks of good regulation and governance. These principles underpin the ‘rule of law’, check arbitrariness and are read as the intent of the legislation, which the Courts, if need be, will enforce as a principle of interpretation. The Board is entrusted to preform legislative, executive, investigative and adjudicatory functions. A regulator when it executes statutory functions interprets the enactment and gives meaning and, in that sense, lays

[28] Under sub-section (3) to Section 15-I, the Board has the power to call for and examine records of any proceedings if it considers the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market and after causing or making an inquiry pass an order enhancing the quantum of penalty if the circumstances of the case so justify. The second proviso states that an order under sub-section (3) can be passed by the Board after expiry of period of three months from the date of the order passed by the adjudicating officer or disposal of the appeal under Section 15-T, whichever is earlier.

down what is believes is the rule. As a legislator who constructs and states at the first instance what is the rule, the Board tacitly promises and prophecies the interpretation that appeals to them. Any good regulatory system must promote and adhere to principle of certainty and consistency, providing assurance to the individual as to the consequence of transactions forming part of his daily affairs.[29] Lord Diplock has aptly said "unless men know what the rule of conduct is they cannot regulate their actions to confirm to it." Otherwise the regulator "fails in its primary function as a rule" maker.[30] This does not mean that the regulator/authorities cannot deviate from the past practice, *albeit* any such deviation or change must be predicated on greater public interest or harm. This is the mandate of Article 14 of the Constitution of India which requires fairness in action by the State, and non-arbitrariness in essence and substance. Therefore to examine the question of inconsistency, the analysis is to ascertain the need and functional value of the change, as consistency is a matter of operational effectiveness. Sometimes changes are desiable and necessary. Referring to

[29] *Union of India v. Raghubir Singh,* (1989) 2 SCC 754. Also see, *The Nature of the Judicial Process*, Benjamin N. Cardozo, page 33: "*I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another."*

[30] Franics Bennion, *Bennion on Statutory Interpretation,* Fifth Edition (Indian reprint), Section 266 at page 801.

these aspects, in some cases, the Indian courts have applied the doctrine of substantive legitimate expectation[31] observing that the change in policy should not be irrational or perverse or one which no reasonable person could have made. In other words, principles of Wednesbury's reasonableness would apply. Such a principle stems, but is somewhat different from the foundational idea of procedural legitimate expectation, which applies where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in similar manner without any reasonable principle, can be labelled as arbitrary.[32]

53. In ***Punjab Communications Ltd.*** v. ***Union of India and Others,***[33] it is observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which he had in the past been permitted by the decision-maker to enjoy, and which he can legitimately expect to be permitted to continue to do until he has been communicated some rational grounds for withdrawing it and

[31] See, *Council of Civil Service Unions v. Minister for the Civil Service*, 1985 AC 374, wherein it was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[32] *Bannari Amman Sugars Ltd.* v. *Comercial Tax Officers and Others,* (2005) 1 SCC 625.

[33] (1999) 4 SCC 727

he has been given an opportunity to comment. It also means that the assurance given by the decision maker will not be withdrawn, without giving him an opportunity of advancing reasons to contend that they should not be withdrawn. Reference can also be made to a recent decision of this Court in ***State of Jharkhand and Others*** v. ***Brahmputra Metallics Ltd., Ranchi and Another*** [34] wherein reference was made to earlier judgment in ***National Buildings Construction Corporation*** v. ***S. Raghunathan and Others*** [35] to reiterate that claims based on legitimate expectations have been held to acquire reliance on the representations and resulting detriment to the complainant in the same way as claims based on promissory estoppel.

54. In the context of the present case, it is to be noted that the Board is the draftsman of the legislation having enacted the Takeover Regulations 1997 and hence, their interpretation and understanding of the Regulations is of importance and relevance. In the context of the present case, the Board, nearly five years after the transactions, had issued the show-cause notice and then passed an order taking a view on interpretation of Regulation 10, which was contrary to the view expressed by it in several

[34] (2020) SCC Online SC 968
[35] (1998) 7 SCC 66

communications as also orders passed by the adjudicating authority.Past is passe and not present, and by giving 'retroactive' operation without good reason and ground[36], the direction violates fundamental notions of predictability and legal stability.[37]

55. We also feel that the principle of doubtful penalisation would be applicable in the present case. Way back in 1955, this Court in ***Tolaram Relumal and Another*** v. ***State of Bombay***[38] had held that it is a well settled rule of construction of penal statutes that if two views and reasonable constructions can be put on a provision, the court must lean in favour of construction which exempts the subject from penalty rather than one which imposes penalty.[39] In ***Bipinchandra Parshottamdas Patel (Vakil)*** v. ***State of Gujarat and Others***,[40] a three Judges' Bench of this Court had referred to this principle and quoted the following passage from ***Mohammad***

[36] See our findings below.
[37] Methew P. Harrington: *Foreward: The Dual Dichotomy of Retroactive Lawmaking*.
[38] (1955) 1 SCR 158
[39] *Ibid,* para 8: "The question that needs our determination in such a situation is whether Section 18(1) makes punishable receipt of money at a moment of time when the lease had not come into existence, and when there was a possibility that the contemplated lease might never come into existence. It may be here observed that the provisions of Section 18(1) are penal in nature and it is a well-settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature. As pointed out by Lord Macmillan in *London and North Eastern Railway Co*. v. *Berriman* [1946 AC 278, 295] "where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however, beneficient its intention, beyond the fair and ordinary meaning of its language".
[40] (2003) 4 SCC 642

Ali Khan and Others v. ***Commissioner of Wealth Tax, New Delhi***,[41] which reads:

> "6. It is a cardinal principle of construction that the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning unless that leads to some absurdity or unless there is something in the context or in the object of the statute to suggest the contrary. It has been often held that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. Obviously the aforesaid rule of construction is subject to exceptions. Just as it is not permissible to add words or to fill in a gap or lacuna, similarly it is of universal application that effort should be made to give meaning to each and every word used by the legislature."

Reference was thereafter made to Francis Bennion's Statutory Interpretation which observes that the principle of doubtful penalisation, often limited to criminal statutes, in fact, extends to any form of detriment. The jurist has opined that it is a principle of legal policy that a person should not be penalised except under clear law. We, when considering in relation to the facts of the instant case, wherein the opposing constructions of the enactment is possible, should presume that the legislature intended to observe this principle. The courts, therefore, try to avoid adopting a

[41] (1997) 3 SCC 511

construction which penalises a person where the legislature's intention to do so is doubtful.

56. We would quote Section 278 from the Bennion on Statutory Interpretation, 5th Edition, Indian Reprint, which reads as under:

> "Section 278. Statutory interference with economic interests
>
> One aspect of the principle against doubtful penalisation is that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law."

In the comments in Section 278 of the treatise, it is stated that the presumption against imposition of statutory detriment to a person's property or other economic interest has been recognised and explained in ***Entick*** v. ***Carrington***[42] by Brat C.J. in the following words:

> "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole."

57. The principle of doubtful penalisation has limited value when interpreting beneficial or remedial statutes where the adjudicator may adopt a liberal and a purposive interpretation.[43] The principle

[42] (1765) 19 State Tr 1029 at 1060.
[43] Franics Bennion, *Bennion on Statutory Interpretation*, Fifth Edition (Indian reprint), Section 271 at page 827.

can be ignored when other interpretative factors, like interest of public law and good of the society, weigh heavily to tilt the scales against application of the principle.[44] The law of interpretation and court decisions applying the law of interpretation recognise pluralism in interpretation.[45] Legal meaning of the enactment/ provision in question often involves applications of divergent principles, rules, cannons and presumptions, which are resolved by weighing and balancing the conflicting interpretative criteria and factors.[46] Clearly, a straitjacket approach should not be adopted without reference to the context, the subject matter and the object of the provision. Only then the court can interpret and give meaning which the legislature wanted to achieve and convey.

58. We have already, while referring to the principle of legitimate expectation, referred to the exceptions when the court may not apply the said principle.

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[44] See Her Majesty The Queen *ex rel*. *Linda Merk* v. *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers*, Local 771, 2005 SCC 70; *R*. v. *Hasslewander*, [1993] 2 S.C.R. 398; *R*. v. *Goulis* (1981), 125 D.L.R. (3d) 137; Sullivan, Ruth. Sullivan and Driedger on the Construction of Statutes, 4th ed. Markham, Ont.: Butterworths, 2002 at page 387: "*The rule [of strict construction] is difficult to reconcile with federal and provincial Interpretation Acts which provide that all legislation is to be deemed remedial and given a liberal and purposive interpretation. In the clearest possible language, this statutory directive requires doubts and ambiguities in penal legislation to be resolved in a manner that promotes the purpose of the legislation, regardless of the impact on accused persons*."; Côté, Pierre-André. The Interpretation of Legislation in Canada, 3rd ed. Scarborough, Ont.: Carswell, 2000 at page 477; Graham, Randal N. Statutory Interpretation: Theory and Practice. Toronto: Emond Montgomery, 2001. at pp. 210-15.

[45] Franics Bennion, *Bennion on Statutory Interpretation*, Fifth Edition (Indian reprint).

[46] *Ibid.*

59. The Board has drawn our attention to the decision of this Court in ***Swedish Match*** (supra) wherein Mr. Justice S.B. Sinha, who is also the author of the judgment in ***Bipinchandra*** (supra), had not applied the principle of doubtful penalisation with reference to Regulation 11 of the Takeover Regulations 1997. The Hon'ble Judge in ***Swedish Match*** (supra) has explained that in the said case there was a clear violation and failure on the part of the persons statutorily obliged to comply with the imperative statutory provisions. With reference to this decision, the Board had referred to one line in paragraph 77[47] which refers to Regulation 10 and states that the same would apply as no public announcement was made in its compliance. It is to be noted that Regulation 10 was not invoked by the Board in ***Swedish Match*** (supra) and its violation was not alleged. In the subject appeal before this Court in ***Swedish***

[47] *"77. With a view to advert to the question, the admitted facts may be noticed: Swedish Match Singapore agreed to acquire majority shareholding in Haravon and Seed subsequent to 17-12-1997 wherefor the public offer was made. SMS comprising Haravon and Seed had 28.28% and 10.33% whereas the Jatia Group comprising AVP and Plash had 5% and 15% respectively whereas public/others had 41.39% shares. In concert with each other the two groups acquired shares from public. On or about 25-8-1999 by acquiring preferential shares the Swedish Match Group obtained 52.11% and the Jatia Group obtained 24.11% as a result whereof in Wimco the shares held by public/others came down to 23.78%. Both the Swedish Group and the Jatia Group were exercising joint control. By reason of the Jatia Group opting out of the joint control by transfer of shares in favour of Swedish Match Singapore, a subsidiary of Swedish Match AB (a part of the Swedish Match Group) obtained 74% of shares whereas Haravon — 46.18%, Seed — 5.93% and SMS — 21.89%. Thus, the extent of shares of the Jatia Group came down to 2.22%. The Jatia Group sold its shares to the public as a result whereof shares of the public became 23.78%. SMS is a subsidiary of the Singapore Match Group. Swedish Match is the holding company being the owner of 100% shares of SMS. It stands categorically admitted by the appellants herein that acquisition of shares from the Jatia Group in favour of SMS was done by the Swedish company as a group and not as an individual company. Factually, therefore, it is not correct to contend, although in its notice dated 28-1-2002, SEBI had given indication thereof, that SMS had acquired 21.89% shares of its own. Even if SMS had done so, Regulation 10 would apply as no public announcement was made therefor."*

Match (supra), reliance was placed on Regulation 12 to get over the mandate of Regulation 11, which contention was rejected. One stray sentence in paragraph 77 that Regulation 10 would apply should not be read as *ratio decidendi* of the said decision and as a finding on the interpretation of Regulation 10.[48] Decision dated 25th July 2012 of the Appellate Tribunal in ***Hanumesh Realtors Private Limited*** v. ***Securities and Exchange Board of India***[49] is *per incuriam* as it has referred to the decision in ***Swedish Match*** (supra), which decision relates to and interprets Regulation 11(1). In the present reasoning, we are not dealing and interpreting Regulation 11(1) but Regulation 10 of the Takeover Regulations,1997.

60. Contention of the Board that there is no estoppel against law is well known, but the said principle is not applicable for several reasons. *First*, the interpretation accepted by the Appellate Tribunal is not only plausible but more acceptable than the interpretation propounded by the Board. *Secondly,* the Board, which has the

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[48] See *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1:
"70. Each case entails a different set of facts and a decision is a precedent on its own facts; not everything said by a Judge while giving a judgment can be ascribed precedential value. The essence of a decision that binds the parties to the case is the principle upon which the case is decided and for this reason, it is important to analyse a decision and cull out from it the ratio decidendi……..
73. It is also important to read a judgment as a whole keeping in mind that it is not an abstract academic discourse with universal applicability, but heavily grounded in the facts and circumstances of the case. Every part of a judgment is intricately linked to others constituting a larger whole and thus, must be read keeping the logical thread intact……."

[49] Before Securities Appellate Tribunal, Mumbai, Appeal No. 66 of 2012, Date of Decision: 25.07.2012.

power to enact the Regulations, interpret and apply them, adjudicate and also pass a penalty order in case of violation for good and substantial reasons had interpreted regulations in the same manner in earlier instances as interpreted by the Appellate Tribunal. *Thirdly,* the adjudication orders in the present case were passed well after the Takeover Regulations 1997 were repealed with the enactment and enforcement of the Takeover Regulations 2011. In the present case, therefore, we are dealing with a legacy issue. Regulation 10 of the Takeover Regulations 1997, as interpreted and applied by the Board for over ten years, is sought to be overturned by the Board, thereby, creating penal consequences. This should not be permitted and is hardly acceptable when we apply the principle of good governance and regulation.

61. The argument of the Board that Takeover Regulations 2011 are retrospective is to be only noted and rejected. The impugned order passed by the Appellate Tribunal in the case of *Madhur S Pitti* (Appeal No. 2 of 2013) specifically records that the Board had conceded that Takeover Regulations 2011 do not have any retrospective application.[50] The contention that Takeover

[50] "27. We agree with the Respondent to the extent that the SEBI Act is certainly a social welfare legislation. But this does not take away from the undeniable fact that Regulations 3(3) of the SAST Regulations, 2011 introduced the provision stating that even in case of an individual's shareholding

Regulations 2011 are clarificatory and, therefore, retrospective is *ex facie* fallacious and untenable. Regulation 3(3) of Takeover Regulations 2011 specifically postulate as under:

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

62. In the aforesaid background, on the enforcement of Takeover Regulations 2011, it is clear that Regulation 10 will apply on an acquirer who crosses the threshold of 15%, which under the Takeover Regulations 2011, has been increased to 25%. Further, Regulation 10 would apply both when an individual acquirer or an acquirer in concert with others acquires shares or voting rights beyond the threshold level and such an acquirer would have to comply with the applicable regulation. Takeover Regulations 1997 and Takeover Regulations 2011, therefore, postulate different

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crossing the stipulated threshold, which is now 25%, the need to make a public offer shall arise. The Respondent has in all fairness has agreed that the new Takeover Code of 2011 does not apply retrospectively."

We may observe that SEBI Act is not a social welfare legislation but an eco-legal legislation and, therefore, must be interpreted pragmatically taking into account the commercial practices, interest of the investors/shareholders and also without ignoring the difficulties of the persons in control of the company. Competing interests, rights and obligations have to be balanced.

preconditions and thresholds. Reliance placed upon the Takeover Regulatory Advisory Committee Report would show that there was a rethought and re-examination of Regulation 10 pursuant to which Regulation 3(3) was enacted and made a part of the regulatory mechanism under the Takeover Regulations 2011.

63. It is a general rule of law of interpretation that unless explicitly mentioned, a law cannot be presumed to be retrospective. In ***Commissioner of Income Tax, (Central) -I, New Delhi*** v. ***Vatika Township Private Ltd.***,[51] a constitution bench decision, this court observed that:

> "31. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it……
>
> 32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation…."

[51] (2015) 1 SCC 1.

Further, in the absence of express statutory authorisation, delegated legislation in the form of rules or regulations, cannot operate retrospectively.[52] Certainly, Regulation 3(3) in the Takeover Regulations 2011 clarified and possibly removed the shortcoming of the 1997 Regulations. However, the language of Regulation 3(3) as reproduced above is apparently not of clarificatory or declaratory nature.[53]

E. Regulation 11 and the penalty under Regulations 44 and 45 of the Takeover Regulations 1997:[54]

64. The impugned order in Appeal No. 23 of 2013 (*Sunil Krishna Khaitan* case) dismisses the appeal preferred by the respondents and thereby affirms the order holding the respondents guilty of violation of Regulation 11(1) of the Takeover Regulations 1997. The respondents have not filed appeals or cross objections challenging the said finding of the Appellate Tribunal. Hence, we are not required to and would not comment on the findings recorded by the Appellate Tribunal on violation of Regulation 11(1) of the Takeover

[52] *Assitant Excise Commr, Kottayam and Others.* v. *Esthappan Cherian and Another*, (2021) 10 SCC 210. Also see, *Income Tax Officer, Alleppey* v M.C. Ponnose and Others, 1970 SCR (1) 678; *Hukum Chand Etc.* v *Union of India and Others*, (1973) 1 SCR 896; *Regional Transport Officer,Chittoor and Others* v. *Associated Transport Madras (P) Ltd. and Others*, (1980) 4 SCC 597; *Federation of Indian Mineral Industries and Others* v *Union of India and Another*, (2017) 16 SCC 186 and *Union of India and Others* v *G.S. Chatha Rice Millsand Another*, (2021) 2 SCC 209.

[53] See *L.R. Brothers Indo Flora Ltd*. v. *Commissioner of Central Excise*, 2020 SCC OnLine SC 705, *Commissioner of Income Tax (Central)-I, New Delhil* v. *Vatika Township (P) Ltd*., (2015) 1 SCC 1 and *Union of India and Another* v. *Indusind Bank Ltd*. and Another, (2016) 9 SCC 720.

[54] In Civil Appeal No. 1762 of 2014 (*Madhuri S. Pitti's* case), as per the findings recorded by the Appellate Tribunal, violation of Regulation 11(1) was not alleged and made the basis of the letter dated 17th December 2012.

Regulations 1997. We proceed on the basis that the respondents are guilty and have failed to make public announcement within stipulated timeline as per the Takeover Regulations 1997.

65. As noticed above, the contention of the Board is that the Appellate Tribunal should not have modified the direction given by the Whole Time Member obligating public announcement with the monetary penalty of Rs. 25,00,000/-.

66. Regulations 44 and 45 of the Takeover Regulations 1997 read thus:

> "**44. Directions by the Board.**
>
> Without prejudice to its right to initiate action under Chapter VIA and section 24 of the Act, the Board may, in the interest of securities market or for protection of interest of investors, issue such directions as it deems fit including:
>
> (a) directing appointment of a merchant banker for the purpose of causing disinvestment of shares acquired in breach of regulation 10, 11 or 12 either through public auction or market mechanism, in its entirety or in small lots or through offer for sale;
>
> (b) directing transfer of any proceeds or securities to the Investors Protection Fund of a recognised stock exchange;
>
> (c) directing the target company or depository to cancel the shares where an acquisition of shares pursuant to an allotment is in breach of regulation 10, 11 or 12;
>
> (d) directing the target company or the depository not to give effect to transfer or further freeze the transfer of any such shares and not to permit the acquirer or any nominee or any proxy of the acquirer to exercise any

voting or other rights attached to such shares acquired in violation of regulation 10, 11 or 12;

(e) debarring any person concerned from accessing the capital market or dealing in securities for such period as may be determined by the Board;

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

(g) directing disinvestment of such shares as are in excess of the percentage of the shareholding or voting rights specified for disclosure requirement under regulation 6, 7 or 8;

(h) directing the person concerned not to dispose of assets of the target company contrary to the undertaking given in the letter of offer;

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

45. Penalties for non-compliance.

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

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

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

(4) The Board may, for failure to carry out the requirements of the regulations by an intermediary, initiate action for suspension or cancellation of registration of an intermediary holding a certificate of registration under section 12 of the Act: Provided that no such certificate of registration shall be suspended or cancelled unless the procedure specified in the regulations applicable to such intermediary is complied with.

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

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

(a) criminal prosecution under section 24 of the Act;

(b) monetary penalties under section 15H of the Act;

(c) directions under the provisions of section 11B of the Act;

(d) directions under section 11(4) of the Act;

(e) cease and desist order in proceedings under section 11D of the Act;

(f) adjudication proceedings under section 15HB of the Act.”

67. It may be also relevant to reproduce here Sections 15-H and 15-I, which form part of Chapter-VIA, of the Act, which read thus:[55]

> "**15H. Penalty for non-disclosure of acquisition of shares and take-overs** -
>
> If any person, who is required under this Act or any rules or regulations made thereunder, fails to,-
>
> (i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or
>
> (ii) make a public announcement to acquire shares at a minimum price;
>
> (iii) make a public offer by sending letter of offer to the shareholders of the concerned company; or
>
> (iv) make payment of consideration to the shareholders who sold their shares pursuant to letter of offer,
>
> he shall be liable to a penalty twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.
>
> **15I. Power to adjudicate** -
>
> (1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA and 15HB, the Board shall appoint any of its officers not below the rank of a Division Chief 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

[55] As they existed during the relevant time period for this case.

> 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."

68. Regulation 44 states that the Board, without prejudice to their rights to initiate action under Chapter VI-A[56] and Section 24[57] of the Act, may in the interest of the securities market or for protection of the interests of the investors, issue such directions as it may deem fit. Thereafter, it specifies certain directions in clauses (a) to (i), using the word 'including', which implies that the directions issued by the Board can include the directions given in clauses (a) to (i), *albeit* the Board may issue directions even beyond what is stated in clauses (a) to (i). Thus, the Board's power to give directions is wide. This is also clear from the relevant provisions of the Act, namely, Section 11 and 11B and Sections 11(2)(h), which read:

> "11. Functions of Board. – (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.
>
> xx xx Xx
>
> 11-B. Power to issue directions. – Save as otherwise provided in section 11, if after making or causing to be

[56] Chapter VI-A: "Penalties and Adjudication" (Section 15A to 15JA)
[57] Section 24: "Offences"

made an enquiry, the Board is satisfied that it is necessary –

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors of securities market; or

(iii) to secure the proper management of any such intermediary or person, it may issue such directions –

(a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matter specified in section 11-A, As may be appropriate in the interests of investors in securities and the securities market.

xx xx Xx

11(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for:

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

69. The use of the word 'may' in Regulation 44 and the wording of Sections 11(1), 11B and 11(2)(h) reflect that the Board has been conferred a discretion, which in turn also means and should be interpreted as imposing a duty, an aspect which we will elucidate in the subsequent paragraphs. Use of the word 'may' over the years is normally construed as permissive and not imperative. The words 'may' or 'shall' by their very etymological foundation denote

discretion and mandatory nature of an act respectively. This Court has, therefore, held that the courts should not readily interpret the word 'may' as 'shall' unless such interpretation is necessary to avoid absurdity, inconvenient consequences or as mandated by the intent of the legislature which is gathered from the other parts of the statute.[58]

70. Use of the word 'may' and not 'shall' in Regulation 44 is significant. It is not mandatory that in case of every violation and breach of Regulations 10, 11 and 12, direction under Regulation 44 shall be issued. The interpretation gets fortified in view of the words and object of the Regulation 44 which empowers the Board to issue directions as it deems fit. Section 11(1), while broadly defining the functions of the Board, states that it is the duty of the Board to protect interest of investors in securities and to promote the development of, and regulate the securities market by such measures as it thinks fit. Section 11B, which deals with the power of the Board to give directions, states that the Board, after making or causing an inquiry, may issue directions if it is satisfied that it is necessary in the interest of the investors, or orderly development of

[58] See *Official Liquidator* v. *Dharti Dhan (P) Ltd.*, (1977) 2 SCC 166; *Dinesh Chandra Pandey* v. *High Court of Madhya Pradesh and Another*, (2010) 11 SCC 500; *Mohan Singh and Others* v. *International Airport Authority of India and Others*, (1997) 9 SCC 132. Also see, *Rajender Mohan Rana and Others* v. *Prem Prakash Chaudhary and Others*, 2011 SCC OnLine Del 3684.

the securities market; to prevent the affairs of any intermediary or other persons referred to in Section 12 from conducting affairs in a manner detrimental to the interest of the investors or to secure proper management of such intermediary or persons. Section 11(2)(h) provides that the Board is entitled to take measures for regulating substantial acquisition of shares and takeover of companies. Regulation 44 states that the Board while issuing directions, has to keep in mind the interest of the securities market and its role as a protector of interest of investors. We will read the word 'or' between the expression 'in the interest of securities market or protection of investors' as 'and'. The Board, therefore, when it decides to exercise its power under Regulation 44 and issues directions under the said Regulation has to keep the two facets in mind, namely, (i) interest of the securities market; and (ii) protection of interest of the investors. The exercise of discretion of the Board, in fact, would not be restricted to the two facets mentioned above as the power and functions of the Board are far broader as they include promotion, development and regulation of securities market as a whole and regulating substantial acquisition of shares and takeover of companies.

71. Discretion is an effective and an important tool which the legislature confers and vests with the executive for effective and good

governance, administration, and in the present case – regulation, of the securities market which has complex commercial and economic facets. Therefore, the law provides an option to the Board and the authorities to adopt one or the other alternatives. However, this does not mean that the Board or the authorities enjoy unfettered and unchecked discretionary jurisdiction to act according to private or personal opinion in a vague and fanciful manner.[59] Discretion, when of wide amplitude, and when it can have civil and penal consequences, must be exercised in a legal and regular manner.[60] Exercise of discretion is always governed by rules, which means that the exercise of discretion should be fair and reasonable as the legislature while conferring discretion never intends that the authorities would not act whimsically, arbitrarily, but on the precept that they shall act only when it appears to be necessary in public interest.[61] Legal exercise of discretion is one, where the authority examines and ascertains the facts, is aware of the law, and then decides objectively and rationally what serves the interest better. This is true even when the statutes are silent and only the power is conferred to act in one way or the other. Reasonableness as a

[59] *Sharpe* v. *Wakefield*, [1891 AC 173]. Also see, *Sant Raj and Another* v. *O.P. Singla and Another*, (1985) 2 SCC 349 at para 4 and *S.G. Jaisinghani* v. *Union of India and Others*, AIR 1967 SC 1427.
[60] *Clariant International Ltd*. and Another v. *Securities and Exchange Board of India*, (2004) 8 SCC 524 at para 26.
[61] *Banglore Medical Trust* v. *B.S. Muddappa and Others,* (1991) 4 SCC 54 at para 46 and 48.

standard is tested by reference to the community standards at the time of exercise of discretion. This means that discretion should be exercised within the limit to which an honest man competent to discharge his office ought to confine himself.[62] It will be also true to state that the greater the harm or penal consequences, greater is the duty and obligation of the public authority to ensure that discretion is used as an effective tool in regulation or administration but does not cause confusion, chaos and instability.

72. In the context of Regulations 44 and 45, it implies that the Board has the power to make a choice between different courses of action or inaction. This choice is not unfettered but is always held subject to implied limitations inherent in every statute, limitations set by the common law and the constitutional mandate of rule of law. The underlying rationale of giving discretion is to ensure that the Board exercises the discretion in consonance with legitimate values of public law, which include need to maintain legal certainty and consistency which are at the heart of the principle of rule of law.[63] These have to be balanced with other equally legitimate public law

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[62] *Sharpe* v. *Wakefield*, [1891 AC 173]: "*according to the rules of reason and justice, not according to private opinion;…according to law and not humor. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."*

[63] De Smith's Judicial Review, 7th Edition, Sweet and Maxwell (South Asian Edition) at Heading 9-005 on page 515.

value, which is the object and purpose of the enactment. The need for the said flexibility is given and is necessary to meet unusual and practical situations and to do justice in a particular case.[64] The remedial order passed by the Board as the regulator must also meet the said parameters in addition to meeting the requirements of the enactment.

73. Clearly, therefore, Regulation 44 differs from Section 15-H, which is somewhat a strict liability provision that applies if a person fails to comply with the clauses (i) to (iv). It may be, however, noted that Section 15-H prescribes the lower as well as the higher monetary penalty limits. These stipulations have undergone modifications and changes from time to time. As per the amendments made by Act No. 59 of 2002, with retrospective effect from 29th October 2002, the penalty which can be imposed is not to be less than Rs. 10,00,000/- but may extend up to Rs. 25,00,00,000/- or three times the amount of profits made out of such failure, whichever is higher. The phase 'profits made out of such failure' in Section 15-H indicates that while imposing quantum of penalty the authority should consider the profit made by the acquirer on account of failure

[64] C. Hilson, 'Judicial Review, Policies and the Fettering of Discretion" [2002] P.L. 111; D. Galligan, 'The Nature and Functions of Policy Within Discretionary Power' [1976] P.L. 332.

to comply with the requirements mentioned in clauses (i) to (iv) of Section 15-H.

74. Reference in this regard is also to be made to Section 15-I, which has been quoted above. It states that the person concerned has to be given a reasonable opportunity of being heard for the purpose of imposing any penalty. The adjudicating officer has the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or produce documents which, in the opinion of the adjudicating officer, would be useful or relevant to the subject matter of enquiry. Lastly, the adjudicating authority should be satisfied that the person has failed to comply with the provisions of the section specified in sub-section (1).[65]

75. In this context, reliance placed by the Board on the judgments which relate to and arise from the orders passed by the adjudicating officer under Chapter VI-A of the Act are of no relevance, as Regulation 44 is a discretionary power and not mandatory in nature. Not only this, the directions under Regulation 44 are required to be

[65] Sub-section (3) empowers the Board to call for and examine records of any proceedings under this Section and if it considers the order passed by the adjudicating authority is erroneous to the extent it is not in the interest of the securities market, it may, after making or causing an inquiry to be made, pass an order enhancing the quantum of penalty. The order under sub-section (3) can be passed within a period of three months from the date of order passed by the adjudicating authority or disposal of the appeal under Section 15-T, whichever is earlier.

issued considering relevant factors, including, interest of the securities market and protection of the investors in mind. Regulation 44 is not a strict liablity provision.

76. The above position in law gets fortified from Regulation 45 which stipulates that any person violating a provision of the regulations shall be liable in terms of the Regulation, that is, the Takeover Regulations 1997 and the Act. Sub-regulation (6) to Regulation 45, with reference to the penalties, states that it would include monetary penalties under Section 15-H of the Act. It may also include directions under the provisions of Section 11B and 11(4) of the Act. Further, there is power to issue cease and desist order in proceedings under Section 11D of the Act. Criminal prosecution under Section 24 of the Act can also be initiated. Lastly, adjudicating proceedings under Section 15-H of the Act can be held. Therefore, the authorities have a right to take recourse to multiple proceedings which have been loosely classified and referred to as 'penalties' in Regulation 45(6). Nowhere, however, Regulation 45 stipulates that in case of violation of Regulations 10, 11 or 12 of the Takeover Regulations 1997, the Board must initiate action and issue directions in terms of Regulation 44. The Board, in appropriate case, may take action under Regulation 44 and issue directions, but when it issues such directions, it must keep in mind

the interest of securities market and to the protect the interests of the investors. Existence and conferment of power, and reasonable and legilimate exercise of the power in accordance with law are two different facets.

77. We will now reproduce the order passed by the Whole Time Member recording the reasons for issuing directions:

> "31. In my view, the facts and circumstance of the case, do not suggest any reason to deviate from the normal rule of requirement of making public announcement in accordance with the Takeover Regulations, 1997 as the same would be in the interest of the public shareholders of the Target Company.
>
> 32. In this case, since requisite public announcement has not been made by the noticees, KLL has contravened regulation 10 and the promoter group has contravened regulation 11(1) as discussed above. I note that the Takeover Regulations, 1997 have been repealed by the Takeover Regulations, 2011. In terms of regulation 35(2)(b) of the Takeover Regulations, 2011, the obligation or liability acquired, accrued or incurred under the repealed regulations, shall remain unaffected as if the repealed regulations has never been repealed. In the present case, the noticees triggered the obligation under regulation 10 and 11(1) of the Takeover Regulations, 1997 on March 12, 2007 and in terms of regulation 14(1) thereof they were obligated to make requisite public announcement within 4 days from March 12, 2007. Thus, the noticees had incurred this obligation prior to repeal of Takeover Regulations, 1997 and the obligation has to be completed under Takeover Regulations, 1997.
>
> 33. Since obligation under regulations 10 and 11 both have overlapped in this case, as observed by Hon'ble Supreme Court in 'Swedish Mach' case, the noticees shall make a combined public announcement under

regulations 10 and 11 read with regulation 14(1) of the Takeover Regulations, 1997.

34. Had the noticees made the public announcement in accordance with the Takeover Regulations, 1997 regulations and complied all related activities within the timelines specified under the Takeover Regulations, 1997, all formalities with respect to their public announcement and the open offer would 7 have been completed on June 15, 2007. Since the noticees have failed to make the public announcement within the stipulated time and the public announcement in compliance with this order would be after delay, the noticees shall pay interest on consideration amount as provided under the Takeover Regulations, 1997 to the shareholders who tender their shares in the open offer and who are eligible for interest as per law.

35. I, therefore, in exercise of powers conferred upon me under sections 19, 11 and 11B of the SEBI Act, 1992 and regulations 44 and 45 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with regulation 32(1)(h) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereby issue the following directions:

(a) The noticees, Mr. Sunil Krishan Khaitan, Mr. Krishan Khaitan, Khaitan Lefin Limited and The Orientale Mercantile Company Limited shall make a combined public announcement to acquire shares of the Target Company, Khaitan Electricals Limited, in terms of regulations 10 and 11(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, within a period of 45 days from the date of this Order.

(b) The noticees shall, along with consideration amount, pay interest at the rate of 10% per annum, from June 16, 2007 to the date of payment of consideration, to the shareholders who were holding shares in the target company on the date of violation and whose shares have

been accepted in the open offer, after adjustment of dividend, if any, paid."

78. The Appellate Tribunal, on the other hand, has given the following reasons why the aforesaid directions were unacceptable and should be set aside:

> "35. In the instant case too, as a matter of undisputed fact, the promoter group has been in control of the Company since its very establishment in the year 1975. The Appellants seem to have been aware of the implication of the limit of creeping acquisition of 5% and, hence, did not breach regulation 11 by letting some warrants lapse and not converting them into shares. In fact, the Tribunal notes that during the relevant period there were about 7 acquisitions but at no point of time did the Appellants violate the provisions of any law but for the two conversions on March 12, 2007. We also note from the records that the Appellants have invariably acted in a bonafide manner by keeping the concerned stock exchanges and the Respondent informed regarding the true happenings with respect to the acquisitions of shares and the corresponding changes in the shareholding pattern. In this connection, the Tribunal has perused various corporate announcements made by the Company to the stock exchanges informing them about the allotment of equity shares as well as shareholding pattern as of March 2006, June 2006, September 2006 and December 2006. Letters dated April 10, 2006, October 13, 2006 and April 11, 2007 etc. are on record and have been perused by the Tribunal.
>
> 36. Similarly, it is noted that the two conversions of warrants on March 12, 2007, which were different transactions, in as much as the shares in the first tranche pertaining to 5 lac shares allotted to the promoter group were allotted pursuant to conversion of warrants at the rate of Rs.60 per share, and the shares in the second transaction consisting of 8 lac warrants were converted at the rate of Rs.131 per share.

Although, the two spells were different, they were executed on the same date and the creeping acquisition limit of 5% was clearly crossed in respect of the acquisition by the promoter group. Therefore, technically there is violation of Regulation 11(1) of the Takeover Code of 1997. For this violation, we are of the opinion that a suitable monetary penalty, must be imposed instead of calling upon the Appellants to make a combined public announcement to acquire shares of the Company at this belated stage. The requirement of making a public announcement would be totally superfluous in the facts and circumstances of the case and would not beget any good. The objective of the preferential allotment of shares in question was only to address the working capital requirements of the Company for its smooth day to day functioning. Therefore, a stable, low-cost funding-source, such as preferential allotment, was undertaken in the larger interests of the Company and, in effect, its shareholders. In this connection, it is pertinent to note that the allotment of preferential shares in question was made after seeking approval of the shareholders of the Company in two duly convened EGM's held on March 23, 2006 and November 29, 2006.

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

> iniquitous and would lead to more harm than good for a mere technical fault, which in our opinion is remissible. Indeed, this Tribunal has taken a view consistently that in such cases of technical violation a monetary penalty could be imposed to serve the ends of justice keeping in view the factuality of a given situation."

79. We entirely agree with the reasoning given by the Appellate Tribunal for setting aside the directions given in the penultimate paragraph of the orders passed by the Whole Time Member. As noticed above, the violation alleged in Appeal No. 23 of 2013 in the case of *Sunil Krishna Khaitan* relates to the years 2006-2007. The order issuing the directions was passed on 31st December 2012, nearly eight years after the alleged violation. The direction given is that the shareholders should be given an option to sell the shares held by them on 16th June 2007 by directing the respondents to make a public announcement to acquire the shares. Direction has also been given to pay interest @ 10% per annum from 16th June 2007 till shares have been accepted in the open offer. The dividend paid, if any, would be adjusted. We are not stating that this direction can never be issued, but the exercise of discretion to issue the said directions has to be predicated and based upon good grounds and reasons. The directions of this nature are not automatic and are to be issued only when they are warranted and justified. The incongruities and absurdities of the directions issued have been

highlighted and noticed in the order passed by the Appellate Tribunal.

80. The direction given by the Board *vide* letter dated 17th December 2012 in the case of *Madhuri S. Pitti* in the form of direction to modify the draft letter of offer submitted to the Board for approval on 19th September 2011 pursuant to the public announcement made by PLL on 9th September 2011, it must be stated, is rather odd and defies objectivity and logic. The Appellate Tribunal is right in noticing that there was lack of clarity on the part of the Board as to the provision under which the power has been exercised, as the Board's power under Regulation 18 of the Takeover Regulations 1997 is to specify changes, if any, in the letter of offer, without there being any obligation on the part of the Board to do so, and thereupon the merchant banker and the 'acquirer' are required to carry out such changes before the letter of offer is despatched to the shareholders. As per sub-regulation (2), the letter of offer is to be despatched to the shareholder not earlier than 21 days from the date of submission of the letter of offer to the Board in terms of sub-regulation (1). In this case, directions of the Board for amendment of the letter of offer was issued after a lapse of more than one year as the draft letter of offer was submitted on 19th September 2011 and the directions were issued *vide* letter dated 17th December

2012. Further, these directions were for the reason that the acquirer had failed to comply with Regulation 10 of the Takeover Regulations 1997 in the remote past, that is, in the year 2006 and 2007. Clearly, this is whimsical and arbitrary exercise of discretion by the Board which would have led to chaos and confusion.

81. This Court in the judgment authored by one of us (Sanjiv Khanna, J.) in ***Bhavesh Pabari*** (supra) had examined the question of delay and laches in initiating proceedings under Chapter VI-A of the Act and the principle of law that when no limitation period is prescribed proceedings should be initiated within a reasonable time and what would be reasonable time would depend upon facts and circumstances of each case. In this regard, it was held as under:

> "35. The appellants have also contended that in the absence of any prescribed limitation period, SEBI should have issued show-cause notice within a reasonable time and there being a delay of about 8 years in issuance of show-cause notice in 2014, the proceedings should have been dropped. This contention was not raised before the adjudicating officer in the written submissions or the reply furnished. It is not clear whether this contention was argued before the Appellate Tribunal. 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. The show-cause notice in the present case had specifically referred to the respective dates of default and the date of compliance, which was made between 30-8-2011 to 29-11-2011 (delay was between 927 days to 1897 days). Only upon compliance being made that the defaults had

> come to notice. In the aforesaid background, and so noticing the quantum of fine/penalty imposed, we do not find good ground and reason to interfere."

82. The directions given in the aforesaid quotation should not be understood as empowering the authorities/Board to initiate action at any time. In the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period. What would be the reasonable period would depend upon facts of each case, such as whether the violation was hidden and camouflaged and thereby the Board or the authorities did not have any knowledge. Though, no hard and fast rules can be laid down in this regard as determination of the question will depend on the facts of each case, the nature of the statute, the rights and liabilities thereunder and other consequences, including prejudice caused and whether third party rights have been created are relevant factors. Whenever a question with regard to inordinate delay in issuance of a show-cause notice is made, it is open to the noticee to contend that the show-cause notice is bad on the ground of delay and it is the duty of the authority/officer to consider the question objectively, fairly and in a rational manner. There is public interest involved in not taking up and spending time on stale matters and, therefore, exercise of power, even when no time is specified, should be done within

reasonable time.[66] This prevents miscarriage of justice, misuse and abuse of the power as well as ensures that the violation of the provisions are checked and penalised without delay, thereby effectuating the purpose behind the enactment.

83. We have already referred to Regulations 6, 7 and 8 of Takeover Regulations 1997 which requires the acquirer/shareholders to make disclosures to the company as well as to the stock exchange where the shares are listed. Violation of Regulations 6, 7 and 8 is not alleged. While it is true that the said disclosures and public notice of the disclosures cannot be treated as disclosure to the Board or authorities under the Act, the Board and the authorities, as a good regulator, cannot also claim complete ignorance. Significantly, in the present case, the investors of the target company have not raised any objection. The impugned order passed by the Whole Time Member does not refer to any market manipulation or fluctuation in share price, which was detrimental to the interests of the investors. It is not the case of the Board that any windfall gains or profits have been made by the respondents on account of violation of Regulation 11(1) of Takeover Regulations

[66] See *State of Gujarat* v. *Patil Raghav Natha and Others*, (1969) 2 SCC 187 at para 11; *Mansaram* v. *S.P. Pathak and Others*, (1984) 1 SCC 125 at para 12; *Government of India* v. *Citedal Fine Pharmaceuticals, Madras and Others*, (1989) 3 SCC 483 at para 6; *State of Orissaand Others* v. *Brundaban Sharma and Another*, 1995 Supp (3) SCC 249 at para 16; *State of Punjab and Others* v. *Bhatinda District Coop. Milk Producers Union Ltd.*, (2007) 11 SCC 363.

1997. The order passed by the Whole Time Member, in fact, does not take into account the impact of the order on the securities market in case the investors/shareholders in the target company as on 16th June 2007 are given an option to sell their shares on or after 31st December 2012, possibity of distruption on the functioning market place, detrimental impact on the market place/investor confidence, qualitative impact of the retroactive directions on the law's santity predicated on predicibilty and legal stability, as well as undermining of the people's faith and trust on the Board as the protector of law. The directions, therefore, cannot be sustained.

84. There is, as noticed and held below, some merit in the contention of the Board that the Appellate Tribunal could not have imposed penalty under Section 15-H when proceedings under the said Section had not been invoked by the Board and there is no order passed by the adjudicating authority imposing penalty under Section 15-H of the Act. However, the effect of the argument raised by the Board would be that the order passed by the Whole Time Member under Regulation 44 giving directions would be quashed and set aside. The respondents would have, therefore, escaped without having to pay any penalty for violation of Regulation 11(1) of the Takeover Regulations 1997. It is in this factual background we have to decide the present appeals. As noticed above, the

respondents have not filed appeals or cross objections challenging the penalty imposed by the Appellate Tribunal for violation of Regulation 11(1) of the Takeover Regulations 1997.

F. Power of the Appellate Tribunal under section 15T of the Act:

85. The last aspect of the present appeals relates to the power of the Appellate Tribunal.[67] Sections 15-T of the Act read as under:[68]

> "**15T. Appeal to the Securities Appellate Tribunal.**
>
> (1) Save as provided in subsection (2), any person aggrieved,-
>
> (a) by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made thereunder; or
>
> (b) by an order made by an adjudicating officer under this Act, may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.
>
> (2) No appeal shall lie to the Securities Appellate Tribunal from an order made –
>
> (a) by the Board on and after the commencement of the Securities Laws (Second Amendment) Act, 1999;
>
> (b) by an adjudicating officer, with the consent of the parties.
>
> (3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Board or the adjudicating officer, as the case may be, is received by

[67] In reference to impugned judgment in Appeal No. 23 of 2012.
[68] As it existed pre-2014 and 2017 amendment.

him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), the Securities Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Securities Appellate Tribunal shall send a copy of every order made by it to the Board, the parties to the appeal and to the concerned Adjudicating Officer.

(6) The appeal filed before the Securities Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal."

86. The Board has contended that the Appellate Tribunal, in the exercise of power under Section 15-T and while considering appeals against proceedings under Section 11 and 11B of the Act and Regulation 44 of the Takeover Regulation, 1997, could not have converted the directions of the Board with monetary penalty under Section 15-H. Thus, the impugned order could not have substituted the direction of the Board against respondents to: (a) make a public offer in terms of Regulation 11; and (b) pay consideration amount along with interest at the rate of 10% per annum from June 16, 2007 to the date of payment of consideration

to the shareholders, with the direction to pay a monetary penalty of Rs. 25,00,000 for the breach of Regulation 11(1) of Takeover Regulation 1997. We have briefly referred to the reasoning in the earlier paragraphs, and commented on the same. We have also reproduced the reasoning given by the Appellate Tribunal to substitute the direction of the Whole Time Member with that of the penalty.

87. The appeal before the Appellate Tribunal under Section 15T, is the first appeal against the decision of the Board or the adjudicating officer. First appeal is a continuation or is co-terminus with the proceedings of the original adjudicating authority.[69] The first appeal is a valuable right of the party aggrieved, and all questions of fact and law decided by the Board or the adjudicating authority, including exercise of discretion whether within the law, are open for full consideration and examination.[70] The Appellate Tribunal, in the

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[69] See, *Commissioner of Income Tax, U.P., Lucknow v. Kanpur Coal Syndicate, Kanpur*, AIR 1965 SC 325; *Jute Corpn. of India Ltd. v. Commissioner of Income Tax and Another*, 1991 Supp (2) SCC 744; *Commissioner of Income Tax, M.P., Bhopal v. Nirbheram Daluram*, (1997) 10 SCC 373; *National Thermal Power Co. Ltd. v. Commissioner of Income Tax*, (1997) 7 SCC 489.

[70] *Clariant International Ltd. and Another* v. *Securities & Exchange Board of India,* (2004) 8 SCC 524:

> "74. The jurisdiction of the Appellate Tribunal under the Act is not in any way fettered by the statute and, thus, it exercises all the jurisdiction as that of the Board. It can exercise its discretionary jurisdiction in the same manner as the Board.
>
> ……..
>
> 77. The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof. The only check upon exercise of such wide-ranging powers is that it must comply with the Constitution and the Act. In that view of the matter. where an expert Tribunal has been constituted, the scrutiny at its end must be held to be

absence of any limit, has plenary powers in disposing of an appeal.[71] It can do what the Board/authorities can do and also direct them to do what they have failed to do. The position as to the power of the Appellate Tribunal has been appropriately summarised in ***Swedish Match*** (supra), wherein it has been held:

> "84. It may be true that the Board in its impugned order dated 4-6-2002 proceeded on a wrong premise that having regard to the proviso appended to Regulation 12, Regulation 12 would be attracted. But SAT, in our opinion, rightly construed the provisions of Regulations 11 and 12 in arriving at a finding that Regulation 11 would be attracted and Regulation 12 would not be. The Tribunal was entitled to take a different view of the matter from that of the Board with a view to sustain the ultimate result in the appeal in exercise of its appellate power. Such a power in the appellate court/tribunal is akin to or analogous to the principles contained in Order 41 Rule 33 of the Code of Civil Procedure. Even otherwise, before us the judgment of the Tribunal is in question, this Court is required to consider the correctness or otherwise of the Tribunal. In any event, the reasoning of the Tribunal shall prevail over the Board."
>
> (**Emphasis Supplied**)

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of wide import. The Tribunal. another expert body, must, thus, be allowed to exercise its own jurisdiction conferred on it by the statute without any limitation."
(**Emphasis Supplied**)

[71] *Securities and Exchange Board of India v. Opee Stock-Link Ltd. and Another,* (2016) 14 SCC 134:
"15. Upon perusal of the impugned order passed by SAT, we do not find any specific conclusion arrived at by SAT to the effect that the findings recorded by the WholeTime Member as well as the Adjudicating Officer of SEBI were incorrect. The appeals before SAT were in the nature of first appeal and therefore, it was open to SAT to reappreciate the evidence after looking at the facts of the case but upon perusal of the impugned order, we do not find any such finding to the effect that the findings arrived at by the Whole-Time Member as well as the Adjudicating Officer of SEBI were incorrect or perverse for a particular reason."
(**Emphasis Supplied**)

88. In the context of the present appeal, it is to be noted that in the case of Sunil Krishna Khaitan, an order in the form of directions under Regulation 44 of the Takeover Regulations 1997 was issued. It was this order which was made subject matter of challenge before the Appellate Tribunal.Thus we do not accept the contention of the Board that the Appellate Tribunal while exercising appellate power could not have set aside and quashed the directions given in the appeal.

89. At the sametime, in *Sunil Krishna Khaitan's* case proceedings under Section 15-H for levy of penalty were not initiated and no order of penalty under 15-H was passed by the adjudicating authority. The Appellate Tribunal, therefore, was not hearing an appeal against imposition of penalty under Section 15-H of the Act. Further, an order under Section 15-H of the Act is passed by an adjudicating authority which, while imposing penalty, is required to take into consideration the factors mentioned in Section 15-J.[72]

[72] 15J.Factors to be taken into account by the adjudicating officer.-

While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:
(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
(b) the amount of loss caused to an investor or group of investors as a result of the default;
(c) the repetitive nature of the default

90. We have also referred to Regulation 45 which in sub-regulation (6) refers to different types of penalties which can be imposed on a person violating any of the provisions of the Regulations. The Appellate Tribunal does not have the power for the first time to initiate and thereupon, impose penalty for non-compliance of the provisions of the Regulations under Chapter VI-A of the Act while deciding an appeal against directions issued under Regulation 44 of the Takeover Regulations, 1997. That power is vested with the authority specified in the Act or the Regulations. The Appellate Tribunal is an appellate forum and not the authority empowered to initiate penalty proceedings under Section 15-H or suo moto issue directions under Section 11, 11B or 11(4)(d) of the Act. It can uphold or set aside the direction issued, or modify and substitute the direction issued under Regulation 44 of the Takeover Regulations 1997 read with Sections 11, 11B and 11(4)(d) of the Act. Similarly, Appellate Tribunal can uphold, set aside, modify and even substitute the order of penalty under Chapter VI-A of the Act. The power to initiate and levy penalty in terms of Section 15-I[73] is vested

[73] 15-I. Power to adjudicate:

(1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G,15H, 15HA and 15HB, the Board shall appoint any officer not below the rank of a Division Chief 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

with an officer to be appointed by the Board, not below the rank of Divisional Commissioner, to act as an adjudicating officer. The adjudicating officer is required to hold an inquiry in the prescribed manner after giving the person a reasonable opportunity of being heard for the purpose of imposing any penalty. Powers are vested with the adjudicating officer to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document.

91. Thus, the Appellate Tribunal in Appeal No. 23 of 2013 in the case of *Sunil Krishna Khaitan*, could not have substituted the penalty imposed by the Board under Regulation 44 with that of penalty under Section 15-H. An appropriate view, in our opinion, would be that when the Appellate Tribunal holds that the order passed by the Whole Time member on violation of Regulations 10, 11 and 12 is sustainable, but the directions given in the order under Regulation

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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 subsection (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.

(3) The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify:

Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter:

Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer or disposal of the appeal under section 15T, whichever is earlier.

44 are not sustainable, it should leave it open to the Board to initiate proceedings and pass an order under Chapter VI-A of the Act.

92. However, as held above, in the absence of any cross-appeal or cross-objection by the respondent in Appeal No. 23 of 2013 (*Sunil Krishna Khaitan's* case), we are not interfering with the order imposing penalty of Rs.25,00,000/- for the violation of Regulation 11(1) of the Takeover Regulations 1997. The said direction has attained finality. At the same time, we are inclined to direct that the Board would give quietus to the matter and should not initiate proceedings under Chapter VI-A of the Act.

93. For the aforesaid reasons and grounds, the Civil Appeals preferred by the Board are dismissed with the clarification as to the power of the Appellate Tribunal under Section 15-T of Chapter VI-A of the Act, which is confined to examination of correctness and legality of the order under challenge.

94. There will be no order as to costs.

.....J.
(SANJIV KHANNA)

.....J.
(BELA M. TRIVEDI)

NEW DELHI;
JULY 11, 2022.