BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. BM/AO- 164/2013]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995.

In respect of

Shri. Bhavook Tripathi

(PAN: ABBPT7159D)

In the matter of M/s R System International Limited.

FACTS OF THE CASE

1. Securities and Exchange Board of India (hereinafter referred to as **SEBI**) while examining the offer document of Shri. Bhavook Tripathi (hereinafter referred to as the **Noticee**) found that Noticee failed to comply with Regulation 10 read with Regulation 14(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **Takeover Regulations**) with respect to the acquisition of shares of M/s R System International Limited (hereinafter referred to as the **company**) on July 29, 2011.

2. It was observed that Noticee made an open offer vide public announcement dated December 15, 2012 to acquire 33,45,242 shares of the company representing 26% of the paid up capital of the company. The draft letter of offer with respect to the said offer was filed with SEBI vide letter dated December 29, 2012. While examining the offer document it was observed that Noticee had not complied with Regulation 10 read with Regulation 14(1) of Takeover Regulations with respect to the acquisition of

shares of the company. From the shareholding build up of the Noticee, it was observed that Noticee was holding 18,42,635 share representing 14.96% of the paid up capital of the company as on July 28, 2011. Noticee further purchased 2,71,004 shares representing 2.1% of the paid up capital of the company on July 29, 2011 and thus crossing 15% of the paid up capital of the company. It was observed that Noticee sold the shares on the same day. Merchant Banker to the open offer issue vide letter dated May 07, 2012 confirmed that Noticee had purchased the shares first and then sold them. It was observed that Noticee by executing aforesaid transactions crossed 15% share capital of the company on July 29, 2011 and was liable to make public announcement to acquire shares of the company in accordance with the Takeover Regulations as stipulated under Regulation 10 read with Regulation 14(1) of the Takeover Regulations.

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned was appointed as Adjudicating Officer vide order dated February 8, 2012 under Section 15 I of SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as **Rules**) to inquire into and adjudge the alleged violations of Takeover Regulations.

SHOW CAUSE NOTICE, HEARING AND REPLY

4. Show Cause Notice No. EAD-6/BM/VS/6119/2013 dated March 12, 2013 (hereinafter referred to as **SCN**) was issued to the Noticee under rule 4 of the Rules to show cause as to why an inquiry should not be held and penalty be not imposed under Section 15H (ii) of SEBI Act for the alleged violation specified in the said SCN. The said SCN was delivered and acknowledged by the Noticee. Noticee filed reply to the SCN vide letter dated March 24, 2013 made the following submissions:

a. *That on July 28, 2011, I held 18,42,635 shares constituting 14.96% of the fully diluted paid up capital of the Target Company. On July 28, 2011, SEBI came out with a press release bearing no. PR No. 119/2011 dated July 28, 2011 ("Press Release") announcing, inter alia, that SEBI has decided to increase the initial trigger threshold for making an open offer from the existing limit of 15% to 25%. I sought to purchase shares of the Target Company on July 29, 2011 only on the honest belief that the Takeover Regulations, 2011 had come into force on July 28, 2011. Several media reports highlighted SEBI's decision to increase the open offer trigger limit from 15% to 25% of the voting rights of a company on July 28, 2011, based on which I placed order to purchase shares constituting 2.1% of the paid-up capital of the Target Company through open market purchases on July 29, 2011. However, on knowing that the Takeover Regulations, 2011 had not been implemented with immediate effect, I sold the said shares on July 29, 2011 itself in good faith and compliance with the provisions of the law as on that day and was therefore well within the shareholding limit of less than 15%. It is pertinent to note here that as per my trading details provided in Annexure B to your SCN, as on July 29, 2011, my total shareholding in the Target Company was 14.96%. At no point of time did I become a registered or beneficial owner of the said shares as has been explained in detail later in these submissions. Furthermore, I did not enter into any agreement to purchase shares or acquire voting rights in the Target Company.*

b. *That on December 15, 2011, I held 30,65,000 shares constituting 23.82% of the total paid up equity capital of the Target Company i.e., well within the new threshold limit of 25% under the Takeover Regulations 2011. On the same date, I made a public announcement dated December 15, 2011 ("PA") to acquire 26% shares of the Target Company at an offer price of Rs. 122/- before placing purchase orders for acquiring further 9,24,142 shares constituting 7.18% of the total paid-up capital of the Target through market purchases in compliance with*

the Takeover Regulations, 2011, and increased my total shareholding in the Target Company to 30.97%.

c. *That SEBI vide its observation letter no. CFD/DCR/TO/CB/OW/16697/12 dated July 25, 2012 ("Observation Letter") made various observations on my letter of offer dated December 29, 2011 for the said open offer. SEBI stated that it has received many complaints from the shareholders and promoters of the Target Company alleging violations of the Takeover Regulations 1997 and Takeover Regulations 2011. The following violations, inter alia, were alleged:*
   i) *That I violated Regulation 10 read with Regulation 14(1) of Takeover Regulations 1997 by failing to make an open offer on acquiring 2.1% of the paid up share capital of the Target Company on July 29, 2011 as I crossed 15% threshold limit on July 29, 2011 itself.*
   ii) *That I violated Regulation 22(1) and Regulation 22(2) of the Takeover Regulations 2011 on December 15, 2011 by completing the acquisition of 7.18% shares of the Target Company post the PA dated December 15, 2011 without first depositing 100% consideration of the open offer in an escrow account.*

d. *That in the said observation Letter, SEBI directed me, inter alia, to recalculate the offer price as well as interest taking July 29, 2011 as the trigger date. Further, SEBI stated that it may initiate appropriate penal action for the aforesaid violations of the Takeover Regulations 1997/2011 and asked me to disclose, in the letter of offer dated December 29, 2011 and corrigendum to PA dated December 15, 2011, the details of the violations alleged and the possibility for penal action. Being aggrieved, I preferred an appeal to the Securities Appellate Tribunal ("SAT") in relation to violations of Regulations 22(1) and 22(2) of the Takeover Regulations 2011 and the direction to deposit 100% consideration in the escrow account. SAT passed an order dated September 7, 2012, inter-alia, directing SEBI to provide me with the relevant material, if any, relied upon by*

SEBI as basis for its Observation Letter, and directed me to respond thereto, within three weeks thereafter. Further, SAT also directed SEBI to issue its comments/observations after considering my reply. ("SAT Order") Here, it is pertinent to note that I had voluntarily revised the offer price I was offering to pay for shares of the Target Company from Rs. 122/- to Rs. 150.05 pursuant to acquisition of 10 equity shares of the Target Company through market purchase on March 9, 2012 i.e., even before receiving of the said Observation Letter dated July 25, 2012. Therefore, without prejudice to my submissions that I did not violate Regulation 10 read with Regulation 14(1) of the Takeover Regulations 1997, since the revised offer price of Rs. 150.05 was higher than what was required to be paid as per the SEBI directions, I did not prefer an appeal to SAT with respect to SEBI's direction to recalculate the offer price.

e. *That after exchanging a few submissions and letters with SEBI, I finally wrote to SEBI on October 31, 2012 stating that I did not have any understanding to acquire shares of the Target Company, as alleged by one Mr Manmohan Passi (who was foisted by the promoters), and I have clearly demonstrated that the material and data relied upon by SEBI had not been able to establish the violations which were alleged by SEBI in its Observation Letter dated July 25, 2012. However, keeping the interest of fellow minority shareholders in mind, and since I was not in favour of any delay, I voluntarily agreed to go ahead with the open offer by depositing 100% in the escrow account (instead of 25%), without prejudice to my submission denying any violation and subject to the following conditions:*

   i) *That no penal action shall be initiated against me with regard to the alleged violations under the Takeover Regulations 1997 and Takeover Regulations 2011 in context of acquisition of shares of the Target Company;*
   ii) *That if the open offer is stayed by any authority/court, I shall be entitled to withdraw the additional 75% deposited in the escrow account.*

f. That based on the above submissions, SEBI passed the following orders by its letter dated December 3, 2012:

i) That my submissions of October 31, 2012 have been taken on record and that since I have agreed to put 100% cash in escrow account, SEBI may not initiate any proceedings against me for the alleged violation of Regulation 22(1) and 22(2) of the Takeover Regulations 2011.

ii) That I have to comply with SEBI's Observation Letter dated July 25, 2012 subject to the modification as mentioned above in point (a).

g. Finally, vide my letter dated December 4, 2012, I thanked SEBI for taking on record the following submissions:

i) That there was no agreement to acquire the shares from Mr. Passi or anybody else;

ii) That there were no violations in context of acquisition of shares of the Target Company, before and after the PA dated December 15, 2011.

h. That between December 20, 2012 and January 21, 2013, I issued the final letter of offer and completed the said open offer on January 21, 2013. It is pertinent to note here that as per the Takeover Regulations 2011 I have already paid interest to the shareholders of the Target Company for the alleged period of delay i.e., from the date of triggering of the alleged open offer (July 29, 2011) till the actual date of the PA (December 15, 2011) – without admitting any violation, since it was for the benefit of fellow minority shareholders.

i. That Regulation 2(1)(b) of the Takeover Regulations 1997 defines an acquirer as, "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." [Emphasis supplied]

j. That on a plain reading of Regulation 2(1)(b) it is clear that a person is said to be an acquirer once he acquires or even agrees to acquire shares or voting rights/control in a company. It is clear that there is no agreement to acquire shares or voting rights. It is also equally clear that there was no acquisition of any voting rights as no shares were in fact credited to my demat account. The limited issue for examination is whether or not I acquired shares, even though set off intra-day.

k. That Regulation 10 of the Takeover Regulations 1997 States that, "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." [Emphasis supplied]. A plain reading of Regulation 10 of the Takeover Regulations 1997 suggests that it is the entitlement to exercise voting rights which would trigger the open offer requirement contained in Regulation 10 of the Takeover Regulations 1997. In other words the plain language of the Regulation 10 states that acquisition of shares or voting rights is qualified by the phrase "entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company" would trigger the open offer norms." So if one were to acquire shares which didn't have voting rights or had a miniscule voting right, there would be no trigger if the voting rights acquired were below the threshold.

l. That it has been a consistent interpretation of the Supreme Court of India that where the words of a statute are clear and unambiguous, they must be read literally. This is called the golden rule of interpretation. Therefore, reading Regulation 2(1)(b) and Regulation 10 of the Takeover Regulations, it is clear that acquiring or agreeing to acquire shares or voting rights by itself will not attract the provisions of Regulation 10 of the Takeover Regulations 1997 unless the acquisition or agreement to acquire entitle the acquirer to exercise 15% or more

of the voting rights in the company. This proposition has found support in the ruling of SAT in the matter of Ch. Kiron Margadarsi Financiers v. Adjudicating Officer, Securities & Exchange Board of India (Appeal No. 21/2001, dated August 28, 2001) where it was held that :

"On a perusal of regulation 2 (1) (b) it is clear that a person is an acquirer who acquires or agrees to acquire shares or voting rights/control in the target company. The mode of acquisition of shares or the purpose of acquisition is of not much significance to identify the acquirer. As has been held in the case of Joshi Jayantilal v. State of Gujarat (AIR 1962 Gujarat 297) and as per the Blacks Law Dictionary acquisition is the act of becoming the owner of certain property, the act by which one acquires or procures the property in any thing. In this context it is to be noted that the act of acquisition of shares or voting rights by itself will not attract the provisions of regulation 10, though the person who acquired the shares or voting rights may fall within the definition of the expression 'acquirer'. Each and every acquisition by an acquirer need not necessarily attract the provisions of regulation 10. What attracts the regulation is the acquisition of shares/voting rights which will entitle the person acquiring the shares to exercise voting rights beyond certain limits specifically provided in the regulation, say ten percent in regulation 10. Thus it is clear that a plain acquisition even if it exceeds 10% of the paid up capital of the company will not attract regulation 10, unless the acquisition entitles the acquirer to exercise ten percent or more of the voting rights in the company."

m. *That an acquirer becomes entitled to exercise voting rights as per the provisions of the Companies Act, 1956. Section 87 of the Companies Act states:*

"(1) Subject to the provisions of section 89 and sub-section (2) of section 92- (a) every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company; and (b) his voting right on a poll shall be in proportion to his share of the paid-up equity capital of the company…"

As per the above quoted Section 87(1) of the Companies Act, 1956, it is clear that the voting right vests in members of a company. SAT in the matter of Sharad Doshi v. the Adjudicating officer (Appeal No. 1/98) held that :

"Section 87 deals with the voting rights. Equity share by its very nature carry voting right where as a preference share does not enjoy such built up voting rights, but only in exceptional circumstances, that too for limited purposes. Voting rights is attached to equity share or say, it is built in the moment the share is issued. In the common parlance, share carrying rights means equity share or ordinary share as sometimes called. However, the right to exercise such voting right to the person holding equity share is not automatic. A person holding shares with voting rights will be entitled to exercise that voting right only on entering his name in the company's register of members required to be maintained under section 150 of the Companies Act. In other words, in order to be eligible to exercise the voting rights attached to a share, physical possession of share certificate alone is not enough, but it is necessary to have the name of the holder entered in the company's members register. While the voting right is attached to equity share, registration of holding the share enables the holder to exercise the voting rights attached thereto."

As also held by the Supreme Court of India in the case of Vodafone International Holdings v. Union of India at paragraph 271 that, "voting rights vest in persons whose names appear in the register of members."

n. *That Section 41 of the Companies Act defines a member of a company as , "(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company, and on its registration, shall be entered as members in its register of members. (2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members shall be a member of the company. (3) Every person holding equity share capital of a company and whose name is entered as*

beneficial owner in the records of the depository shall be deemed to be a member of the concerned company."

Section 41(3) of the Companies Act has been introduced as a consequential amendment made by the Depositories Act, 1996 since it became necessary to expand the concept of shareholding through depositories. It states that a person holding equity shares capital of a company with an entry in the records of a depository as a beneficial owner shall be deemed to be a member of the company. Thus an entry in the records of a depository is deemed to be an entry in the register of member. In other words, a person who is a beneficial owner in the records of the concerned depository is deemed to be the member of a company till the time such beneficial owner in the records of the depository is changed as per the process prescribed by law.

o. *That in the matter of Liquid Holdings Private Limited v. SEBI (Appeal No. 83 of 2010, dated March 11, 2011), SAT has explained the concept of registered and beneficial ownership in the following words:*

"Shares in dematerialised form are regulated by the Depositories Act, 1996 and the regulations framed thereunder. This Act makes a distinction between a registered owner and a beneficial owner of a security. As per section 10 of this Act, a depository is deemed to be the registered owner for the purposes of effecting transfer of ownership of security on behalf of a beneficial owner. "Beneficial owner" is defined to mean a person whose name is recorded as such with a depository. A beneficial owner is entitled to all the rights and benefits and is subjected to all the liabilities in respect of his securities held by a depository."

p. *That in the instant case, it is clear from the provisions of the Companies Act, 1956 and the decisions of SAT that before I could exercise voting rights in the Target Company, I must:*

   i) *hold equity share capital exceeding the prescribed threshold limits of 15% in the Target Company; and*

ii) be entered as a beneficial owner in the records of the depository to be deemed to be a member of the Target Company;

q. That I did not, at any point on July 29, 2011, acquire beneficial ownership of the shares of Target Company that would take my shareholding to or above 15% of the paid-up capital of the Target Company since the said shares were sold on the same day they were ordered to be purchased, i.e., on July 29, 2011. These shares were netted off and no delivery was made to me. I cannot be regarded as the beneficial owner of the said shares for the following reasons. Section 2(1)(a) of the Depositories Act, 1996 defines a beneficial owner as a person whose name is recorded as such with a depository. Section 11 of the Depositories Act, 1996 mandates that every depository shall maintain a register and an index of beneficial owners in the manner provided in the Companies Act, 1956.

r. SEBI has implemented settlement of trades on a T+2 basis vide its circular no. SMD/POLICY/Cir-/03 dated February 6, 2003 as amended from time to time. I additionally refer to SEBI Master Circular no. CIR/MRD/DP/10 /2012 dated April 13, 2012 read with SEBI circulars no. SMDRP/Policy/Cir-05/2001, dated February 1, 2001, SEBI/MRD/Policy/AT/Cir-19/2004, dated April 21, 2004 and MRD/DoP/SE/Dep/Cir-30/2004, dated August 24, 2004 which broadly deal with the issues of transfer of funds and securities from clearing members to clients and specify the timelines therein. As per the above circulars it is mandated that clearing members shall transfer the funds and securities from their respective pool accounts to the respective beneficiary accounts of their clients, within 1 working day after the pay-out day i.e., within 1 working day after the T+2 settlement date. Keeping in view these provisions of law, since it is evident that the said shares were not transferred to my demat account as I had sold them on the same day i.e., on 'T' day, it cannot be said that beneficial ownership rested with me.

s. *Hence, it is submitted that since I did not receive the said shares as a beneficial owner in my demat account, I do not become a member/shareholder of the Target Company and consequently, cannot be said to have been entitled to exercise the voting rights associated with such shares in view of the provisions of the Companies Act, 1956 and the case laws cited above. Therefore, I cannot be said to have crossed the 15% voting rights threshold to trigger the open offer requirements under Regulation 10 read with Regulation 14(1) of the Takeover Regulations 1997.*

5. In the interest of natural justice an opportunity of hearing was provided to the Noticee on April 25, 2013 vide hearing notice dated April 3, 2013. Shri. Sandeep Parekh, (Advocate) Authorized Representative (AR) appeared along with the Noticee and reiterated the submissions given in the reply to the SCN. During the hearing Noticee sought time till April 29, 2013 for filing additional submission. Vide letter dated April 29, 2013 Noticee reiterated the submission made vide letter dated March 11, 2013 and further submitted:

a. *That it has been a consistent interpretation/recommendation of various committee reports on takeover regulations, Securities Appellate Tribunal ("SAT"), and SEBI itself that grossing of acquisition should be taken into account only in cases of creeping acquisition. I submit that grossing of purchase of shares is not applicable to Regulation 10 of the Takeover Regulations 1997 for the following reasons. The 'Justice P N Bhagwati Committee Report On Takeovers' ("Bhagwati Committee Report") in its paragraph 6.2 recommended the following:*

"The Committee recommends that

- *person(s) holding not less than 10% but not more than 75% may acquire upto 2% shares in any period of twelve months, without attracting the mandatory public offer requirement. (Reference : Part II of the Report - Regulation 11).*

The percentage of acquisition referred to above is on absolute basis i.e. there should be no netting of acquisition and disinvestment during the said period. In other words if a person acquired x% during a period of 12 months, sold y% and acquired z% his aggregate acquisitions of (x% + z%) would be reckoned for the purpose of the Regulation and not (x% - y% + z%)."

b. *That it is pertinent to note here that the above mentioned Bhagwati Committee Report recommended that it is only in cases of creeping acquisition that grossing of purchase is to be taken into account while calculating the (then) 2% creeping acquisition limit. The intent behind such grossing of acquisition is that on the one hand under Regulation 10 of the Takeover Regulations 1997 an acquirer is permitted to acquire and hold a substantial number of shares in a target company and on the other hand, if he is already holding beyond that substantial number of shares, he is allowed to only consolidate his acquisition further up to a certain threshold in a year. In other words, under Regulation 10 of the Takeover Regulations, an acquirer can acquire up to 14.99% of the shares of a Target Company at one go and when he is already holding that substantial number of shares i.e., 15% or more, he is allowed to only consolidate his shareholding further by acquiring not more than 5% of the shares calculated on a gross basis. Therefore, the precise reason for taking into account gross acquisitions while computing the quantum of creeping acquisition is that the acquirer who is already holding substantially in a target company is permitted to only consolidate his holdings up to a certain well defined threshold limits and he should be not allowed to exercise control in the target company over that threshold limit at any point of time in a given year. The 'Justice P N Bhagwati Committee Report On Takeovers' observed the following:*

"The Committee also recognised the need to harmonise consolidation of holdings by persons already holding substantial shares with the need to protect the interest of shareholders in a competitive, free market environment. Indeed, for the same reason, Regulations of other countries do not trigger mandatory public

offers for all acquisitions and provide for consolidation of shareholdings within a band in a specified period. This only allows for consolidation in a regulated manner without unduly affecting the interest of the shareholders." [Emphasis supplied]

c. *That although it may be important to refer to the Bhagwati Committee Report to understand the intent behind the Takeover Regulations 1997, it is to be noted that SEBI did not accept the above mentioned recommendation of the Bhagwati Committee Report and did not mandate grossing of acquisitions under Regulation 11 of the Takeover Regulations 1997 i.e., the regulation applicable to creeping acquisitions. The SEBI Board deliberately chose not to implement this recommendation. As the Regulations themselves chose to depart from the recommendation of the Bhagwati Committee Report, the recommendations cannot supersede the applicability of the Takeover Regulations 1997 which have the full force of law and which are tabled in each house of Parliament for 30 days. As discussed, where the plain language is clear no interpretive help may be taken. In fact where the statutory provisions deliberately depart from recommendations, relying on the recommendations would do severe violence to the sanctity of regulations. Even the subsequent circular has no applicability to the present case and therefore relying on it to impose penalty on Mr. Tripathi would be impermissible. As the Bhagwati Committee Report itself did not recommend the grossing rule beyond the creeping acquisition, applying it to the present case would be incorrect even if one were to assume the grossing rule applied i.e. the most extreme interpretation of the grossing rule were to be applied.*

d. *However, in the year 2009 SEBI partially implemented the recommendation relating to grossing for the purposes of the creeping acquisition by its 'SEBI's interpretative Circular under Regulation 5 of the Takeover Regulation 1997 – Applicability of provisions of Regulation 11(2) thereof, as amended on October*

30, 2008' ("SEBI Circular 2009"). SEBI clarified with respect to its amendments permitting one time acquisition of further shares up to 5% for acquirers who already held shares between 55-75% in the following manner:

"…(a) The acquisition, within the limit of five per cent (5%) under the second proviso to sub-regulation (2) of regulation 11, may be made by 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 the target company; (b) The acquirer together with persons acting in concert with him, holding shares or voting rights as specified at (a) above, may acquire additional shares or voting rights upto a maximum of five per cent (5 %) voting rights in the target company in one or more tranches, without any restriction on the time-frame within which the same can be acquired; (c) The aforesaid acquisition of five per cent (5 %) shall be calculated by aggregating all purchases, without netting the sales…." [Emphasis supplied]

e. *That a plain reading of the SEBI Circular 2009 suggests that only in case of one time acquisition under the second proviso to Regulation 11(2) of the Takeover Regulations 1997, the 5% limit shall be calculated by aggregating all purchases, without netting the sales. Therefore, it is pertinent to note here that under Regulation 10, the concept of grossing is not provided. Further, the 'Report of the Takeover Regulations Advisory Committee Under the Chairmanship of Mr. C Achuthan' has also observed the same:*

"The Committee underscored the fact that the creeping acquisition route is meant to facilitate consolidation by persons already in control or holding substantial number of shares. Therefore, the Committee does not find it necessary to disturb the current policy in this regard in that gross purchases (ignoring any sales or dilution of stake due to equity issuances in which the existing shareholder did not participate) would count towards ascertaining if this limit has been reached." [Emphasis supplied]

f. *That if it has been the intention of SEBI to apply grossing of purchases on Regulation 10 of the Takeover Regulations 1997 then the same must have been done under the new SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 ("Takeover Regulations 2011"). However, it may be noted that under the Takeover Regulations 2011 as well, grossing is applicable only in context of creeping acquisitions. Regulation 3 states:*

"3. (1) No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations. (2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations: Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

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

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company." [Emphasis supplied]

g. *That it is patently clear from the above Regulation 3 of the Takeover Regulations 2011 that it is only for the purposes of determining the quantum of acquisition of additional voting rights under Regulation 3(2) i.e., creeping acquisition, the gross acquisition alone shall be taken into account. Therefore, I submit that it is nowhere mentioned either under the Takeover Regulations 1997/2011 or the SEBI Circular 2009 that an acquirer shall take into account his gross acquisitions while acquiring a substantial number of shares either under Regulation 10 of the Takeover Regulations 1997 or Regulation 3(1) of the Takeover Regulations 2011.*

h. *With respect to applicability of grossing of acquisition to Regulation 10 of the Takeover Regulations 1997 based on the case of Khaitan Electricals Limited, I submit the following:*

First, the plain reading of Regulation 10 of the Takeover Regulation 1997 does not require grossing of acquisitions under Regulations 10. Second, the SEBI Cicular 2009 also does not apply to Regulation 10 of the Takeover Regulations 1997. Third, nowhere in the Khaitan Electricals Limited case is it observed that grossing should be done while calculating acquisitions under Regulation 10 of the Takeover Regulations 1997. Fourth, on the contrary, the Khaitan Electrical Limited case also talked about grossing of purchases in cases of creeping acquisition only. At paragraph 21 and 22, it stated:

"…This is not the intention of the regulation which, since inception, had put a limit on percentage of creeping acquisition and did not allow netting of acquisition and disinvestment for determining the percentage of increase. Such intention is noted from Justice P.N. Bhagwati Committee Report of 1997 wherein the Committee had recommended that - "The percentage of acquisition referred to above is on absolute basis i.e. there should be no netting of acquisition and disinvestment during the said period. In other words, if a person acquired x% during a period of 12 months, sold y% and acquired z% his aggregate acquisitions

of (x% + z%) would be reckoned for the purpose of the Regulation and not (x% - y% + z%).

22. I, therefore, am of the view that for the purpose of availing creeping benefit under regulation 11(1), the gross acquisition of the acquirer should not be more 5% in a financial year that starts on April 1st and ends on March 31." [Emphasis supplied]

i. *Therefore, it is submitted that grossing of acquisition is limited to creeping acquisitions only under both the Takeover Regulations 1997 and Takeover Regulations 2011.*

j. *Further, it is submitted that under Regulation 10 of the Takeover Regulations 1997 or Regulation 3 of the Takeover Regulations 2011 there is no time frame provided within which 14.99% or 24.99% of the shares, as the case may be, in a target company can be acquired. As explained above, grossing of acquisitions is linked to consolidation of shareholding by an acquirer already holding substantial shares in a target company. It may be noted that under Regulation 10 an acquirer can acquire up to 14.99% shares in a target company at one go and therefore, in the absence of any well-defined time frame within which such substantial shares can be acquired, the concept of grossing is of no consideration. Therefore, all positions must be calculated at a particular point of time. However, determination of the date on which such an acquirer breaches the limit of 14.99% in a target company depends upon the facts and circumstances of each case. In the instant case, I have explained later in these written submissions that in case of open market purchases, the holding of the acquirer should be taken into account as on the T+3 day of his acquisitions.*

k. *That if one were to import the grossing requirement by doing violence to the clear language of the Regulations (both 1997 and 2011) and the SEBI Circular 2009, it would result in absurd results. For instance purchases over 10 years*

would be aggregated and sales over 10 years would not be considered. That would cause most day traders with zero shareholding to be required to routinely make open offers.

l. *Regulation 14(1) of the Takeover Regulations 1997 states that,*

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

m. *It is submitted that Regulation 14(1) of the Takeover Regulations 1997 is procedural in nature in the sense that it provides for a time frame within which an acquirer shall make the public announcement for an open offer in case he breaches the prescribed limits under Regulation 10/11 of the Takeover Regulations 1997. The substantial obligation to make an open offer is provided under Regulation 10 of the Takeover Regulations. If there is no breach of Regulation 10 of the Takeover Regulations 1997 then by no stretch of interpretation can there be any violation of Regulation 14(1) of the Takeover Regulations 1997. In other words, an acquirer should not be obligated to make an open offer which is an irreversible process (except in certain specified circumstances) when in fact he has not breached the threshold limits in a given fact scenario. In the case of Kosha Investments Ltd., v. SEBI, SAT held that:*

"The above regulation clearly says that the public announcement should not be made later than 4 working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage. A plain reading of this regulation shows that if a person has exceeded the voting right by the required percentage or it has violated or triggered the Takeover Code by exceeding the respective percentage it should make a public announcement for open offer within 4 days of that event." [Emphasis supplied]

n. *It is pertinent to note here that the SAT in the case of Pramod Jain v. SEBI has observed the following which in my view aptly summaries the concern of law abiding investor in the market:*

"On a meaningful understanding of regulations 10, 12 and 22(16), it cannot be said that the code is triggered on a mere agreement to acquire shares without that agreement being acted upon. Supposing for a moment parties resile from the agreement and there is no change in the control over the target company at the instance of the acquirer, it cannot be said that there will be a compulsion of law that the alleged acquirer will be forced to make a public announcement to acquire shares of the target company." [Emphasis supplied]

o. *The fact that Mr. Tripathi never acquired the said shares, on the contrary he resiled from his purchase order within few hours on the same day and further never acquired shares till the new Takeover Regulations 2011 were implemented, are the other relevant facts and circumstances of the instant case to determine the alleged violation of Regulation 10 of the Takeover Regulations 1997. In Indian exchanges, orders even after executions do not necessarily result in delivery. This could be because of either short delivery or because of netting off intra-day. There is an extensive process for default of delivery and damages and closing out process where delivery is not made. Thus every order execution does not result in purchase of shares.*

p. *The second Bhagwati Committee Report observed the following:*

"The Committee considered the various issues. The Committee felt that pursuant to an acquisition under a MOU, the acquirer is required to make an offer to the public and hence such a public offer cannot be conditional, unless of course the MOU itself is rescinded and not acted upon if the public offer does not elicit the required acceptances." [Emphasis supplied]

q. *We submit firstly that there was no agreement to purchase shares. There was an order to purchase shares, but the same never fructified into an actual purchase of shares. In addition, the non fructification of the order was not supported by the necessary requirement of entitlement to vote. And thus there was doubly neither agreement to acquire nor actual acquisition entitling Mr. Tripathi to vote.*

r. *Hence Mr. Tripathi didn't violate Regulation 10 read with Regulation 14(1) of the Takeover Regulations 1997 for the following reasons:*
   i) *He never acquired the said shares of the Target Company as he was not in possession or control of the same;*
   ii) *He never became member/beneficial owner of the said shares as they were not delivered to his demat account due to netting off of the trades intra day;*
   iii) *Since he never became beneficial owner of the said shares, he was never entitled to exercise voting rights with respect to the said shares of the Target Company; and*
   iv) *An acquirer i.e., Mr. Tripathi in the instant case, who is not entitled to exercise voting rights beyond a certain threshold limit, i.e., 15% in the instant case, is not obligated to make an open offer pursuant to Regulation 10 read with Regulation 14(1) of the Takeover Regulations 1997.*

6. I observed that vide letter dated July 25, 2012, issued by SEBI, it was alleged that Noticee had violated Regulation 10 read with Regulation 14(1) of the Takeover Regulations and directed to recalculate the offer price as well as interest taking July 29, 2011 as the trigger date, which was incorporated in the Letter of Offer. Noticee preferred an Appeal to Securities Appellate Tribunal but did not contest on the alleged violation of Regulation 10 read with Regulation 14(1) of the Takeover Regulations. Hence, vide letter dated July 29, 2013 Noticee was advised to offer his comment on the same. Noticee vide letter dated August 5, 2013 submitted the following:

a. *That the letter dated July 25, 2012 only dealt with SEBI's comments on the letter of offer and were not in the nature of a Show Cause Notice and no specific allegations were made out, to reasonably form the subject of an appeal to the SAT. Furthermore, the allegations set out in Annexure I to the July 25, 2012 letter were predicated on a prima-facie observation, rather than any material facts or circumstances that were specifically set out.*

b. *That since the action of setting out a list of allegations relating to perceived and prima facie views of violation of the Takeover Regulations, 1997 as a mere annexure to a letter containing SEBI's comments on a Letter of Offer was not in accordance with law, and did not form part of a separate Show Cause Notice or a letter intimating the detection of such alleged violations, Noticee was not legally obliged to challenge such correspondence. Even if such an appeal was preferred, it would have likely been dismissed as premature since no Show Cause Notice or a finding of violation was alleged.*

CONSIDERATION OF ISSUES AND FINDINGS

7. I have carefully examined the documents available on record. The allegation against the Noticee is that he failed to make open offer under Regulation 10 read with Regulation 14(1) of the Takeover Regulations when his shareholding crossed 15% share capital of the company on July 29, 2011.

   In view of the above it was alleged that the Noticee violated the provisions of Regulation 10 read with Regulation 14(1) of the Takeover Regulations.

8. Before moving forward, it will be appropriate to refer to the relevant provisions of Regulation 10 read with Regulation 14(1) of the Takeover Regulations, which reads as under:

Regulation 10 of Takeover Regulations: Acquisition of fifteen percent or more of the shares or voting rights of the company.

No acquirer shall acquire shares or voting rights which taken together with shares or voting rights, if any, held by him or person acting in concert with him, entitle such acquirer to exercise fifteen percent or more of the voting rights in the company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations.

Regulation 14(1) of Takeover Regulations: Timing of the public announcement of offer.

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

Provided that in case of disinvestment of a Public Sector Undertaking, the public announcement shall be made by the merchant banker not later than 4 working days of the acquirer executing the Share Purchase Agreement or Shareholders Agreement with the Central Government 2[or the State Government as the case may be,] for the acquisition of shares or voting rights exceeding the percentage of shareholding referred to in regulation 10 or regulation 11 or the transfer of control over a target Public Sector Undertaking.

9. The issues that arise for consideration in the present case are:

   i. Whether Noticee has violated Regulation 10 read with Regulation 14(1) of the Takeover Regulations when his shareholding crossed 15% share capital of the company on July 29, 2011?
   ii. Does the violation, if any, on the part of the Noticee attract monetary penalty under Section 15H(ii) of SEBI Act?
   iii. If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in Section 15J of the SEBI Act?

FINDINGS:

10. I now proceed with the alleged violations of SAST Regulations.

i. From the shareholding build up of the Noticee presented before me, it is observed that Noticee was holding 18,42,635 share representing 14.96% of the paid up capital of the company as on July 28, 2011. Noticee further purchased 2,71,004 shares representing 2.1% of the paid up capital of the company on July 29, 2011, however the same was sold on the same day.

ii. It was observed that Noticee by executing the buy transaction crossed 15% share capital of the company on July 29, 2011, however when the transaction was reversed and the position was squared off in the exchange by his sale transaction, the Noticee was not entitled for any net delivery of shares from the Exchange on the said date. This position is undisputed as is borne out by facts in the matter before me.

iii. This position then brings me to deal with the following issues:

- Whether Regulation 10 of the Takeover Regulations entails an acquirer to be a beneficial owner of the shares of the target company.
  - If yes, whether the acquirer who has squared off his position intraday can be considered as the beneficial owner of the shares of the target company.
- Whether an acquirer under Regulation 10 of the Takeover Regulations, is entitled to exercise voting rights in the target company even if he is not a beneficial owner of the acquired shares.
  - If not, whether an acquirer who is not entitled to exercise its voting rights is obligated to make an open offer under Regulation 10 of the Takeover Regulations.
- Whether "*an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights*" as stipulated under Regulation 14(1) triggers Regulation 10 of the Takeover Regulations.

iv. Before I address the aforesaid issue, I would first like to dwell on the meaning of 'acquire' as understood. As per the Blacks Law Dictionary acquire is an *"action of buying or gaining the possession of property."* It is important here to drill down to what is considered as possession of property, the same dictionary provides that the meaning of possession as " The detention and control, or the manual or ideal custody, of any- thing which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name.

v. Thus it is clear from the above that acquire means that the entity should have a legal possession over the property. While this is the interpretation, with reference to the specific matter at hand the same meaning can be transposed to a person having possession of the shares.

vi. Further, it is to be observed that there are judicial pronouncements of the SAT for the legislative intention and the judicial interpretation of Regulation 10 and 14(1) of the Takeover Regulations, some of which are being enumerated herein.

Regulation 10 of the Takeover Regulations reads as:

"No acquirer shall acquire shares or voting rights which taken together with shares or voting rights, if any, held by him or person acting in concert with him, entitle such acquirer to exercise fifteen percent or more of the voting rights in the company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations."

Regulation 10 suggests that "entitlement to exercise voting rights" would trigger the open offer. This implies that shares which didn't have voting rights would not trigger Regulation 10.

vii. Securities Appellate Tribunal in the matter of *Ch. Kiron Margadarsi Financiers v. Adjudicating Officer*[1] held that *"the act of acquisition of shares or voting rights by itself will not attract the provision of Regulation 10, though the person who acquired the shares or voting rights may fall within the definition of the expression 'acquirer'. What attracts the acquisition of shares or voting rights which entitle the person acquiring the shares to exercise voting rights beyond certain limit specified in the regulation. Thus it is clear that a plain acquisition even if it exceeds 10% of the paid-up capital of the company will not attract regulation 10, unless the acquisition entitles the acquirer to exercise ten percent or more of the voting rights in the company."*

It is evident from the SAT ruling that a plain acquisition even if it exceeds fifteen percent of the paid-up capital of the company will not attract Regulation 10 unless the acquisition entitles the acquirer to exercise fifteen percent or more of the voting rights in the company.

viii. Also an acquirer becomes entitle/ has right to exercise voting rights under Section 87 of the Companies Act, 1956. Section 87 of the Companies Act states:
"(1) Subject to the provisions of section 89 and sub-section (2) of section 92- (a) every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company; and (b) his voting right on a poll shall be in proportion to his share of the paid-up equity capital of the company…"

Section 87(1) of the Companies Act, 1956, gives member of a company the right to exercise voting rights. "Member" as defined under Section 41(3) of the Companies Act, 1956 includes:
"(3) Every person holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company."

[1] *Appeal No. 21/2001, dated August 28, 2001*

The aforesaid sub-section (3) has been brought into Companies Act, by the Depositories Act 1996. The effect of new provision is that a person holding the equity share capital of a company and whose name is entered as beneficial owner in the records of the Depository, he shall be deemed to be a member of the concerned company even though there is no written agreement with the company. "Beneficial owner" as defined under Section 2(a) of Depositories Act, 1996 means: *"a person whose name is recorded with a depository".*

In the matter of *Liquid Holdings Private Limited v. SEBI* (Appeal No. 83 of 2010, dated March 11, 2011), SAT has explained the concept of beneficial ownership in the following words:

"Beneficial owner is defined to mean a person whose name is recorded as such with a depository. A beneficial owner is entitled to all the rights and benefits and is subjected to all the liabilities in respect of his securities held by a depository."

ix. It is inferred from the provisions of the Companies Act, 1956 and the decisions of SAT that an acquirer, under Regulation 10 of the Takeover Regulations, is entitled to exercise voting rights in the target company, only if, he becomes beneficial owner of the shares. In the instant case Noticee has netted of his position intraday and no delivery was made to his beneficiary account. Noticee in his submission has referred to Circular No. SMD/POLICY/Cir-/03 dated February 6, 2003, SEBI Master Circular no. CIR/MRD/DP/10 /2012 dated April 13, 2012 read with SEBI circulars no. SMDRP/Policy/Cir-05/2001, dated February 1, 2001, SEBI/MRD/Policy/AT/Cir-19/2004, dated April 21, 2004 and MRD/DoP/SE/Dep/Cir-30/2004, dated August 24, 2004 which broadly deal with the issues of transfer of funds and securities from clearing members to clients and specify the timelines therein. From the aforesaid submission made by Noticee I note that the circulars mandate that clearing members shall transfer the funds and securities from their respective pool accounts to the respective beneficiary accounts of their clients, within 1 working day after the pay-out day

i.e., within 1 working day after the T+2 settlement date. Since the Noticee had sold them on the same day i.e., on 'T' day, it cannot be said that beneficial ownership rested with him. Thus, I conclude that Noticee vide his transaction dated July 29, 2011 did not become beneficial owner of the acquired shares and therefore, was not entitled to exercise fifteen percent or more voting rights in the company.

x. Regulation 14(1) of the Takeover Regulations reads as:

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

Regulation 14(1) of the Takeover Regulations imposes following pre-condition on the acquirer to make a public announcement within four working days of:

a) Agreement to acquire;

b) Deciding to acquire.

Noticee has claimed that he did not enter into any agreement to acquire shares or voting rights and thus Regulation 14(1) is not applicable to him. Although Noticee did not entered into an agreement but whether his act of acquiring more than fifteen percent shares be attributed to his *"decision"* to acquire shares for which he was required to make necessary public announcement under Regulation 14(1). Owing largely to SAT's interchanging use of the word's *"intend"* and *"decide"* in its description of the triggering of an open offer,[2] it can be inferred that "*deciding*" to acquire shares amounts to *"intent"* to acquire shares. However, legally, it is clear that the position was articulated correctly by SAT in a different context in Hitachi[3]: *"Mere intention to acquire shares without a definitive concluded contract cannot be the basis for triggering the code"*.

[2] *See, for example, in BP Amoco plc v SEBI (SAT order Dated 27 April 2001, Appeal No 11/2001)*

[3] *Hitachi Home and Life solutions Inc v SEBI (SAT Order Dated 6 July 2005, Appeal No. 106 and 106A/2004)*

xi. From the above judicial pronouncements it is inferred that Regulation 10 is triggered once the acquirer entered into a definitive concluded contract to acquire shares or voting rights which entitles to exercise fifteen percent or more of the voting rights in the company. However, in the present matter Noticee did not enter into any agreement in the first place to acquire shares but instead merely crossed the fifteen percent threshold limit. The claim of the Noticee that Regulation 10 r/w 14(1) is not applicable to him since he was not "entitled" to exercise fifteen percent or more of the voting rights in the company is a tenable argument.

11. In view of the above I hold that the violation of Regulation 10 r/w Regulation 14(1) of the Takeover Regulations does not stand.

ORDER

12. Considering the facts and circumstances of the case, I do not find the instant matter fit for imposition of penalty in terms of Section 15H(ii) of SEBI Act and dispose of the proceeding accordingly.

13. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to SEBI.

Date: **October 01, 2013** **BARNALI MUKHERJEE**

Place: **Mumbai** **ADJUDICATING OFFICER**