BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 24.06.2014
Date of Decision: 06.08.2014

Misc. Application No. 95 of 2013
And
Misc. Application No. 96 of 2013
And
Appeal No. 111 of 2012

1. Mr. Pramod Jain
   L-7, Green Park Extension,
   New Delhi- 110 016

2. Plus Corporate Ventures Pvt. Ltd.
   (Formerly Known As
   Pranidhi Holdings Pvt. Ltd.)
   L-7, Green Park Extension,
   New Delhi- 110 016

3. J.P. Financial Services Pvt. Ltd.
   2 Abhoy Guha Road,
   Howrah- 711 204 …Appellants

Versus

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

Mr. Gaurav Joshi, Senior Advocate with Mr. Ankit Lohia, Mr. Raj Panchmatia, Mr. Peshwan Jehangir, Mr. Anindya Basarkod and Ms. Adyasha Das, Advocates for Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Ajay Khaire Advocate for the Respondent.

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

Per: Justice J.P. Devadhar (Majority View)

1. Appellants are aggrieved by order dated April 13, 2012, whereby Whole Time Member of the Securities and Exchange Board of India (“SEBI” for short) has rejected the application filed by appellants on October 11, 2011 seeking permission to withdraw public offer made by appellants on November 12, 2009 under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“SAST Regulations, 1997” for short). By public offer dated November 12, 2009, appellants intended to acquire 25% of issued equity share capital from the equity shareholders of Golden Tobacco Ltd. (”GTL” for short).

2. Appellants wanted to withdraw the public offer basically on two grounds. Firstly, inordinate delay of more than two years on part of SEBI in approving the draft of the letter of offer submitted on November 26, 2009 has frustrated the public offer, because, under regulation 18(2) SAST Regulations, 1997, SEBI was required to approve or suggest changes within 21 days from the date of receiving draft of the letter of offer whereas SEBI took more than two years to approve the draft letter of offer. Secondly, during the period, of two years, promoters and management of GTL have played havoc with the assets of the company by encumbering the most valuable Vile-Parle property of GTL in gross violation of SAST Regulations, 1997 and have also siphoned of funds of GTL thereby rendering GTL a shell company without any substance and made it a sick company. In these circumstances, it is contended that the public offer has become frustrated and impossible of performance and therefore under regulation 27(1)(d) of SAST Regulations, 1997, appellants must be permitted to withdraw from public offer.

3. Facts relevant for present appeal according to appellants are as follows:-

(a) GTL is a company engaged in the business of manufacturing tobacco and tobacco related products. GTL owns immovable properties inter alia at Vile Parle (West), Mumbai and at Vadodara. According to appellants, property situated at Vile Parle (West) was the prime property valued approximately at ₹ 2000 crores and at the material time was completely unencumbered.

(b) Sometime in September 2008, GTL invited bids from prospective developers for redevelopment of Vile Parle property. On September 29, 2008, appellant no.1 made an offer for joint development of Vile Parle property by offering ₹150 crores as non-refundable amount and suggested profit sharing in the joint venture at a ratio of 50:50.

(c) On June 8, 2009, GTL appointed Ernst & Young for shortlisting and selecting suitable developer for the Vile Parle property. In September 2009, Ernst & Young shortlisted Sheth Developers Pvt. Ltd. (‘Sheth Developers’ for short) for joint development of Vile Parle property. On account of Sheth Developers

being shortlisted as the best bidder, bid of Appellant No.1 obviously stood rejected.

(d) On November 12, 2009, appellants in terms of regulations 10 and 12 of SAST Regulations, 1997 made voluntary public announcement for acquisition of 44,02,201 fully paid-up equity shares of ₹10 each representing 25% of the issued equity share capital from the equity shareholders of GTL at a price of ₹101/- per share (offer price) payable in cash (open offer). At that time, market price of GTL share was ₹109/- per share, networth of GTL as on 31st March, 2009 was ₹42.44 crores, net current assets were ₹134.4 crores and gross sales were ₹173.68 crores.

(e) Object of acquiring 25% shares of GTL as stated in the public offer was to obtain substantial stake/voting rights in GTL. The public offer bid was an effort to carry out hostile takeover of GTL and if the bid was concluded, it would have resulted in the promoters of GTL being ousted from control and management of GTL.

(f) On November 26, 2009 appellants, in accordance with regulation 18(1) of SAST Regulations of 1997, submitted draft of the letter of offer to SEBI for approval. Regulation 18(2) provides that the letter of offer shall not be dispatched before expiry of 21 days

from the date of its submission to SEBI under regulation 18(1) and if within 21 days from the date of submission of the draft letter of offer, SEBI specifies changes, if any, in the letter of offer, then the acquirer shall carry out such changes before the letter of offer is dispatched to shareholders.

(g) On same day i.e., on November 26, 2009 itself appellants had lodged a complaint with SEBI wherein it was stated that the promoters of GTL have been making factually incorrect and misleading statements after public announcement made by appellants.

(h) On December 7, 2009, appellants received a letter from SEBI wherein certain clarifications in relation to offer price and background of appellants, financial arrangements, etc. were sought. By their letter dated December 23, 2009, appellants furnished requisite clarifications to SEBI and requested SEBI to issue final observations at the earliest. However, SEBI failed to issue final observations and in the meantime date for commencement of open offer/ closing offer as set out in the draft letter of offer lapsed on December 30, 2009 and January 18, 2010 respectively.

(i) While draft of the letter of offer was pending approval before SEBI, GTL on November 26, 2009 entered into a Memorandum of Understanding (MOU for short) with Sheth Developers and Suraksha Realty Ltd. for joint redevelopment of Vile Parle property without approval of the general body of shareholders which was in violation of regulation 23(1) of SAST Regulations, 1997. Consideration receivable by GTL under the said MOU was ₹542.70 crores plus 10% of the built-up area including common areas and facilities to be constructed on the said Vile Parle property as per the terms set out in the MOU.

j) By notice dated December 21, 2009, Extra Ordinary General Meeting ("EGM") of GTL was convened on January 18, 2010 to consider joint development of Vile-Parle property. However, even before EGM approval could be obtained, the promoters of GTL in breach of regulation 23(1) of SAST Regulations entered into an MOU with Sheth Developers. Although it is claimed that in the EGM held on January 18, 2010 it is resolved to authorize two executives of GTL to undertake necessary steps for development of Vile-Parle, Marol (Andheri), Hyderabad and Guntur properties of GTL, it is a

matter of record that on date when MOU was entered into there was no approval of the general body of shareholders.

(k) In January 2010, appellants and some others filed Company Petition No.3 of 2010 before the Company Law Board under Sections 397 and 398 of the Companies Act alleging oppression and mismanagement of GTL by its promoters, particularly Dalmia Group. In the Company Petition, appellants had also challenged decision of GTL in encumbering the Vile-Parle property by entering into MOU with Sheth Developers without disclosing all material facts to the shareholders and without the approval of the general body of shareholders of GTL. It was also alleged in the Company Petition that the promoters of GTL have been mismanaging the affairs of the company and have siphoned away huge amounts from the company, as a result whereof there has been deep decline in the performance and profitability of the company. In the said Company Petition, appellants had also sought an order restraining GTL from holding the EGM scheduled to be held on January 18, 2010.

(l) Company Law Board, however, heard the matter and passed an order on January 19, 2010. In the said

order, statement made by counsel for GTL to the effect that in the EGM held on January 18, 2010 requisite resolutions for joint development of Vile-Parle property have been passed and in implementation of the said resolution third party rights have been created was recorded and pending further hearing GTL was directed not to act upon resolution dated 18th January, 2010 any further.

(m) Between November 26, 2009 and September 1, 2011 appellants filed various complaints wherein SEBI was requested to investigate the conduct of promoters of GTL in mismanaging the affairs of the company and siphoning off funds and assets of GTL to the detriment of minority shareholders including appellants whose open offer was pending for approval before SEBI. However, SEBI took no steps to investigate the complaints made by appellants inter alia on ground that SEBI had no jurisdiction to investigate the matter in respect of complaints filed by appellants.

(n) By not investigating the affairs of GTL inspite of several complaints filed by appellants, SEBI indirectly promoted the cause of promoters in encumbering the assets and siphoning off funds of GTL. While refusing to investigate the affairs of

GTL, SEBI went on forwarding complaints received by it from time to time against the appellants and sought comments of the appellants on the said complaints. First of such complaint was forwarded by SEBI on January 19, 2010, for which suitable reply was filed by appellants on February 3, 2010 (see Page 723 & 726). Similarly other complaints forwarded by SEBI were suitably replied by appellants from time to time. Each of the complaints filed against appellants were frivolous and SEBI instead of rejecting those complaints as devoid of any merit, went on forwarding the complaints for comments of appellants, thereby unduly delaying approval of the draft of the letter of offer.

(o) On February 8, 2010, Company Petition No.3 of 2010 was withdrawn by appellants. In the order passed by Company Law Board it was merely recorded that the parties have amicably settled the matter without any further claims against each other.

p) Annual accounts of GTL published for the year 2010-2011 as on March 31, 2010 revealed that out of the proceeds received from MOU and mortgage of Marol property, approximately ₹ 175 crores have been advanced by GTL to its subsidiary namely Golden Realty and Infrastructure Limited during

Financial Year 2009-2010 and 2010-2011 (see page 179 of Appeal paper book). Golden Realty was a company as per Directors report, with no operational income and was in the process of conducting a feasibility study to provide manufacturing facilities to the parent/holding company and was exploring the real estate business. Between 2009 & 2011, out of the amount advance by GTL to Golden Realty, a sum of ₹172.55 crores have been transferred by Golden Realty to undisclosed third parties under the guise of acquiring development rights for construction of property (see page 180 of the Appeal paper book).

q) From June, 2010 several letters and reminders were sent by Merchant Banker of appellants to SEBI requesting them to approve draft of the letter of offer submitted by appellants. Last of such reminder was sent on August 26, 2011.

r) On September 18, 2010 Annual General Meeting of GTL was held to pass an enabling resolution to enter into agreements with Sheth Developers for joint development or sale of the property at Vile-Parle.

s) On February 12, 2011 notice of postal ballot was sent to shareholders seeking their consent to enter into agreements with Sheth Developers for joint

development of Vile-Parle property. Thus, approval of general body of shareholders was sought after about 1 and ½ years from the date of execution of the MOU dated November 26, 2009.

t) On account of delay in approval of the draft letter of offer, failure to investigate complaints filed by appellants and failure to implement the statutory requirements on part of SEBI, the promoters and management of GTL were successful in their fraudulent activities of siphoning off funds of GTL. As a result of fraudulent activities of promoters and management of GTL, net worth of the company was reduced from ₹42.44 crores on March 31, 2009 to ₹– 3.36 crores on March 31, 2011, book value per share was reduced from ₹24.13 on March 31, 2009 to ₹-1.91 on March 31, 2011, borrowings increased from ₹107.69 crores on March 31, 2009 to ₹153.16 crores on March 31, 2011.

u) In April 2011 appellants filed S.C. Suit No. 817 of 2011 before the City Civil Court at Mumbai praying inter alia that the promoters of GTL had no right, authority and/or power to sell the Vile Parle property and that pending final disposal of the suit, promoters of GTL be restrained from disposing and/or creating

third party interest pursuant to the resolution dated January 18, 2010. On April 26, 2011 City Civil Court at Mumbai granted ad-interim relief in favour of appellants after considering plea of appellants that the proceeding before the Company Law Board was withdrawn on an assurance by the promoters of GTL that sale of Vile Parle property would not take place without a public auction, but in breach of that assurance, promoters of GTL were trying to dispose of the Vile Parle property without public auction.

v) On August 2, 2011, Appellant No. 3 made an application to SEBI seeking permission to withdraw open offer on various grounds set out therein. By its letter dated August 16, 2011, SEBI called upon the appellants to address all communication through the merchant banker.

w) On September 6, 2011 merchant banker of the appellants addressed a letter informing SEBI that the promoters of GTL were acting in a manner contrary to the interest of the acquirer as well as shareholders and requested SEBI to initiate investigation in the matter. In that letter personal hearing was sought to enable appellants to make their submissions in support of the allegations made by the appellants.

x) On October 11, 2011 application was made by all appellants seeking permission of SEBI to withdraw from the open offer under regulation 27(1)(d) of SAST Regulations, 1997. On January 17, 2012 and February 8, 2012 personal hearing was granted to the appellants and on April 13, 2012 impugned order was passed by SEBI rejecting the withdrawal application filed by appellants.

y) On 23 April, 2012 SEBI issued its comments on the draft letter of offer submitted by appellants on November 26, 2009. Comments issued by SEBI required appellants to update the draft letter of offer with the events that had transpired between its filing and approval. Comments issued by SEBI had no bearing on the queries raised by SEBI on the basis of various complaints received by it.

z) By an order dated December 31, 2012 SEBI levied penalty of ₹ 3 lac against GTL for failure to comply with regulation 7(1A) which required GTL to make appropriate disclosures in respect of change in shareholding during the period April 30, 2007 and October 5, 2007.

(aa) By order dated July 31, 2013 SEBI levied penalty of ₹ 40 lacs against GTL for violating clause 35 of the

listing agreement under section 23E of the Securities Contracts (Regulation) Act, 1956 and imposed penalty of ₹ 60 lacs for violation of PFUTP Regulations on account of failure to provide details of shares pledged or encumbered by promoters and playing fraud on investor by concealing information relating to encumbrance of shares.

(bb) On February 14, 2014 SEBI passed an order levying penalty of ₹1 crore against the promotes of GTL inter alia for acting in violation of regulation 23 which could frustrate the open offer made by appellants.

4. We have extensively heard Mr. Gaurav Joshi, learned Senior Advocate appearing on behalf of appellants and Mr. Shiraz Rustomjee, learned Senior Advocate appearing on behalf of respondent.

5. Case of appellants, in nutshell is that, their request for withdrawal from public offer deserved to be allowed basically on two grounds. Firstly, it is contended that delay of more than two years in approving the draft letter of offer has frustrated the public offer, because, when regulation 18(2) provides for 21 days to approve the draft of the letter of offer, SEBI could not have taken more than two years to approve the draft letter of offer and during the period of two years, GTL has become a sick company. Secondly, during the pendency of public offer, promoters/management of GTL have encumbered the most valuable

asset (Vile-Parle property) in gross violation of regulation 23 and have also siphoned of funds of GTL thereby frustrating the object with which public offer was made and making it impossible for appellants to acquire shares of virtually a dead company.

6. In support of first contention, it is contended that regulation 18 of SAST Regulations, 1997 specifically prescribes time limit of 14 days for filing draft of the letter of offer and 21 days for approving the draft letter of offer. Object of prescribing time limit is to ensure that the public offer does not become frustrated on account of delay in approving the draft letter of offer. In the present case, though draft letter of offer was filed by appellants within the stipulated time, SEBI has failed to approve the draft letter of offer within the stipulated time. For the violations committed by SEBI appellants could not be penalized especially when the public offer has become frustrated on account of delay in approving the draft letter of offer.

7. It is further contended that notwithstanding the decisions of Apex Court in case of SEBI vs. Akshya Infrastructure Pvt. Ltd. (Civil Appeal No. 6041 of 2013, decided on April 25, 2014) and in case of Nirma Industries Ltd. vs. SEBI reported in (2013) 8 SCC 20, regulation 27(1)(d) ought not to be read ejusdem generis with regulation 27(1)(b) and 27(1)(c). Submission is that regulation 27(1)(d) would cover all situations which SAST Regulations, 1997 may not have been in a position to envisage and as such regulation 27(1)(d) ought to be interpreted as broadly as possible. It is contended that giving narrower

interpretation to regulation 27(1)(d) as held by Apex Court would amount to limiting the powers of SEBI and preventing them from performing their duties and responsibilities.

8. Without prejudice to the above, it is contended that the appellants case falls squarely within regulation 27(1)(d) as interpreted by the Apex Court in case of Nirma Industries Ltd. as well as Akshya Infrastructure Pvt. Ltd., because, the expression 'such circumstances' in regulation 27(1)(d) would includes circumstances where the open offer stands frustrated interalia on account of frustrating actions taken by the promoters/shareholders of the GTL in violation of regulation 23. Submission is that assuming without admitting that the power of SEBI under regulation 27 (1)(d) has to be read ejusdem generis with regulation 27(1)(b)&(c), even then the test of virtual impossibility has to be read to include the test of frustration. In other words, it is contended that the test of impossibility is not confined to physical impossibility, but would cover situations where it becomes impracticable or useless to make the open offer having regard to the objects and purpose of the parties by intrusions or unexpected events or change in circumstances, which were not contemplated and which strike at the very root of the matter. In support of above contentions, reliance is placed on Takeover Code of Hong Kong, United Kingdom, Thailand, Singapore and Australia wherein provisions pari materia with regulation 23 of SAST Regulations, 1997 contain the principle of prevention of frustrating action. In the present case, it is contended that open offer has become frustrated/impossible of performance on account of GTL becoming a

defunct company due to actions taken by the promoters/shareholders in encumbering the assets of GTL and siphoning of funds of GTL.

9. We see no merit in the above contentions. No doubt, that above arguments at first blush appear to be attractive but on a deeper consideration in our opinion said arguments do not merit acceptance. It is true that regulation 18(2) of SAST Regulations, 1997 requires SEBI to offer its comments within 21 days from the date of submission of draft letter of offer. However, second proviso to regulation 18(2) provides that if the disclosures in the draft letter of offer are inadequate or the Board has received any complaint or has initiated any enquiry or investigation in respect of the public offer, then SEBI may call for revised letter of offer with or without rescheduling the date of opening or closing of the offer and may offer its comments to the revised letter of offer within seven working days of filing of such revised letter of offer.

10. In the present case, facts on record reveal that apart from forwarding complaints received against appellants from time to time and seeking their comments on such complaints, it does not appear that SEBI had actually initiated any enquiry or investigation relating public offer. Assuming that forwarding complaints itself amounted to carrying out investigation, SEBI cannot continue with such investigation for years together. Therefore, when the provisions contained in the SAST Regulations, 1997 require SEBI to act swiftly in offering its comments on the draft of the letter of offer, in the facts of present case, SEBI was

wholly unjustified in taking more than two years for offering its comments on the draft of the letter of offer submitted by appellants.

11. However, in case of Nirma Industries Ltd. (supra) as also in case of Akshya Infrastructure Pvt. Ltd. (supra), Apex Court while criticizing the conduct of SEBI for the delay in offering its comments on the draft letter of offer has held that the delay in offering its comments by SEBI on the letter containing voluntary open offer, though undesirable, is not fatal to the decision ultimately taken by SEBI. In case of Akshya Infrastructure Pvt. Ltd., (supra) delay in offering comments on draft of the letter of offer was 13 months, whereas, in the present case, delay in offering comments is more than 24 months. Therefore, irrespective of the fact that the delay in the present case is enormous, in view of the aforesaid decisions of Apex Court argument of appellants that delay on part of SEBI in approving the draft letter of offer has made mockery of provisions contained in SAST Regulations, 1997 cannot be accepted.

12. Being aware of the above legal position, Mr. Joshi, learned Senior Advocate appearing on behalf of appellants fairly stated that even though arguments based on delay are untenable in view of aforesaid decisions of Apex Court, he is not giving up the arguments based on delay, because, appellants would like to reagitate the issue with a view to persuade the Apex Court to take fresh look on the issue of delay defeating the provisions contained in SAST Regulations, 1997. Accordingly, first contention of appellants that the delay of more than two years on part of SEBI in offering its comments on the draft letter of

offer and also the argument that regulation 27(1)(d) ought not to be read ejusdem generis with regulation 27(1)(b) and 27(1)(c) is rejected as it runs counter to the dictum laid down by the Apex Court in case of Nirma Industries (supra) and Akshya Infrastructure Pvt. Ltd. (supra).

13. Second argument of appellants is that assuming regulation 27(1)(d) has to be read ejusdem generis with regulation 27(1)(b)/ 27(1)(c) of SAST Regulations, 1997, in the facts of present case, public offer made by appellants became frustrated and became impossible of performance, because, during the period of two years taken by SEBI to offer its comments on the draft letter of offer, the promoters/management of GTL have encumbered the most valuable Vile Parle property of GTL in gross violation of regulation 23 of SAST Regulations, 1997 and have also siphoned of funds of GTL, thereby making GTL a shell company and a sick company and hence appellants are entitled to withdraw from public offer under regulation 27(1)(d) of SAST Regulations, 1997.

14. We see no merit in the above contentions. Admittedly, GTL had decided to develop the Vile-Parle property even before public offer was made by appellants on November 12, 2009. In fact Appellant No. 1 had made an offer to GTL on September 29, 2008 for joint development of Vile-Parle property by offering ₹ 150 crores as non refundable amount and had suggested profit sharing in the joint venture at a ratio 50:50. However, GTL rejected the offer made by appellants and on recommendation of Ernst & Young shortlisted Sheth Developers as best

bidder for joint development of Vile-Parle property. Thereupon appellants decided to make hostile public offer on November 12, 2009 with a view to frustrate decision of GTL to develop the Vile-Parle property jointly with Sheth Developers. Although object of the proposal to acquire 25% shares of GTL at ₹ 101/- per share as against the market price of ₹ 109/- per share, as stated in the public offer was to obtain substantial stake/voting rights of GTL, it is not in dispute that appellants were basically interested in developing the Vile-Parle property. Thus, it is evident that appellants being frustrated in their endeavour to develop the Vile-Parle property, had resorted to the mechanism of public offer with a view to frustrate the decision of GTL in jointly developing the Vile-Parle property with Sheth Developers. Therefore, appellants having made public offer out of frustration on account of not being able to develop the Vile-Parle property, are not justified in alleging that entrusting the development of Vile-Parle property to Sheth Developers has frustrated the public offer made by appellants.

15. Admittedly, after making public offer, appellants had filed Company Petition No. 3 of 2010, wherein specific grievance was made to the effect that GTL had entered into MOU with Sheth Developers without disclosing all material facts to the shareholders and without the approval of shareholders which was in gross violation of regulation 23 of SAST Regulations, 1997. It was also alleged in the Company Petition that the promoters of GTL have been mismanaging the affairs of the company and have siphoned of huge amounts from the company, as a result whereof, there has been deep decline in the performance and

profitability of the company. Appellants had also sought an order restraining GTL from holding EGM which was scheduled to be held on January 18, 2010.

16. Company Law Board in its order dated January 19, 2010, recorded statement made by counsel for GTL that in the EGM held on January 18, 2010 requisite resolutions have been passed in relation to development of Vile-Parle property and in implementation of the said resolution third party rights have been created. By that order Company Law Board directed that during the pendency of Company Petition No. 3 of 2010 GTL shall not act upon resolution dated January 18, 2010 any further. From aforesaid order passed by Company Law Board it is clear that in view of resolution passed in the EGM held on January 18, 2010, violation of regulation 23 committed by GTL in relation to development of Vile-Parle property stood rectified. Dispute, if any in relation to passing of resolution on January 18, 2010 was to be considered at the hearing of Company Petition No. 3 of 2010.

17. However, on February 8, 2010, appellants withdrew Company Petition No.3 of 2010 by merely recording that the parties have amiably settled the matter without any further claims against each other. Having settled the dispute relating to development of Vile-Parle property with the promoters/management of GTL on the basis of undisclosed reasons and having withdrawn Company Petition No. 3 of 2010 unconditionally, it is not open to appellants to allege that their public offer is frustrated

on account of GTL entering into MOU with Sheth Developers for development of Vile-Parle property.

18. Similarly, having settled the dispute relating to siphoning of funds by GTL during 2009-2010 which plea was specifically raised in Company Petition No. 3 of 2010, appellants are not justified in agitating the very same issue before SEBI on ground that GTL has siphoned of its funds during the year 2009-2010 and 2010-2011. In other words, since the plea of siphoning of funds by GTL during the year 2009-2010 and prior thereto having been specifically raised in Company Petition No. 3 of 2010 and that issue having been settled by appellants with the promoters/ management of GTL for undisclosed reasons, the appellants are not justified in reagitating the very same issue before SEBI in relation to siphoning of funds either during 2009-2010 or during 2010-2011.

19. No doubt that during the period 2010-2011 there were several complaints filed by appellants against promoter/management of GTL and there were several complaints filed against appellants in relation to their public offer. Admittedly, SEBI has not considered the complaints filed by appellants, but unduly delayed in offering its comments on the draft letter of offer by forwarding the complaints received against the appellants and seeking their comments on the complaints received from time to time. SEBI was not justified on one hand declining to consider the complaints filed by appellants against promoters of GTL and on other hand indefinitely withholding their comments on the draft letter of

offer on ground that complaints received against appellants in relation to public offer made by appellants are being investigated.

20. However, as held by Apex Court in case of Nirma Industries Ltd. (supra) and Akshya Infrastructure Pvt. Ltd. (supra) failure on part of SEBI to offer its comments on the draft letter of offer within the stipulated time does not entitle appellants to withdraw public offer. Moreover grounds on basis of which appellants sought withdrawal of public offer were admittedly grounds raised and settled in Company Petition No. 3 of 2010. Therefore, fact that siphoning of funds during 2010-2011 was not the subject matter of Company Petition No. 3 of 2010 would make no difference, because, if the grievance relating to siphoning of funds during the year 2009-2010 and prior thereto raised in Company Petition No. 3 of 2010 has been settled for undisclosed reasons, then, appellants are not justified in agitating that issue only in relation year 2010-2011. In other words if grievance of appellants relating siphoning of funds during 2009-2010 and prior thereto do not survive in view of settlement based on undisclosed reasons, then for the same reasons, the grievance relating to siphoning of funds during 2010-2011 would not survive.

21. It is relevant to note that appellants, subsequent to withdrawal of Company Petition No. 3 of 2010 in February 2010, have filed S. C. Suit No. 817 of 2011 in April 2011 before the City Civil Court at Mumbai, alleging for the first time that the Company Petition No. 3 of 2010 was withdrawn on account of oral assurance given by promoters of GTL that

Vile-Parle property would be developed only after holding public auction and that the promoters of GTL have committed breach of that oral assurance.

22. Admittedly, City Civil Court at Mumbai has granted ad- interim relief in favour of appellants on April 26, 2011 and that ad- interim order continues to be in operation till date. Therefore, irrespective of the fact that SEBI was not justified in taking more than two years for approving the draft letter of offer, in the facts of present case, grievance of appellants that the public offer is frustrated and has become impossible of performance cannot be accepted, because, both grounds based on which appellants had sought withdrawal of public offer, were in fact settled by appellants on the basis of oral assurance given by promoters of GTL and further, for the alleged breach of oral assurance, appellants have filed Suit in the Bombay City Civil Court and obtained stay of development of Vile-Parle property and that stay is admitted operating till date.

23. Strong reliance was placed by counsel for appellants on decision of SEBI dated February 14, 2014 wherein penalty of ₹ 1 crore has been levied against the promoters of GTL interalia for violating regulation 23 of SAST Regulations, 1997. No doubt that entering into an MOU by GTL with Sheth Developers on November 26, 2009 without obtaining approval of general body of shareholders was in violation of regulation 23 of SAST Regulations, 1997. However, admittedly on January 18, 2010 the general body of shareholders has authorized GTL to enter into

Joint Development Agreement is in respect of Vile-Parle property. In view of approval granted by the general body of shareholders on January 18, 2010, grievance of appellants that Vile-Parle property has been encumbered in violation of regulation 23 does not survive at least from January 18, 2010.

24. Fact that the date on which MOU was entered into, there was violation of regulation 23 for want of approval of the general body of shareholders of GTL does not entitle the appellants to back out of open offer, because, firstly, even after the MOU dated November 26, 2009 appellants were insisting on pursuing with the public offer by repeatedly asking SEBI to offer its comments on the draft of the letter of offer. Secondly, by filing Company Petition No. 3 of 2010 appellants sought to restrain GTL in seeking approval for development of the Vile-Parle property from the general body of shareholders in the EGM scheduled to be held on January 18, 2010. Admittedly, in the EGM held on January 18, 2010 shareholders of GTL approved joint development of the Vile-Parle property thereby rectifying the deficiency in compliance of regulation 23 of SAST Regulations, 1997 with effect from January 18, 2010. Thirdly, after settling Company Petition No. 3 of 2010 for undisclosed reasons and after unconditionally withdrawing the said Company Petition No. 3 of 2010, appellants have filed Suit and secured their interest in Vile-Parle property by obtaining stay of development. Therefore, appellants are not justified in contending that since penalty has been imposed upon the promoters of GTL for violating regulation 23

of SAST Regulations, 1997, appellants must be permitted to withdraw from the public offer.

25. Penalty had to be imposed on the promoters of GTL, because, entering into MOU without the approval of general body of shareholders constituted violation of regulation 23 of SAST Regulations, 1997. Fact that the said lacunae was removed on January 18, 2010 on account of the approval granted by the general body of shareholders did not absolve liability of promoters to pay penalty for entering into MOU without the approval of general body of shareholders. Therefore, fact that penalty has been imposed upon promoters of GTL for violating regulation 23 cannot be a ground for appellants to withdraw from public offer, especially when appellants had filed Company Petition No. 3 of 2010 to challenge MOU and after the shareholders granted approval for joint development of the Vile-Parle property, appellants amicably settled the dispute and withdrew Company Petition No. 3 of 2010 for undisclosed reasons. Thereafter, appellants have filed Suit in the City Civil Court at Mumbai and obtained stay thereby restraining GTL from developing the Vile-Parle property. Admittedly, that stay is operating till date. In these circumstances, appellants having taken steps to safeguard their interest in Vile-Parle property which according to them is worth ₹ 2000 crores, are not justified in seeking to withdraw from public offer on ground that penalty has been imposed upon promoters of GTL or on ground that GTL has become a defunct company. Very fact that appellants after securing their interest in Vile-Parle property want to continue with the litigation relating to Vile-Parle property which is worth ₹ 2000 crores

and at the same time want to withdraw from public offer, clearly shows that the entire exercise of public offer was undertaken solely with a view to develop the Vile-Parle property.

26. Apart from above, as late as on August 9, 2011 appellants had addressed a letter to SEBI requesting them to keep the process of open offer in abeyance, because, in the proceedings pending before the City Civil Court at Mumbai, GTL had filed an affidavit stating that in the board resolution dated May 25, 2011 company has decided not to proceed further with the MOU dated November 26, 2009 (wrongly stated therein as December 26, 2009) entered with Sheth Developers and instead take necessary steps to develop the Vile-Parle property by the company of its own. By the said letter dated August 9, 2011 appellants called upon SEBI to investigate about the exact legal status of the Vile-Parle property, investigate regarding possession of the original title deeds of Vile-Parle property and investigate regarding possession of the original title deeds of Vile-Parle property, investigate regarding usage of funds etc. It was further stated in the said letter until appellants are assured of their concern on the above issues, SEBI should keep the process of open offer in abeyance.

27. Aforesaid letter dated August 9, 2011, clearly falsifies the case of appellants that the actions taken by promoters of GTL during the course of two years has frustrated the public offer, because, if public offer was frustrated, appellants would not have asked SEBI to keep the process of public offer in abeyance. Having asked SEBI on August 9, 2011 to keep

the process of public offer in abeyance, appellants were not justified in filing application on October 11, 2011 seeking permission to withdraw the open offer on ground that inordinate delay has frustrated the open offer.

28. Once it is held that appellants were not justified in contending that the public offer is frustrated or has become impossible of performance, then it is not necessary to deal with various decisions as well as rules and regulations of various countries relied upon by the counsel for appellants in support of his contention that where the public offer is frustrated or has become impossible of performance, then SEBI is empowered under regulation 27(1)(d) of SAST Regulations, 1997 to permit withdrawal of public offer.

29. For all the aforesaid reasons, we hold that in the facts of present case, decision of SEBI in rejecting the application for withdrawal of open offer made by appellants cannot be faulted.

30. Appeal filed by appellants is accordingly dismissed with no order as to costs. In view of dismissal of appeal, the two Miscellaneous Applications filed by interveners have become infructuous and accordingly those two Miscellaneous Applications are also disposed of with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

06.08.2014
Prepared & Compared By: Pk

Per: A.S. Lamba (Minority View)

1. The present appeal has been filed by Pramod Jain and others (hereinafter referred to as 'Appellants') vs. Securities and Exchange Board of India (hereinafter referred to as 'Respondent') against Order No. WTM/RKA/CFD-DCR/12/2012 dated April 13, 2012 under section 15T of Securities and Exchange Board of India Act, 1992 challenging order dated April 13, 2012 passed by Respondent, rejecting application of Appellants seeking permission to withdraw voluntary public offer, envisaged in Public Announcement dated November 12, 2009, for acquisition of 25% shares of Golden Tobacco Limited (hereinafter referred to as 'Target Company').

2. Target Company was considering re-development of its property situated in Vile Parle in 2008-09 and invited bids from prospective developers and Appellant No. 1, made offer for joint development of Vile Parle property, which was not accepted since another developer, namely, Sheth Developers Pvt. Ltd. was shortlisted, by Ernst and Young, - the consultant- as best bidder on September 8, 2009.

3. On November 12, 2009, Appellants made public announcement of voluntary open offer for acquisition of 25% shares of Target Company at Rs. 101/- per equity share, when net worth of Target Company was Rs. 42.44 crore, net current assets at Rs. 134.4 crore and gross sales at Rs. 173.67 crore, as on March 31, 2009. Objective of acquisition, as stated in Public Announcement , was "to obtain substantial stake / voting rights in Target Company and was in the nature of strategic investment for diversification and growth, and if successful, would have resulted in ouster of present promoters from control and management of Target Company".

4. Appellants filed Draft Letter of Offer (DLO) with SEBI on November 26, 2009, in terms of Regulation 18(1) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'Takeover Regulations'). Period of 21 days, available to Respondent, in terms of first proviso to Regulation 18(2), to specify changes, if any, in DLO; expired on December 17, 2009, but till then Respondent did not approve DLO.

5. It may also be mentioned that a letter dated December 7, 2009 was received from Respondent by Appellant, who sought information on background of Appellants, financial arrangement; which was replied to by Appellant on December 23, 2009. As per time-table for carrying out various activities, to be carried out in pursuance to submission of DLO to Respondent; December 24, 2009 was the last date for Letter of Offer to be dispatched to shareholders of Target Company, which expired but no communication from Respondent specifying changes in DLO, was received by Appellants and accordingly time table to carryout activities, to give effect to DLO, could not be maintained by Appellants.

6. At this point of time relevance of Regulation 23 of Takeover Regulations is specified to effect that Board of Directors of Target Company shall not, during the offer period:-

> ***"General obligations of the board of directors of the target company.***
>
> *23. (1) Unless the approval of the general body of shareholders is obtained after the date of the public announcement of offer, the board of directors of the target company shall not, during the offer period,—*
>
> *(a) sell, transfer, encumber or otherwise dispose of or enter into an agreement for sale, transfer, encumbrance or for disposal of assets otherwise, not being sale or disposal of assets in the ordinary course of business, of the company or its subsidiaries; or*

(b) issue [or allot] any authorised but unissued securities carrying voting rights during the offer period; or

(c) enter into any material contracts."

7. It is seen that since after Public Announcement of takeover of Target Company by Appellants, Promoters of Target Company, initiated a series of measures, allegedly in violation of Regulations 23 of Takeover Regulations, about starting alienating, disposing off and/or encumbering assets of Target Company after Public Offer and without approval of shareholders in EGM. Instances of these alleged violations were brought to the notice of Respondent by Appellants from time to time, with request to investigate these violations. Appellants filed the following complaints, alongwith many other complaints, with Respondent, between November 26, 2009 to September 1, 2011:

Sr. No.	Date of complaint / correspondence	Content
1.	26.11.2009	Non- disclosure of correct pledge of shares by GTC and GHCL.
2.	E-mail dated 23.12.2009 and letter dated 24.12.2009	Default by promoters of GTC to Indiabulls and initiation of arbitration proceedings and GTC's attempt to sell off unencumbered property at 'Vile Parle' to discharge personal liabilities of Promoters.
3.	E-mail dated 31.12.2009	Siphoning of fund by management of GTC. EGM convened by company is cover up for transaction already concluded.
4.	16.10.2010	Indiabulls FIR against promoters of GTC, where it is alleged that promoters plan to sell GTC property at 'Vile Parle'.
5.	E-mail dated 18.1.2010	Allegation that proxy forms, authority letters of shareholders opposing the motion were destroyed publically.
6.	22.02.2011	Intimation by Appellants that failure on part of SEBI to initiate action against Promoters of Target Company, may force Appellants to withdraw public offer.
7.	09.08.2011	Intimation of Board Resolution dated 25.05.2011 regarding cancellation of MOU of GTC with Sheth Developers.
8.	01.09.2011	Reiterating request to SEBI to review Appellants' complains, during the last 21 months.

8. During the period intervening between date of public offer i.e. November 12, 2009 and rejection of request of Appellants to withdraw public offer on April 13, 2012 by Respondent; following complaints were received by Respondent against public offer and Appellants:

Sr. No.	Date and Complainant	Contents	Response from Appellants	Remarks, as per Appellants
1.	08.01.2010 Indian Council of Investors	Poor Corporate Governance Practices by GHCL and violative of PFUTP Regulations by Appellants.	Appellant No. 1 was Additional Director of GHCL for some time and did not attend any meeting of BOD.	Some apprehensions of complainant were not relevant to offer and others were already disclosed.
2.	05.02.2010 Shobhana S. Mehta	Non-disclosure of details of PAC and suppression of real intention and objectives of Appellants. None-disclosure of 20 entities as PAC.	PAC an Open Offer was as per Takeover Regulations. Fact of debarment of Appellant No. 1 had been informed to SEBI on 11.01.2010. Requirement of Escrow Account complied as per SAST Regulations.	All disclosure as required were made in DLOF.
3.	July 6, 2010 Arun Goenka	Education Qualification of Appellant, shareholding of Pranidhi why JPFSIL, acting as PAC object clause of Pranidhi and JPFSPL and if diversification has consent of RBI.	Replies to these queries sent to SEBI and no query reveals doubt as to eligibility of Appellant for open offer.	Queries were baseless and irrelevant. SEBI should have examined relevancy of queries to arose under consideration.

9. Other relevant events in the matter under Appeal:-

(i) In January 2010, Appellants filed Petition before Company Law Board (CLB), under Section 397 and 398 of Companies Act, 1956, alleging oppression and mismanagement of Target Company by, its promoters. Hon'ble CLB passed order on recording that resolution of GTC Board dated January 18, 2010 was already implemented and third party rights had been created and hence restrained Target Company from further acting on implementation of its resolution dated January 18, 2010, empowering Target Company to develop Vile Parle, Marol, Hyderabd and Guntur properties. Later, on February 8, 2010, Appellants withdrew petition before Hon'ble CLB, due to oral assurance of promoters of Target Company that sale of properties of the company would be only by way of public auction;

(ii) In April, 2011, Appellants apprehended that Promoters of Target Company intended to breach the assurance, before settling case before CLB, and hence filed S.C. Suit before Hon'ble City Civil Court, praying that Target Company be restrained from disposing and / or creating third party interest, pursuant to resolution dated January 18, 2010; and City Civil Court granted ad-interim relief to Appellants, which is still in force;

(iii) Appellants filed for withdrawal of open offer before Respondent, in terms of Regulation 27(d) which reads – No public offer, once made, shall be withdrawn except under the following circumstances, such circumstances as an opinion of the Board merits withdrawal, primarily since Promoters / Management were successful in fraudulent activities and frustrated the open offer by over an extensive period of two years, inter-alia, disposing off, alienating and / or encumbering the properties and siphoning off funds of Target Company, reducing net worth of Target Company at 3.36 crore, book value of share reduced to (–) Rs. 1.91 as on March 31, 2011; in flagrant violation of regulation 23(1)(a) of Takeover

Regulations, while Respondent took no notice / action of repeated complaints of Appellant, describing the violations and urgency Respondent to investigate and take action in terms of Takeover Regulations and since Target Company has got reduced to a Shell Company i.e. a company with practically no assets but with huge liabilities. This application of Appellants for withdrawal of public offer was rejected by Respondent vide order dated April 13, 2012.

(iv) Subsequent to Respondent's impugned order dated April 13, 2012; Respondent vide its order dated July 31, 2013, levied consolidated penalty of Rs. 1 crore – 0.4 crore for violation of clause 35 of listing agreement and Rs. 0.6 crore for violation of PFUTP Regulations on Target Company; due to failure of Target Company to provide details of shares pledged or encumbered by Promoters of Target Company and playing fraud on investors by concealing information relating to pledge / encumbrances of shares.

(v) Vide e-mail dated January 19, 2010 Respondent (Neelam Bhardwaj, General Manager, SEBI) informed Appellants, with reference to Appellants' complaint on EGM proceedings of Target Company that there is no scope for SEBI to interfere at this stage, as under Takeover Regulations, there is no prohibition on Target Company from disposing any of its assets, if decision to dispose of assets is done with approval of general body of shareholders;

(vi) Respondent were informed by Appellants, vide their letter dated December 24, 2009, to the effect that Target Company are clandestinely making serious attempts to sell or dispose of the public belonging to the Target Company, etc. – clearly bringing out that sale or disposal is being done clandestinely and not through open process or with consent of shareholders, obtained in EGM.

(vii) Respondent passed order on February 14, 2014, against promoters of Target Company, for violation of regulation 23(1)

of Takeover Regulations, prejudicing interests of Appellants and shareholders of Target Company and frustrating open offer dated November 12, 2009 of Appellants, Promoters of Target Company were subjected to a penalty of Rs. 1 crore, jointly and severally, for these violations;

10. Submissions of Appellants:-

(i) Open offer has become impossible of performance as it has been frustrated by frustrating actions undertaken by Promoters /Shareholders of Target Company by selling / creating encumbrances on valuable assets of Target Company and SEBI did not take any action to prevent promoters from such action, though the same was brought to notice of SEBI, promptly and repeatedly. SEBI took action against promoters of Target Company, for violations of Takeover Regulations, after the Target Company was drained of all resources and was reduced to a sick company and during the period of over two years, after Appellants made public offer to rejection of their application to withdraw public offer, SEBI did not entertain any request of Appellant to take action against promoters for prevention of violation of Takeover Regulations;

(ii) Circumstances, frustrating action of Promoters of Target Company, refusal of SEBI to act and take action against promoters as per Takeover Regulations, reduction of a good company to a sick company due to actions of promoters, in violation of Takeover Regulations; render request of Application to withdraw open offer, fit and proper under regulation 27(d) of Takeover Regulations; since open offer stands frustrated on account of frustrating actions of Promoters / shareholders and open offer can be carried out and has been rendered, impossible to perform.

11. Submissions of Respondent:-

Delay on part of SEBI in approving Draft Letter of Offer was due to SEBI looking into complaints made by Appellants and others, seeking information and obtaining the same, entering into considerable

correspondence and taking appropriate action in matter and considering – magnitude of the increase and nature of issues involved- time taken by SEBI cannot be considering such as would vitiate the process of or justify withdrawal of public offer. The following has also been stated by Respondent:

(a) Appellants initiated the process of public offer with full knowledge of relevant facts and circumstances;

(b) Appellants initiated legal proceedings and challenge the actions of promoters in the form of Company Petition before Company Law Board and a Suit before Hon'ble City Civil Court;

(c) Appellants' Petition before CLB was withdrawn on basis of mutual amicable settlement between parties and that they had no claim against each other. In the civil suit, which is still pending, Appellants seek to restrain Target Company and its promoters from relating third party interest / disposal of property of the Target Company;

(d) SEBI has not made any blanket statement that it has no authority in jurisdiction to look into wrongdoing by the Target Company;

(e) SEBI order dated December 31, 2012 and July 31, 2013 relate to failure to make disclosures and provide correct information as per clause 35 of Listing Agreement, respectively and have no relevance to issues of present appeal;

(f) With reference to other submissions of Respondent, the less said the better, since these have been put up to meet a mere formality and have no cohesion with and no relevance of these being brought out with issues in appeal and merely denies everything contended by Appellants with no material facts or basis. On the other hand, Ld. Senior Counsel for Respondent argued the matter in a meaningful manner; based on reason, logic and facts of the case; and will be brought out when the submissions of Appellants are examined.

12. Issues that come up for discussion and for taking a view in the Appeal are:-

(i) Relevance of Regulation 15(1), 15(2)(i) & 15(2)(iii); requiring public announcement of acquisition of shares in national dailies and its submission to SEBI; regulation 18(1), 18(2) and proviso and further proviso under this; requiring filing of Draft Letter of Offer with SEBI within 15 days of Public Announcement and SEBI specifying changes in this Draft Letter of Offer, if any, within 21 days and dispatch of this letter to shareholders, as soon as period available to SEBI to specify changes, expires. Further, as per Regulation 19(1), a specific date is to be mentioned in Public Announcement for determining names of shareholders to whom the Draft Letter of Offer should be sent; regulation 22(1) requires the acquirer to be able to implement the offer; regulation 22(2) require acquirer to send a copy of draft letter within 14 days to Target Company, for being placed before Board of Directors and regulation 22(3) require to send Letter of Offer to all shareholders, including non-resident Indians, within 45 days from date of Public Announcement and regulation 22(5) require offer to acquire shares to shareholders to remain open for 20 days. Price, minimum number of shares to be acquired etc. are available in regulation 20 and 21 respectively;

(ii) Now only change in above mentioned regulations for rescheduling date of opening or closing of offer only is available, in regulation 18(2) further provision of Takeover Regulations to SEBI, which are in eventuality of inadequate disclosures in draft letter of offer or if SEBI has received any complaint or has initiated any inquiry or investigation in respect of public offer.

(iii) In view of what has been mentioned above regarding scheduling of events of public offer and what is contained about these in Takeover Regulations; no one, including SEBI, has any leeway to delay, play or take liberty with duties and timelines cast on all

players, namely Acquirer – including its Merchant Banker - Promoters of Target Company, SEBI and shareholders; except as envisaged under further proviso to regulation 18(2) of Takeover Regulations and that too for rescheduling the date of opening or closing of the offer, if disclosures in Draft of Public Offer are inadequate and some complaint has been received or SEBI has initiated any enquiry or investigation. The rescheduling allow SEBI, in case revised Letter of Offer has been called for, a period of seven working days to offer comments from filing of such revised offer, is available.

(iv) The purpose of stating above is to make it clear to every player in matter of dealing with open offer; is that legislature, while making these regulations, made it clear that every player has to play its part with due solemnness, promptness, efficiency and dedication, so that public offers go through within timelines and nobody acts callously and without meeting timelines. It may also be mentioned that legislature / regulations for Takeover have been set-up in such a manner that everyone concerned has to do everything expected of him, within timelines, so that open offer goes through its course, set out in regulations. This understanding of adhering to timelines is most important, if public offers have to succeed.

(v) In content of legislative framework, the role of SEBI in present appeal needs to be considered. At the cost of repetition, it may be, mentioned that date of Public Announcement by Appellants for purchase of 25% of paid up capital of Target Company was November 12, 2009 and Draft Letter of Offer was filed with SEBI on November 26, 2009. SEBI issues a letter to Merchant Banker (MB) on December 7, 2009 asking to provide clarifications on background of acquirer, persons acting in concert, procedure for acceptance of settlement and documents for inspection. These clarifications were furnished on December 23, 2009. Meanwhile, period of 21 days for approval of Letter of Offer, as per first proviso to regulation 18(2), expired on December 17, 2009 and December 24, 2009 was the date by

which Letter of Offer was to be dispatched to shareholders, also expired. Since reply of MB dated December 23, 2009, in response to Respondent's letter dated December 7, 2009, was after expiry of 21 days period (upto December 17, 2009) available to Respondent to indicate changes, Respondent should have been vigilant, after getting reply from MB, and issued letter to Appellant (or their MB) requiring specific changes to be incorporated in Draft of Open Offer, at the earliest, along with direction to change other dates for carrying out essentials of public offer;

(vi) First complaint regarding public offer from Indian Council of Investors received by SEBI is dated January 8, 2010 and forwarded to MB on January 19, 2010 to MB. Date of receipt of this complaint in SEBI is not clear, since it has not been stamped in SEBI's office. Thus, SEBI had clear 15 days to specify changes in Draft Letter of Offer, since reply from MB on clarifications sought by SEBI had been received by SEBI on December 23, 2009. In other words, SEBI choose not to act within further period of 15 days, after exhausting 21 days initial period available to it to specify changes in Draft Letter of Offer;

(vii) On receipt of complaint dated January 8, 2010, the complaint was forwarded to MB by Respondent on January 19, 2010. Main allegations and MB's response have been brought out in paras above. Main point to be noted in the instant case is that Respondent have been following a practice of forwarding the complaints received by it in cases of IPO, Public Offer, etc. – which are of time sensitive nature – to MB for taking necessary action. In effect this has been interpreted by MB's, dealing with these matters, to verify veracity of the complaint and take necessary action in incorporating it suitably in offer document;

(viii) This was seen by this Tribunal while dealing with Appeal No. 84 of 2012 dated 19.02.2014 between Keynote Corporate Services Ltd. vs. Securities and Exchange Board of India that, as per SEBI (Disclosure and Investor Protection) Guidelines,

2000, “Chapter V”, Pre-Issue obligations that 5.1.1 “The standard of due diligence shall be such that MB shall satisfy himself about all aspects of offering, veracity and adequacy of disclosures in the offer documents”, and it was MB, who was held violative of this clause 5.1, when it was seen that some Inter-Corporate Deposits availed of by Edserv Softsystems Ltd., were not disclosed in offer document; which shows that it is the responsibility of MB to ensure veracity and adequacy of disclosures. Keeping in view the above, Respondent have, as a matter of practice, forwarded complaints against IPO, Public Offers, etc. to MB for taking necessary action i.e. to verify the contents of complaint and to take action for incorporating these in offer document, so that requirement of veracity and adequacy of disclosures, in offer document, is met.

(ix) In the matter of Imperial Corporate Finance and Services Pvt. Ltd. vs. SEBI in Appeal No. 56 of 2003 dated 30.07.2007, it was held by this Tribunal that we do not find any justification for holding the Appellant guilty of violating any regulation on provisions of the Act,” and this was in context of Appellant, were Lead Manager to rights issue of Gammon (India) Ltd., and it was alleged that Appellant did not take immediate action, when it received information of a Director of Gammon (India) Ltd. to have a case pending against it, when it was not mentioned in issue document and that the same was sent to Director concerned for an explanation by Appellant. However, complainant sent another letter to Appellant stating that Director had a criminal case pending against it and Director admitted to have the criminal case pending against him;

(x) The purpose of above referred case is to show the practice prevalent in Respondent to send complaints in connection with IPO, open offers to MB, so that veracity of same can be verified and suitable action taken in offer document, as a measure of due-diligence carried out by MB;

(xi) In oral argument before this Tribunal in case of Suresh N. Vijay vs. SEBI and Another it was stated before Tribunal on July 16, 2014 by Ld. Counsel Shri Kumar Desai of Respondent that it is the practice in Respondent (SEBI) to send all complaints to MB for necessary action in the matter. This should also be the case, since IPO and Public Offers are time sensitive matters, where adherence to timelines is essential, since otherwise no IPO as Public Offer will succeed;

(xii) At this point, it may be mentioned that a specific query was put to Ld. Senior Counsel for Respondent, as to why no action was taken by SEBI, after receipt of clarifications on December 23, 2009 and before receipt of first complaint (dated January 8, 2010) by SEBI, i.e. after expiry of 21 days time available to SEBI to specify changes in Draft Letter of Offer, when at least another 15 days were available to Respondent before first complaint was received. Ld. Senior Counsel could not respond to this. Further, Ld. Senior Counsel was asked as to why it is seen in all cases of Public Offer, coming before Tribunal, that SEBI takes an inordinate amount of time, much beyond 21 days available to it, to specify changes. Ld. Senior Counsel stated that in majority of cases, Respondent does specify change in Draft of Offer within time specified. However, it has to be pointed out that as per page 266 of MOA, in year 2009, time taken to approve 66 cases of open offer, ranged from 31 days in case of Joy Reality Ltd. to 553 days in case of Zenotech Laboratories, followed by 503 days for Orissa Sponge Iron & Steel Ltd. and in none of cases, period of 21 days had been adhered to;

(xiii) From perusal of three complaints namely from Indian Council of Investors, Shobhana S. Mehta and Arun Goenka, it appears that no action was taken by Respondent to verify genuinity of complaint by asking the complainant, if he / she had sent the complaint, which is generally the case of an entity, which deals with complaints, which have bearing on future of subject matter. Also, in case of Indian Council of Investors, it was, perhaps, not

proper to deal with the complaint if this council is not registered with Respondent.

(xiv) From perusal of complaints, it is seen that main issues brought out in complaints are:-

- ❖ Poor Corporate Governance
- ❖ Violation of PFUTP Regulations
- ❖ Non Disclosure of details of PAC
- ❖ Suppression of real intentions and objectives
- ❖ If object clause of Appellants allow diversification

13. In the opinion of undersigned, no grave or serious issues have been brought out in the complaints and could have been dealt by following normal practice of Respondent of referring the complaints to MB for necessary action i.e. of verifying the veracity of complaint and taking action of making necessary changes in DLO, if required. As already stated, if Respondent had stuck to timelines there was no occasion to deal with the complaints, but from delay of Respondent in not taking action for adhering to timelines and leaving sufficient time to complaints to send on their complaints and then to make departure from accepted practice of dealing with complaint – of sending them to MB - but to take action on complaints themselves – when contents of complaints were not grave or serious; raises serious questions, which Respondent have not answered.

14. It may also be stated that complaints appear sufficiently educated and enlightened and that they should also know that Public Offer is an offer only, with no compulsion whatsoever, to sell their holdings to Appellants. In case the complainants were not happy with genuineness of Appellants, their ability to manage the Target Company efficiently without possessing necessary qualifications; the shareholders have every right not to sell their holdings to

Appellants and to retain their holdings and if they felt their not selling of their holding to Appellant, will not prevent Appellants to gain control of company and management, they have the option of selling their holding in market; but Respondent did not have the right to keeping the proposal of “open offer” hanging and not deciding for 2 years on basis of complaints, when they had only 21 days to respond. This clearly shows non-sensitivity on part of Respondent in their dealing with Appellants.

15. Now coming to other aspect of the problem concerning complaints by Appellants to Respondent regarding violation of Regulation 23(1) of Takeover Regulations by Target Company, its promoters and shareholders and response of Respondent to the complaints.

16. Before, the above is dealt with, it may be proper to deal with happenings before public offer. It is known that in 2008-09, Golden Tabacco Limited was considering re-developments of its property at Vile Parle and one of the contenders for development rights was Pramod Jain, whose bid was not selected but Sheth Developers (Pvt.) Ltd. was likely to get these rights. Before any agreement with Sheth Developers could be finalized, Pramod Jain acting in concert with two others, made public offer on November 12, 2009 to Takeover Golden Tobacco Limited.

17. This above is clearly a hostile takeover bid and is allowed under Takeover Regulations and all concerned including Respondent, were aware of same. This is being stated in response to argument of Ld. Senior Counsel for Respondent that Appellants were aware of antecedents of Target Company, its promoters and should have been prepared to face the consequences of their open offer and now cannot plead that they were innocent investors not aware

of conduct of promoters of Target Company. From what has been stated briefly above, will be elaborated in subsequent paras to show that Appellants were aware of Target Company's promoters antecedents but what they could not factor in was conduct of Respondent and how they will deal with entire matter; including complaints of investors, unending enquiry on these complaints, and how Respondent will deal with complaints of Appellants about conduct of promoters of Target Company and allegation of violation of Regulation 23(1) of Takeover Regulations by promoters of Target Company. In other words, it appears to undersigned that all concerned, as per submissions of Ld. Senior Counsel for Respondent, should take recourse to hostile public offers for taking over company, whose promoters are known for bad management and attendant other actions; at their own peril and should not expect any sensitivity / appreciation / assistance from Respondent in upholding, what is due to bidders of hostile open offers, from Respondents, when Takeover Regulations and in particular most important regulation 23(1) is breached.

18. The various complaints lodged by Appellant, brought to knowledge of Respondent that promoters of Target Company have breached regulation 23(1) of Takeover Regulations, with request to Respondent to take action for prevention of breach, but strangely Respondent did not take any action and no enquiry was conducted.

19. Complaints from Appellants to Respondent have been narrated above and there were lodged after each and every move by promoters of Target Company leading to violation of Takeover Regulations but Respondent steadfastly maintained that promoters of Target Company can sell, transfer encumber or dispose of assets during offer period, provided approval of

General Body of shareholders is obtained, as per regulation 23(1) of Takeover Regulations despite complaint being of promoters of Target Company, encumbering properties of Target Company, in violation of regulation 23(1) of Takeover Regulations, without taking approval of shareholders in EGM.

20. On the other hand, it is seen that Respondent was taking action on every complaint received against the Appellants, looking into all aspect of complaint most efficiently, by sending reminders at intervals, without going into the fact that these complaints were not verified, were repetitive and most importantly – whether subject matter of complaint was germane to main issue and whether it has been the practice of Respondent to send complaints regarding IPO / Public Offer, to MB for verification and taking action within timeframe work available for various activities available for IPO / Public Offer or whether questions raised had been addressed substantially in response to earlier complaints or answer to complaint was available in Draft Letter of Offer or in subsequent clarifications.

21. In above content, complaint received from Ms. Shobhana S. Mehta and action taken by Respondent needs to be gone into greater details, since it has been dealt by Respondent in all its aspects in details. Complaint, in question, deal with:-

(i) Non-disclosure of persons acting in concert;
(ii) Fraudulent and misleading statements in public announcement about objective of Takeover;
(iii) Inadequate firm financial arrangements and misleading statements thereto;
(iv) Escrow arrangements not in accordance with Regulation 28 of Takeover Regulations;
(v) Share acquired subsequent to public announcement and no disclosure made;

(vi) Deliberate violations of Timelines prescribed under the Takeover Regulations;

(viii) Track record of Promoter Jain;

22. In content of above complaint, the genuineness of which is in doubt since same has not been verified by SEBI, if person named as sender had sent the complaint or not, it must be appreciated that complainant is a very informed investor with 513 shares of Target Company for 20 years (valued at about Rs. 51,300 at the time of complaint) and is a very knowledgeable about promoters of Target Company, Appellants, their PAC's and connected companies and about rules, regulations of various laws governing these matters; should have also known that DLO or Letter of Offer is voluntary with no compulsion on shareholders to sell his / her shareholding to offerer.

23. The allegation about PAC not being properly disclosed was taken up by Respondent with Target Company, Appellants and named PAC's in complaint, in different ways with these three entities, perhaps this was as part of overall strategy of Respondent, which has not disclosed, and Target Company is asked to inform whether 20 PAC's, named in complaint, have shareholding in Target Company and furnish their latest shareholding and their address; letter to Appellants from Respondent is dated March 02, 2010 and is asking for comments of Appellants on all counts, stated in complaint and letter to 20 PAC's named in complaint and requesting them to state their shareholding in Target Company as on May 12, 2009, as well as changes in shareholding and provide names of shareholders with holding over 2% in their own companies (not in Target Company) alongwith names of promoters and directions in their own company.

24. It may be stated that why Respondent did not await for response from Appellants and without waiting for this, letters were sent to all so named PAC's in complaint and complaint also sent to Target Company to state shareholding of alleged 20 PAC's in Target Company. None of these questions were replied by Ld. Senior Counsel and he was satisfied with stating that since Respondent had to deal with 20 entities named as PAC in complaint, with Appellant and Target Company and hence delay of 2 years in dealing with Draft Letter of Offer – whereas only 21 days time as allowed to Respondent as per Takeover Regulations – is not excessive but justified.

25. Now coming back to letters issued by Respondent to alleged 20 PAC's, the response has been received and from sample of these letters available in compilation of documents, no worthwhile information their being in PAC with Appellants was sought or has emerged, Target Company has provided shareholding of 20 alleged PAC's in Target Company, after two reminders and after more than 3 months of first reference of Respondent to Target Company.

26. Facts emerging from detailed investigation into complaint from Ms. Mehta, spread over more than one year, does not find any mention in comments issued to Appellants for incorporation n DLO, which means that Respondent wasted more than one year of precious time on getting response of entities on contents of an verified complaint, resulting in issue of 22 letters to different entities, asking for different information from different entities and issuing more than 22 reminders to get the information and this fact of meaningless or non-consequential, complaint, could be seen from facts of complaint by Respondent since it deals with these matters day-in and day-out, but Respondent choose to investigate the complaint, in depth, departing from

normal practice of referring to it to MB, for taking up investigation itself but brought no new facts in DLO; has to be answered by Respondent, in more details than cursorily stating than in view of complaints, the requirement to suggest changes in DLO got delayed.

27. Now coming to various complaints sent by Appellants to Respondent, against Target Company, alleging violation of Takeover Regulations by Promoters of Target Company or its shareholders, and these have been numerous and varied alongwith documentary evidence of violation committed; response of Respondent has been discouraging, to say the least, and downright aggressive and hostile beyond contemplation.

28. Respondent have been saying that Appellant made public offer being fully aware of background of promoters Target Company, had known their conduct in dealing with financers that they had entered into various deals with various entities for developing their properties, but did not keep these promises and these entities started civil / criminal proceedings against promoters and that Appellants' bid for development of properties had been refused / not agreed by these promoters. Hence, Appellants knew these facts and were not innocent acquirers and knew what they were doing.

29. Before we go further, it is an admitted position that when Appellants made public offer of acquisition of 25% stake in Target Company on November 12, 2009, the most valuable property of Target Company was wholly encumbered, in any manner whatsoever and agreement for development of this property at Vile Parle was entered into by Target Company with Sheth Developers on December 26, 2009 and was without approval of general body of shareholders as per regulation 23(1) of Takeover

Regulations which is required for any sale / encumbrance of property, during pendency of public offer. This regulation require that Target Company shall not, during the offer period, sell, transfer, encumber or otherwise dispose of or enter into an agreement for sale, transfer, encumbrance or for disposal of assets or otherwise, not being sale or disposal of assets, in the ordinary course of business, of the company or its subsidiaries.

30. This agreement was sought to be regularized by EGM of Target Company held on January18, 2010, which was marred by irregularities in voting at the EGM, as alleged by Appellants. Hence, there have been series of complaints from Appellants to Respondent, against promoters / shareholders of Target Company; giving details of irregularities, violations and other misdeeds. These complaints were, in particular, violative of regulation 23(1) of Takeover Regulations and Respondent were under obligation to enquire these complaints and take action against violators. However, Respondent chose to ignore all these complaints, specifically stating the rule position and maintaining this stead-fasted for all times to come, that promoters of Target Company can dispose off, encumber, sell property of Target Company, after public offer, after obtained approval of shareholders in EGM; whereas complaint was that promoters had encumbered property without shareholders approval in EGM.

31. Now, it is not being held that what the Appellants stated was absolute truth but Respondent were under obligation to investigate and take necessary action, in the matter, since SEBI, by their over admission of their Counsels / Senior Counsels, before this Tribunal, take cognizance of all complaints, information, reports appearing in press etc. i.e. whenever violations of Respondent’s regulations, SEBI Act, come to their notice. But in instant case,

Respondent in their wisdom, choose not to take any action. Respondent did not take action on series of complaints of Appellants, when these complaints were well founded regarding violations of SEBI's regulations.

32. At this stage, it may also be mentioned that when complaints were made by Appellants, they were told that in this case, Respondent does not deal with Appellants directly and they have to come through MB and when Appellants come through MB, MB are told by Respondent that they have merely forwarded the complaint of Appellants, without any input from their side and MB are reminded that his conduct has not improved despite their being told to improve in their previous reference to them. Now, in these circumstances, this is almost threatening a MB by Respondent with consequences, if they bring out problems and difficulties of their client to knowledge of SEBI it may be construed as violation of the condition of their registration with Respondent or violation of their code of conduct, resulting in serious action against them.

33. Further, it may be stated that the same Respondent held promoters of Target Company violative of regulation 23(1) of Takeover Regulations vide their order dated February 14, 2014, on basis of same facts relating to public offer of Appellants. Hence, it is beyond comprehension as to why Respondent decided not to act on numerous complaints of Appellants against Promoters, when solid evidence was marshalled by Appellant to show flagrant violation of regulation 23(1) of Takeover Regulations, when Respondent was supposed to investigate and take this to logical conclusion, on basis of evidence; but frittered away valuable time, in pursuit of complaints of some investors of Target Company against Appellants, when remedy of not offering their shares to Appellant in public offer, was available to them or to off-load their shares

in market, if they thought takeover of Target Company by Appellant, could not be warded off.

34. In short, Respondent response to Appellants' complaint was non-sensitive by not looking into allegation of violation of Takeover Regulation by promoters of Target Company, and Respondent did not take-up investigation or even issued show cause notice to promoters, when solid evidence of wrong doing by promotes existed; Respondent did not stop at that but left no opportunity to chide Appellants / MB for raising hue and cry about violations.

35. In the circumstances, when Ld. Senior Counsel for Respondent pleading that Appellants made hostile takeover bid knowing fully the past conduct of promoters of Target Company and were not innocent investors and should have known consequences of their public offer; is to construed as meaning that entities who make bids for hostile takeover of other companies do this at then own pearl and should not expect any assistance from Respondent, who may not may not pull up violators of Takeover Regulations.

36. Since Respondent did not take any action on the complaints of Appellants, Appellants approached Company Law Board (CLB) and CLB restrained Target Company from further acting on implementation of shareholders resolution of January 18, 2010. Subsequently, Petition of Appellants before CLB was withdrawn on mutual understanding and coming to amicable settlement, without any claim against each other on February 15, 2010.

37. The above has been mentioned; in content of pleadings of Ld. Senior Counsel for Respondent regarding delay in approving Draft Letter of Offer

due to Appellants approaching CLB and obtaining restrain order and subsequently settling the matter amicably. The undersigned sees no merit in this pleadings for delay on their part, since proceedings before CLB, and Respondent are independent and CLB's restrain on promoters does not restrain Respondent from acting on Draft Letter of Offer or specifying changes for incorporation in Draft Letter of Offer.

38. Similarly part of delay has been attributed to Appellant approaching City Civil Court and obtaining restrain order dated May 19, 2011 for restraining Target Company in disposing off assets of Target Company pursuant to resolution dated January 18, 2010. Restrain order from City Civil Court does not in any way restrain Respondent from acting on DLO and to delay issue of changes for incorporation in DLO.

39. However, it may be mentioned that after withdrawal of Petition before CLB on February 8, 2010 promoters of Target Company transferred funds from its subsidiary company, i.e. Golden Reality and Infrastructure Ltd. to undisclosed third parties under guise of acquiring development rights for construction of property.

40. In fact Petition filed before CLB and starting proceedings before City Civil Court, were taken up to stop / restrain promoters of Target Company from further encumbering / selling properties of the Target Company, which were allegedly violative of SEBI's Takeover Regulations also but SEBI refused to act on complaints of Appellants on the issues or to stop / restrain promoters from siphoning of funds from Target Company.

41. It may be further mentioned that Takeover Regulations 1997 have since been revised in 2011 and as per new regulations, period available to

SEBI for offering its comments on Draft Letter of Offer has been reduced to 15 working days, in place of 21 days available under 1997 regulations and most importantly it is stated that in event of no comments being issued by SEBI within such period, it shall be deemed that Board (SEBI) does not have comments to offer.

42. In other words, legislature having realized that Board (SEBI) takes inordinate long time, in approval / offering changes / comments on Draft Letter of Offer, it has been legislated that in absence of comments by Board in 15 working days; approval of Board shall be deemed accorded. This, perhaps, will allow takeover of companies in hostile bids.

43. It may be stated in impugned order that Appellants had requested Respondent, vide their letter dated August 2, 2011, to permit Appellants to withdraw the public offer in terms of regulation 27(1)(d) of Takeover Regulations and subsequent to this, on August 9, 2011, again raised issue of alleged violations of Takeover Regulations by Target Company and requested SEBI to direct Target Company to inform its shareholders about exact status of its prime assets, value over Rs. 1000 crore, and possession of original title deeds of these assets and fund usage. Appellant, in view of above, requested Respondent to keep the process of open offer, in abeyance.

44. In above connection, it may be stated that Appellant is a “die-hand” optimist to make any request to Respondent, when all his earlier requests for enquiry / investigation / restrain to Respondent, have not yielded any positive response and nothing really turn-on its head with letter of August 9, 2011, when it had asked for withholding of its open offer. Respondent have tried to explain that just before August 9, 2011, they were about to issue its

observations on the DLO, but could not do so since August 2, 2011; letter for withdrawal of DLO was received from Appellants.

45. However, this does not make any material change in situation since almost entire damage to Target Company by its Promoters had been done and nothing remained of original quantities of the company and delay of one year and 10 months had done all damage that was possible and whether letter containing Respondent's observations were issued in August, 2012 or later is of no consequence; but if it is Respondent's case that time of one year and 10 months is justified, in place of 21 days available to it; it is not a very healthy state of affairs and Respondent have to do a lot more explanation, based on logic and reasoning, to explain delay in offering changes in DLO in their handling of the case.

46. Several case records have been cited, but none of these case fit with facts of present case, where a genuine offer of hostile takeover has been made infructuous by actions of promoters of Target Company in selling / encumbering good properties of Target Company, in violation of Regulation 23(1) of Takeover Code, and completely overlooked by Respondent, whereas complaints by investors, having no bearing on public offer were investigated, in no holds barred manner by Respondent, spread over two years, instead of referring these complaints to MB and for taking into account relevant facts of complaint in Draft Letter of Offer, and not taking cognizance of Appellants numerous complaints against promoters, whereas substantial evidence was adduced of violation of Takeover Regulations by promoters and least chiding the MB for not being professional; while at the same time allowing the promoters to violate regulation 23(1) and take away funds from Target Company to its subsidiaries and further to unknown accounts; and not approving Draft Letter of Offer within mandated 21 days and further period

of 15 clear days, which were available, before any complaint against Appellant was received and sufficient scrutiny of Draft Letter Offer had been done and queries on Draft Open Letter had been raised and replied by Appellant / MB and yet 15 days time was available to approve the Draft Open Offer, before receipt of any complaint, but it seems that Respondent were waiting for complaints, so that they could deny prompt approval and involve everyone concerned in quagmire of complaint, counter complaint, needless investigation and non investigation of well founded complaint, resulting in needless / avoidable litigation before CLB and City Civil Court, thus totally and effectively frustrating the offer at the end of two years of wastage of time, by which time the company sought to be acquired had been reduced into a Shell Company.

47. Hence, the undersigned has no hesitation in terming the offer of having been becoming impossible of performance, since the Appellants will acquire a dead company, whereas they proposed to acquire a healthy company. The Target Company is before BIFR and in its last stages of life and perhaps no lifeline, short of a miracle, can bring the company to its original health. Towards the end, it may be mentioned that Respondent had forgotten that they had to approve the Draft Letter of Offer, but they sprang up for action when application of withdrawal of open offer was submitted by Appellants on August 2, 2011. Accordingly the impugned order of Ld. WTM dated April 13, 2012 is set aside and appeal allowed to the effect to allow Appellants to withdraw their public offer dated November 12, 2009 in terms of regulation 27(4) of Takeover Regulations.

Sd/-
A.S. Lamba
Member

06.08.2014
Prepared & Compared By:
msb