BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

ADJUDICATION ORDER NO. Order/AK/VP/2022-23/22274-22281

UNDER SECTION 15-I OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995 IN RESPECT OF:

<table>
<tr><th>Name of the Entity (PAN)</th><th>Address</th></tr>
<tr><td>Metex Marketing Pvt. Limited (AADCM9717A)</td><td>357, Kothari Mansion, SVP Road, Mumbai - 400 004.</td></tr>
<tr><td>Mr. Apurva M. Shah (AWPPS7372A)</td><td rowspan="5">4A, Sambhav Tirth,
2A, Bhulabhai Desai Road,
Hajiali, Mumbai - 400 026.</td></tr>
<tr><td>Mr. Ashni Shah (AFIPJ4179A)</td></tr>
<tr><td>Ms. Bhavna M.Shah (ANIPS2033C)</td></tr>
<tr><td>Manish L.Shah (ANIPS0226M)</td></tr>
<tr><td>Manish L. Shah(HUF) (AAEHM1775L)</td></tr>
<tr><td>Ms. Chanchal Jain (ABSPJ9360K)</td><td>1/B, Nagindas Building, Prathna Samaj, Mumbai - 400 004.</td></tr>
<tr><td>Ms. Rashi Jain (ADZPJ3317M)</td><td>601/602, Padmavati Heights, P. B Marg, Tardeo, Mumbai - 400 007.</td></tr>
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In the matter of Koffee Break Pictures Limited

FACTS OF THE CASE

1. Securities and Exchange Board of India (hereinafter referred to as **'SEBI'**) had conducted an examination during which it was observed from the disclosures made by Koffee Break Pictures Limited (hereinafter referred to as "**Target**

Company") in December 2009 to the stock exchange, that its promoter group, comprising of Metex Marketing Pvt. Limited (**Noticee No.1**), Mr. Apurva M. Shah (**Noticee No. 2**), Mr. Ashni Shah (**Noticee No. 3**), Ms. Bhavna M. Shah (**Noticee No. 4**), Manish L. Shah (**Noticee No.5**), Manish L. Shah (HUF) (**Noticee No. 6**), Ms. Chanchal Jain (**Noticee No. 7**) and Ms. Rashi Jain (**Noticee No. 8**) (hereinafter collectively referred to as **"the promoter group/ Noticees"**), and others were holding 28,90,810 shares of Target Company (constituting 4.51% of its issued share) as on June 30, 2009.

2. Thereafter, pursuant to the conversion of warrants (earlier allotted to, inter alia, the promoter group) into equity shares of the target company on various dates between June 30, 2009 to December 31, 2009, it was seen that the collective shareholding of the promoter group increased from 28,90,810 shares constituting 4.51% as on June 30, 2009 to 3,27,63,440 shares constituting 25.20% of the enhanced issued share of the target company as on December 31, 2009.

3. It was observed that on 12.12.2009, as a result of the conversion of 2,07,50,000 warrants of the target company into equity shares, the collective shareholding of the promoter group increased from 12.77% to 25.20%, i.e., an increase beyond the threshold limit of 15% specified under regulation 10 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as "**SAST Regulations, 1997**") and as a result the Noticees were required to make a public announcement in accordance with the provisions of regulation 10 read with regulation 14(1) of the SAST Regulation, 1997 within 4 working days from 12.12.2009. However, despite such an increase in shareholding beyond the stipulated limit, the Noticees failed to make the requisite public announcement thereby violating regulation 10 read with regulation 14(1) of the SAST Regulation, 1997.

4. In light of the above, SEBI issued a Show Cause Notice (SCN) dated 26.09.2014 under sections 11 and 11B of SEBI Act, 1992 (hereinafter referred to as the **'SEBI**

Act') and regulations 44 and 45 of SAST Regulations, 1997 read with Regulations 32 and 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as "**SAST Regulation, 2011**") to Noticees and others calling upon them to show cause as to why suitable directions under sections 11 and 11B of SEBI Act and Regulations 44 and 45 of SAST Regulations, 1997 read with Regulations 32 and 35 of the SAST Regulation, 2011 should not be issued against them for violation of Regulation 10 read with Regulation 14(1) of SAST Regulations, 1997. The said SCN dated 26.09.2014 was disposed of by SEBI, vide order dated 09.03.2016, inter alia, directing Noticees and others to jointly and severally, make a public announcement to acquire shares of the target company in accordance with the provisions of SAST Regulations, 1997, within a period of 45 days from the date of the order i.e., 09.03.2016.

5. I note that Noticees and others preferred an appeal against the said order, dated 09.03.2016, before the Securities Appellate Tribunal (SAT). The Hon'ble SAT, vide its order dated 04.06.2019, upheld the directions issued by SEBI, vide the said order dated 09.03.2016.

6. I observe from the Order dated 04.06.2019 that Hon'ble SAT, inter alia, directed as under:

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

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

7. I note that Noticees failed to comply with the above directions issued by Hon'ble SAT, and hence SEBI filed an application before Hon'ble SAT praying for the following relief:

"Direct all the Appellants to comply with the Order dated June 04th, 2019 and co-operate with the Applicant (SEBI) and the Independent Valuer with respect to the information and/ or documents sought by the Independent Valuer and pay the professional fees of Rs. 2,00,000/- to the Independent Valuer."

8. Hon'ble SAT, vide order dated 10.10.2019, disposed of the said SEBI application inter alia directing as under:

"Having heard the learned counsel for SEBI, we are of the view that no specific direction is required to be given by this Tribunal requiring the original appellants to comply with the information sought by SEBI. SEBI itself has the power to enforce the order of this Tribunal and its own directions. In the event the original appellants are not co-operating in the proceeding it would be open for SEBI to initiate independent proceedings against them. Further, the valuation and thereafter the open offer is required to be made as per the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 which should be done without any further delay. In the event the original appellants are not paying the professional fees of Rs. 2 lakhs to the Independent Valuer as directed by SEBI, then SEBI should pay this professional fee to the Independent Valuer and thereafter recover the same if recoverable from the appellants. Misc. Application is disposed of."

APPOINTMENT OF ADJUDICATING OFFICER

9. Upon being satisfied that Noticees had violated Regulation 10 read with regulation 14(1) of the SAST Regulation, 1997 and also failed to comply with SEBI Order dated 09.03.2016, SEBI, in exercise of powers under section 19 read with sub-section (1) of section 15-I of the SEBI Act and rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as the "**Adjudication Rules**"), appointed Ms. Geetha G as the Adjudicating Officer, vide order dated 27.12.2021, to inquire into and adjudge under section 15-I read with section 15H(ii) and section 15HB of the SEBI Act, the alleged violations by the Noticees. Pursuant to transfer of Ms. Geetha G, SEBI appointed me as Adjudicating Officer, vide order dated 29.08.2022, to inquire into and adjudge under section 15-I read with section 15H(ii) and section 15HB of the SEBI Act, the alleged violations by the Noticees.

SHOW CAUSE NOTICE, HEARING AND REPLY

10. A common SCN dated 01.04.2022 was issued to the Noticees, under rule 4(1) of the Adjudication Rules to show cause as to why an inquiry should not be initiated against them and why penalty should not be imposed against them under sections 15H(ii) and 15HB of the SEBI Act, as alleged therein for the violations brought out against the Noticees. I note that the SCN was delivered to Noticee No. 1, via Speed post Acknowledgement Due (SPAD) on April 12, 2022. However, no response was received from the Noticees, especially Noticee No. 1. Other Noticees responded after issue of Hearing Notices (HN), as mentioned in the subsequent paras in this order.

11. In the interest of natural justice, an opportunity of hearing was granted to Noticees on 06.05.2022, vide HN dated 22.04.2022. I note that the HN issued to Noticee No. 1 via SPAD returned undelivered, with a remark *"Item Returned Refused"*. Noticees No. 2 to 8, vide letter dated 29.04.2022, submitted that they are in the

process of drafting a reply to the SCN and further submitted that they are in process of applying for the settlement under the SEBI (Settlement Proceedings) Regulations, 2018. The Noticees No. 2 to 8 also sough inspection of documents and requested to give time of 4 weeks thereafter to file their reply. Accordingly, Noticees No. 2 to 8 did not attend the hearing granted on 06.05.2022. I note that Noticee No. 1 neither responded, nor availed the opportunity of the hearing granted on 06.05.2022.

12. Another opportunity of hearing was granted to Noticees on 24.05.2022, vide HN dated 17.05.2022. I note that the HN was delivered to Noticee No. 1, via hand delivery on 23/05/2022. Noticees No. 2 to 8, vide letter dated 23.05.2022, again submitted a reply that they are in the process of drafting a reply to the SCN and further submitted that they are in process of applying for the settlement under the SEBI (Settlement Proceedings) Regulations, 2018. Accordingly, Noticees No. 2 to 8 did not attend the second hearing granted on 24.05.2022. I note that Noticee No. 1 neither responded, nor availed the second opportunity of the hearing granted on 24.05.2022.

13. A third opportunity of hearing was granted to the Noticees on 30.05.2022, vide HN dated 26.05.2022. I note that the HN was delivered to all Noticees, via hand delivery. However, none of the Noticees availed the opportunity of the hearing granted to them.

14. Pursuant to my appointment as Adjudicating Officer, status of the settlement application was sought from Settlement Division of SEBI and it was learnt that, vide letter dated 03.06.2022, the settlement application was returned to the applicants in terms of Regulation 5(3)(c) of SEBI (Settlement Proceedings) Regulations, 2018, as the directions issued by SEBI, vide order dated 09.03.2016, were not complied by the Noticees.

15. In the interest of natural justice, a final opportunity of hearing was granted to the Noticees on 14.10.2022, vide HN dated 30.09.2022. I note that the HN was delivered to Noticee No. 1, via SPAD 03/10/2022, however, Noticee No. 1 did not avail the opportunity of hearing. Mr. Kunal Khothari, Advocate and Ms. Ashmita Goradia, Advocate and Mr. Apurva M. Shah (In person) appeared on behalf of Noticees No. 2 to 8 and submitted that they are in the process of making the Open Offer as directed in the SEBI Order, however, due to insufficient funds, the process is getting delayed. Noticees sought time to submit their written submissions. The Noticees also submitted that they also want to pursue the settlement mechanism for the present adjudication proceedings. It was informed to the Noticees that adjudication proceedings and settlement proceedings are parallel proceedings. The Noticees were asked about the steps taken by them after the rejection of the settlement application and the delay in filing their reply to the SCN which was issued around six months back. The Noticees agreed to submit their final written submission latest by 21.10.2022. Noticees also accepted that they won't require any more opportunities of hearing, as the Noticees have already been given four opportunities in the present matter.

16. I note that Noticees No. 2 to 8, vide email dated 22.10.2022, have submitted their reply to the SCN, as under:

   i. *We, Noticee Nos.2 – 8, are in receipt of your SCN. At the outset, we dispute and deny all that is stated in the SCN and nothing contained in the SCN should be deemed to be admitted by us for want of specific traverse. The capitalized terms used in this reply which are not defined have the same meaning as assigned to them in the SCN.*

   ii. *It is not in dispute that we have not made the open offer in Koffee Break so far. It is most humbly submitted that the same is for factors beyond our control as explained hereinbelow:*

a) Around 2006, Noticee No. 2 (who was then merely 24 years old) attempted to venture into the business of film making and try and explore the area of animation films. In order to do the same, they invested in Koffee Break and subscribed to warrants. While the first film (My Friend Ganesha) fared well, the business of the company never took off and in fact suffered huge losses due to the failure of the film [The Green Chic] at the box office. Noticee No. 2 lost all the money that he had invested and in fact some loans were taken from banks and financial institutions which were repaid by way of selling some personal assets of Noticee No. 2.

b) The Noticees invested in the target company at an average price of Rs. 2.10 [face value 1 rs] in 2008 and when the Noticees sold the shares, they sold the same at an average price of Rs. 0.50 paisa. Therefore, the Noticees cumulatively lost Rs. 1.60 per share and a total sum of almost 4 crores in total. It must be noted that this loss was over and above the loss on account of the repayment of the bank loans by selling personal assets.

c) As you are already aware, even before the SCN was issued, the Noticees had already sold all the shares and exited the management of Koffee Break. The Ld. WTM passed the Order on 9.3.2016 and by then the financial condition of the Noticees had deteriorated even further. This coupled with the fact that the Noticees had to spend monies on litigation in the present matter.

d) The last 6-7 years has been very difficult for me and my family. Noticee No. 2 who was leading the company was a 25-year-old and this was his first venture. Noticee No. 2 was not aware of the rules prevalent that time and also was not properly advised by in the issue. There is no substantial income for the past 10-12 years due to the difficult environment.

e) It may be noted that the total income of the Noticees is as follows:

Noticee No.	*AY 2021-22*	*AY 2020-21*	*AY 2019-20*	*AY 2018 – 19*	*AY 2017 - 18*
Noticee No. 2	*4,39,660*	*4,58,350*	*5,85,242*	*4,59,980*	*4,53,995*
Noticee No. 3	*4,17,960*	*4,55,540*	*4,46,242*	*4,02,820*	*3,25,655*
Noticee No. 4	*2,66,770*	*98,830*	*3,90,384*	*7,14,800*	*6,50,150*
Noticee No. 5	*2,77,730*	*1,45,960*	*4,20,088*	*5,34,646*	*5,51,562*
Noticee No. 6	*2,06,370*	*1,90,140*	*1,51,972*	*4,10,142*	*2,44,067*
Noticee No. 7	*8,27,133*	*8,09,610*	*7,54,744*	*9,06,135*	*11,25,445*
Noticee No. 8	*7,83,958*	*6,74,630*	*11,28,107*	*5,78,684*	*6,39,257*

f) *It may be noted that the total income across the last 5 years is Rs. 5-7 lacs annually per noticee. Needless to state that substantial part of the said income is used in the day-to-day expenses. Noticee No. 2 and 3 have 1 child and Noticee No. 4, 5 and 7 are all senior citizens. Noticee No. 8 has 2 children.*

g) *The Noticees never had any financial condition to make the open offer and that is the sole reason why the Noticees have been unable to comply with the directions of the Ld. WTM. There is absolutely no other reason why the Noticees are unable to comply with the provisions of the Takeover Code and make the said open offer so directed.*

iii. *We wish to bring to your attention the following judgements and provisions of laws which may be considered by you while imposing any penalty in the matter:*

a. *Section 15-J provides for mitigating factors which have to be considered by the Ld. AO while passing an order of penalty. It is submitted that as held by the Supreme Court in the case of* ***Hindustan Steel Ltd. vs. State of Orissa 1969 2 SCC 627*** *and* ***Adjudicating Officer, SEBI vs Bhavesh Pabari (2019) 5 SCC 90,*** *penalty need not be levied in every single case, even if there appears to be a violation of law. The principles laid down in Section 15J have to be considered* *before imposing the penalty. The said principle has been accepted by SEBI in the below mentioned cases.*

b. *Even in cases (In the matter of AO Proceedings in the matter of Utsav Pathak Order dated 30.8.2019) where it was proved beyond doubt that there was a violation of Insider Trading regulations by a tipper, the same lead to profits by such tippees, SEBI decided not to impose any monetary penalty on the said noticee on account of the fact that the Noticee had lost his job and did not have any monetary means.*

c. *Even the Ld. WTM in the case of AstraZeneca Pharma India (Order dated 5.6.2020), even though the Ld. WTM came to a finding of violation of the PFUTP Regulations, the Ld. WTM did not issue any directions or impose any penalty.*

d. *In the case of La Waterina Resorts vs SEBI (Appeal No. 341 of 2019, Order dated 23.2.2021), the Hon'ble SAT held that delay in the SCN is a mitigating factor while imposition of penalty. In the present matter, the SCN even by the Ld. WTM was issued much after the Noticees had already sold their shares and exited the company. The present SCN alleges violations which have occurred in 2016 or prior thereto.*
pathak

iv. *It is further submitted that provisions of Section 15HB cannot be used for imposition of penalty for non-compliance with the directions of the Ld. WTM.*

v. *We therefore humbly request your good self to take into consideration the aforesaid factors and dispose of the SCN with no penalty or a minimum penalty. The purpose and object of the SEBI Act is to protect the markets and investors. It is humbly submitted that any harsh penalty would virtually make us go bankrupt and would add to an otherwise strained financial situation. We humbly submit that the failure to make the open offer is not intentional but solely on account of the fact that the*

*Noticees did not have the financial capacity to do so. "**Lex Non Cogit ad impossibilia**" - The law does not compel a man to do that which he cannot possibly perform. The other similarly recognized legal maxims are "Impotentia Excusat Legim" and "neon tenatur ad impossibilia." Where the law creates a duty and the party is disable to perform it without any default in him and has no remedy over there, the law will excuse him.*

vi. *The aforesaid doctrines have been accepted, approved and applied by the Apex Court, in India also as long back as in the case of Cochin State Power and Light Corporation Ltd. v. State of Kerala . where the Apex Court followed the aforesaid maxims and held;*

> *"The performance of this impossible duty must be excused in accordance with the maxim, lex non cogit ad impossibilia (the law does not compel the doing of impossibilities)"*

vii. *A Constitution Bench of seven Hon'ble Judges of the Supreme Court in Re Presidential Pool, held as under:*

> *"The maxim of law impotentia excusat legam is intimately connected with another maxim of law **lex non cogit ad impossibilia**. Impotentia excusat legam is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge and the party is disabled to perform it, without any default in him and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening*

impossibility caused by the act of God. (See Broom's Legal Maxims 10th Edition at pp. 162-163 and Craies on Statute Law 6th Ed. at p.268)."

viii. *In the present case, we are being asked to show cause as to why penalty should not be levied on us for failure to make public announcement and comply with the directions of the Ld. WTM. It is submitted that the Noticees never had the financial capability to make the open offer at any point in time and if the same is not intentional. All attempts were made by Noticee No. 2 to try and arrange for funds for the last three years to comply but the same could not happen due to the factors beyond the control of the Noticees.*

ix. *In view of the same, we the Noticees pray with folded hands that SEBI take a sympathetic view in the matter and not impose a harsh penalty on the Noticees.*

CONSIDERATION OF ISSUES AND FINDINGS

17. From the records, I note that Noticee No. 1 is controlled by the other Noticees. I have perused the submissions put forth by the Noticees regarding alleged violations stated in the SCN. Further, despite ample opportunities, Noticee No. 1 neither replied to the SCN nor appeared for the hearing. Hence, I am constrained to proceed with the present adjudication proceedings based on the facts available on records.

18. The issues that arise for consideration are as under: -

    i. Whether the Noticees have violated provisions of Regulation 10 read with regulation 14(1) of the SAST Regulation, 1997 and also failed to comply with SEBI Order dated 09.03.2016?

    ii. If yes, whether the violations, if any, attract monetary penalty under sections 15H(ii) and 15HB of the SEBI Act read with section 15-I of SEBI Act?

iii. If so, what quantum of monetary penalty should be imposed on the Noticees after taking into consideration the factors mentioned in section 15J of the SEBI Act?

19. The relevant provisions allegedly violated by the Noticees are as under: -

<u>SAST Reguations,1997</u>

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

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

<u>SAST Regulations, 2011</u>

Repeal and Savings.

35.(1) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, stands repealed from the date on which these regulations come into force.

(2) Notwithstanding such repeal, —

(a) anything done or any action taken or purported to have been done or taken including comments on any letter of offer, exemption granted by the Board, fees collected, any adjudication, enquiry or investigation commenced or show-cause notice issued under the repealed regulations, prior to such repeal, shall be deemed to have been done or taken under the corresponding provisions of these regulations;

(b)the previous operation of the repealed regulations or anything duly done or suffered thereunder, any right, privilege, obligation or liability acquired, accrued or incurred under the repealed regulations, any penalty, forfeiture or punishment incurred in respect of any offence committed against the repealed regulations, or any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, shall remain unaffected as if the repealed regulations has never been repealed;

(c) any open offer for which a public announcement has been made under the repealed regulations shall be required to be continued and completed under the repealed regulations.

(3) After the repeal of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, any reference thereto in any other regulations made, guidelines or circulars issued thereunder by the Board shall be deemed to be a reference to the corresponding provisions of these regulations.

Issue No. I: Whether the Noticees have violated provisions of Regulation 10 read with regulation 14(1) of the SAST Regulation, 1997 and also failed to comply with SEBI Order dated 09.03.2016?

20. I note from the provision of Regulation 10 of SAST Regulations that it provides 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 with in four working days for the date if acquisition of the shares.

21. I note that in the present case the collective shareholding of the Noticees along with Person Acting in Concert (PACs) was 82,50,000 shares constituting 8.67% of the issued shares of the Target Company as on 30.11.2009. I note that the following shares were acquired by the Noticees/ Entities who were part of the promoter group, on conversion of warrants on 12.12.2009;

S.No.	Name of Noticee/ Entities who were part of the promoter group	No. of shares acquired	Total number of shares of Target Company pre 12.12.2009	Total number of shares of Target Company post 12.12.2009
1	Bhavna M.Shah	25,00,000	9,50,86,000	13,00,11,000
2	Manish L.Shah	25,00,000		
3	Manish L. Shah(HUF)	25,00,000		
4	Lalitchandra Shah*	21,25,000		
5	Sumitra L Shah*	21,25,000		
6	Metex Marketing Pvt. Limited	65,00,000		
Total		1,82,50,000		

*Since Expired

I note that one Kamlesh Seth, who was earlier alleged to be part of promoter group, also acquired 25,00,000 shares on 12.12.2009 on conversion of warrants, however, he was later found to be not a part of the promoter group, and hence no directions were issued against him, in the SEBI order dated 09.03.2016.

22. I note that pursuant to the acquisition as stated above, the collective shareholding of the promoter group increased from 8.67% to 20.38%, thereby the Noticees triggered Regulation 10 of SAST Regulations due to increase in their shareholding beyond the threshold limit of 15%.

23. At this juncture, I note that Hon'ble SAT, in its order dated July 20, 2015, in the matter of Shri Housing Pvt. Ltd. vs SEBI has observed that:

"…..We are of the considered opinion that the very purpose of public offer envisaged under the Takeover Regulations, 1997 would be frustrated if the acquirers are given opportunity to make public announcement after a long lapse of time from the date of acquisition i.e. the date of SPA's are signed by the parties to acquire shares beyond 15% and/or control of a particular company by the acquirer…………It has, therefore, caused definite prejudice to the shareholders of Premier in the matter of exercising their statutory rights / option to exit or to continue with the said company through open offer mechanism at the very inception when the SPA's were entered into by the appellant. Therefore, the violation of such a valuable statutory right of shareholders to exit and/or to continue with the company cannot be compensated by paying meager interest by the acquirer. The time limit of 4 days prescribed in Regulation 14(1) is crucial and important as time is of the essence in such acquisitions and consequent open offer."

24. Further as held by the Hon'ble Supreme Court of India, in Kosha Investments Ltd vs Securities & Exchange Board of India in its order dated 18.09.2015 with regard to public announcement should not be delayed beyond four working days of the agreement or decision to acquire the requisite number of shares or voting right, following observation are worth mentioning: -

"We are in agreement with the finding of the Tribunal on this issue and find no merit in the contentions of the appellant. If the plea of appellant will be accepted then an acquirer can keep on violating Regulation 11(1) with impunity on as many occasions as he/it wants and avoid letting the public have the required knowledge through public announcements

by simply making subsequent sale or transfer to another entity so as to reduce the so-called net acquisition in a financial year to within 5%. This interpretation will defeat the purpose of Regulation 11(1) and shall also render Regulation 14(1) otiose. The concept of permitting creeping acquisitions by permitting not more than 5% of the shares or voting rights in a company limits the period for such acquisition to a financial year ending by 31st March. But such concept does not dilute the requirement of making a public announcement within the time mentioned in Regulation 14(1) if the acquisition even if only once made and divested, is of more than 5% of shares or voting rights in the target company. In other words, even if such acquisition is followed by sale in the same financial year, the liability of making the public announcement would remain unaffected and shall attract action, as in this case. Hence, the main contention advanced on behalf of the appellant is found to be without any merit. The other contention is that Regulation 14(2) of the Regulations of 1997 postpones the time for required public announcement to acquisition of voting rights when purchased securities are actually converted. According to the contention, only when securities or shares are converted by the acquirer into voting rights by getting it registered or upon exercise of option to acquire voting rights, the liability of making public announcement can be fastened.''

25. I note from the replies of Noticees No. 2 to 8 that they have not disputed the allegations stated in the SCN. Instead they have cited financial constraints in complying with the directions given in the SEBI Order dated 09.03.2016. Hence, it is an admitted fact that the Noticees did not make the open offer in terms of Regulation 10 of SAST Regulations,1997 and as directed in the SEBI Order dated 09.03.2016.

26. Further, in view of the concurrent findings of Hon'ble SAT, in its orders dated 04.06.2019 and 10.10.2019, it is established that Noticees No. 1 to 8 have violated Regulation 10 r/w Regulation 14 of SAST Regulations, 1997 and also failed to comply with the directions issued, vide SEBI Order dated 09.03.2016.

Issue No. II: If yes, whether the violations attract monetary penalty under sections 15H(ii) and 15HB of the SEBI Act read with section 15-I of SEBI Act?

27. The Hon'ble Supreme Court of India in the matter of SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216(SC) held that *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant…".*

28. I note that Noticees No. 2 to 8 have submitted that provisions of Section 15HB cannot be used for imposition of penalty for non-compliance with the directions of the Ld. WTM. I note that as per section 15 HB of SEBI Act, penalty can be imposed against whoever fails to comply with, inter alia, directions issued by the Board for which no separate penalty has been provided. Hence, I am of the opinion that for failure to comply with SEBI Order dated 09.03.2016, section 15 HB of the SEBI Act is the appropriate provision for imposition of penalty and hence I am not inclined to accept the above submissions of the Noticees, which are devoid of merit.

29. As the violations of the alleged provisions of SAST Regulations, 1997 and SEBI order dated 09.03.2016 by the Noticees have been established, I am convinced that it is a fit case to impose monetary penalty on the Noticees under the provisions of Sections 15H(ii) and 15HB of the SEBI Act, which read as under:

Penalty for non-disclosure of acquisition of shares and takeovers.

15H.If any person, who is required under this Act or any rules or regulations made thereunder, fails to,—

(i)…

(ii) make a public announcement to acquire shares at a minimum price;

he shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.

Penalty for contravention where no separate penalty has been provided.

15HB. *Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees."*

Issue No. III: If so, what quantum of monetary penalty should be imposed on the Noticees after taking into consideration the factors mentioned in section 15J of the SEBI Act?

30. The provisions of Section 15J of the SEBI Act and Rule 5 of the Adjudication Rules require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely; -

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.

31. From the submissions of the Noticees, I note that they had sold the share at the lesser amount then for which they had bought the shares and cumulatively occurred loss of Rs. 1.60 per share and a total sum of almost 4 crores in total; that the Noticees had sold all the shares and exited the management of Target

Company even before the SCN was issued; that Noticee No. 2 was leading the family at the age of 25 years old and from last 6-7 years there has been very difficult for him and his family and that Noticee No. 2 was not aware of the rules prevalent that time and also was not properly advised in the matter; that the total income across the last 5 years is Rs. 5-7 lacs annually per notice; that Noticees No. 4, 5 and 7 are all senior citizens; that Noticees didn’t have financial condition to make the open offer.

I am not convinced with the above submissions of the Noticees because the Noticees have not provided sufficient explanation regarding their conditions at the time when the open offer obligation arose i.e. on 12.12.2009 and that the conditions were beyond their control. I note that while the Noticees have not disputed the allegations made in the SCN, they have pleaded ignorance and lack of knowledge of rules. It is a well-established legal maxim that “Ignorantia juris non excusat”, or “ignorance of the law excuses no one". The Noticees who were on the management side of the company ought to have known the responsibility and the consequence of the acquisitions and comply with the extant regulatory and statutory requirements. At this juncture law has to protect the lay investors who were the shareholder of the company and the acquisition of the Noticees caused definite prejudice to the shareholders of the company in the matter of exercising their statutory rights / option to exit or to continue with the company through open offer mechanism at the very inception stage. I note that at the time when SEBI directed the Noticees to make an open offer, vide order dated 09.03.2016, the price of the shares of the target company was Re 0.18 only.

32. I do not agree with the submissions/ request of the Noticees No. 2 to 8 to not levy penalty based on financial constraints and case laws cited (i.e. in the matter of Hindustan Steel Ltd. vs. State of Orissa 1969 2 SCC 627 and SEBI vs Bhavesh Pabari (2019) 5 SCC 90, and other case laws) by the said Noticees on the following grounds:

32.1 Law is made to protect the lay investors who have the right to choose to either stay with the management or exit the company upon change in management/ acquisition of substantial stake by an entity. Not giving the offer to exit amounts to prejudice to the shareholders of the company in the matter of exercising their statutory rights / option and should be dealt with sternly.

32.2 Even though Noticees have submitted that the total income across the last 5 years is Rs. 5-7 lacs annually per Noticee, I note that the Noticees were required to make open offer in the year 2009 and the Noticees have not given any submissions regarding any constraints at that point in time. Further, I note from the records that the Noticees are residents of Mumbai and are staying in upscale areas of Mumbai and hence I do not find merit in their submissions that they have financial constraints.

33. I also note that Noticees No. 2 to 8 have cited Hon'ble Supreme Court judgement in Re Presidential Pool on the maxim *law impotentia excusat legam* and *law lex non cogit ad impossibilia*. In view of the reasons given in para 32 and 33. I am not inclined to accept the submission of the Noticees No. 2 to 8 that it was impossible for them to make the open offer due to the financial problem.

34. I note from the order La Waterina Resorts vs SEBI (Appeal No. 341 of 2019, Order dated 23.2.2021), that the Hon'ble SAT held that delay in the SCN is a mitigating factor while imposition of penalty. The Noticees No. 2 to 8 submitted that the SCN in the proceeding initiated under section 11B of SEBI Act was issued much after the Noticees had already sold their shares and exited the company. The Noticees submitted that the present SCN alleges violations that have occurred in 2016 or prior thereto.

35. I note from the record that SEBI had initially examined that matter in January 2011, based on the surveillance system of SEBI and it was observed that certain

entities, based on the shareholding pattern filed with the Exchanges, had done acquisition of shares in certain companies, including the Target Company, beyond the threshold limits prescribed under SAST Regulations, 1997. Accordingly, vide email sent to the target company in November 2013, the shareholding of promoter group was sought from the target company. Since the company did not provide the details of shareholding of promoter group a reminder was sent to the target company, vide email dated 11.12.2013. The target company, in its reply dated 23.12.2013, submitted that it is in the process of gathering the information and sought extension of time till 10.01.20214, citing the reason that that they were facing difficulty in collecting the information pertaining to period from June 2009 to September 2009.

36. Since no reply was received from the target company by 10.01.2014, another reminder was sent to the target company, vide mail dated 18.01.2014 and 29.01.20214. Another letter dated 19.03.2014 was sent to the target company wherein it was advised to the target company to submit the reply before 31.03.2014, failing which it would be assumed that it has no information to provide and appropriate proceeding would be initiated. I note that since the target company was not providing the information, telephonic communication was done with the Compliance Officer of the target company wherein the Compliance Officer assured that the required information would be submitted at the earliest. I note that despite giving the assurance, the target company failed to provide the information to SEBI and SEBI was constrained to gather the information which was available on the Exchange website wherein it was observed that the target company converted the warrants allotted to allottees into equity shares on numerous occasions in the year 2009.

37. Thereafter, as per the administrative procedures and after taking necessary approvals, SEBI issued SCN, under sections 11 and 11B of SEBI Act and regulations 44 and 45 of SAST Regulations read with regulations 32 and 35 of SAST Regulations, 2011, SCN was issued on 26.09.2014. I note that since then,

the Noticees have been pursuing the matter before SEBI and before Hon'ble SAT and now they are submitting that there was a delay in issuing the SCN. Hence, I am not inclined to accept the submissions of Noticees, that there is a delay in issuing the SCN in the instant proceedings.

38. I note that section 15H(ii) of SEBI Act, which was applicable during the year 29.10.2002 to 08.09.2014, provided as under:

Penalty for non-disclosure of acquisition of shares and takeovers.

15H(ii) *If any person, who is required under this Act or any rules or regulations made thereunder, fails to, make a public announcement to acquire shares at a minimum price; he shall be liable to a penalty twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.*

Further Section 15H(ii) of SEBI Act, which was applicable after 08.09.2014, provided as under:

Penalty for non-disclosure of acquisition of shares and takeovers.

15H (ii) *If any person, who is required under this Act or any rules or regulations made thereunder, fails to, make a public announcement to acquire shares at a minimum price; he shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.*

I note that section 15 H(ii) of SEBI Act, provided higher penalty, as it existed at the time when the Noticees as a promoter group acquired 1,82,50,000 shares of the target company by which their shareholding increased from 8.67% to 20.38% thereby increase their shareholding beyond the threshold limit of 15% specified under regulation 10 of SEBI SAST Regulations, 1997.

39. I note that SEBI Order dated 09.03.2016 directed that Noticees No. 1 to 8 (alongwith Lalitchandra Shah and Sumitra L Shah, who have since expired) to jointly or severally, make a public announcement to acquire shares of the target company in accordance with the provisions of SAST Regulations, 1997, considering the amount under open offer and directed the Noticee to pay interest @10% per annum from 23.03.2010 till the date of payment of consideration within a period of 45 days of the order i.e., 09.03.2016. Thereafter, the Hon'ble SAT, vide its order dated 04.06.2019, upheld the above directions. Since the Noticees failed to comply with the above directions, SEBI filed an application before Hon'ble SAT, as mentioned at para 7 above. Hon'ble SAT, vide order dated 10.10.2019, disposed of the SEBI application, and gave directions, as mentioned at para 8 above.

40. I note that pursuant to the direction of Ho'ble SAT, SEBI appointed Bansi S Mehta & Co. (BSMC) as independent valuer to determine fair value of the shares of the target company. From records I note that the fees to BSMC was paid by the Noticees. I note from the records that the Noticees were not cooperating with BSMC and BSMC, in accordance with Regulation 20(4)(c) of SAST Regulations, 1997, arrived at Rs. 2.95 as a final price of the shares of the target company. It was mentioned in the report of BSMC that the said price does not include the interest component.

41. I note that had the Noticees made the public announcement within a period of 4 days from December 12, 2009 in accordance with the provisions of the Takeover Regulations, 1997 and complied with all related activities within the timelines specified therein, all formalities with respect to their public announcement and the open offer would have been completed by March 23,2010, i.e., 97 days from the date of making the public announcement. Considering interest from 23.03.2010, the following price is arrived at:

Base price (INR)	Base date as per SEBI Order dated 09.03.2016	Interest calculation dates	Delay (no. of days)	Interest component*	Total price (INR)
2.95	23.03.2010	20.12.2022	4652	3.76	6.71

*@10% p.a. in INR

Therefore, as per the obligation of the Noticees (plus Lalitchandra Shah and Sumitra L Shah), the minimum number of shares to be acquired in terms of SAST Regulations, 1997 were 2,60,02,200 i.e. at least 20% of the issued shares of the target company. Considering that the offer would have been fully subscribed, in light of huge difference in the market price and the offer price, the total amount required for same, with interest, as on 20.12.2022 @ Rs. 6.71 comes to 2,60,02,200 x 6.71 = Rs. 17,44,74,762. Considering that the price of the shares of the target company was Re. 0.18, if interest is added to the same as per the above calculations, the same comes to Re.0.41 as on 20.12.2022. Hence, as on 20.12.2022, the worth of shares acquired by Noticees (plus Lalitchandra Shah and Sumitra L Shah) would have been Rs. 1,06,60,902 (2,60,02,200 x Re 0.41). By not giving the open offer, the Noticees (plus Lalitchandra Shah and Sumitra L Shah) avoided loss of Rs. 16,38,13,860 (17,44,74,762-1,06,60,902). Considering that Lalitchandra Shah and Sumitra L Shah have since expired, the Noticees No. 1 to 8 avoided loss to the tune of Rs. 13,10,51,088.

42. I note that SEBI has not taken any action against the Noticees in the past.

ORDER

43. After taking into consideration the violations by the Noticees, the loss avoided by not giving an open offer to the shareholders of the target company as per the SAST Regulations, 1997, time elapsed since the said obligation arose, the calculation of fair price by BSMC and the submissions made by Noticees No. 2 to 8, I impose the following penalty on the Noticees, to be paid jointly and severally:

Noticee No.	Name of the Entity	Penalty Under Section U/s 15H(ii) of SEBI Act for violation of Regulation 10 r/w Regulation 14 of SAST Regulations, 1997	Penalty Under Section 15HB of SEBI Act for Non-compliance of SEBI Order dated 09.03.2016	Total Penalty
1	Metex Marketing Pvt. Limited	Rs. 13,10,00,000/- (Rupees Thirteen Crores Ten Lacs Only)	Rs. 5,00,000/- (Rupees Five Lacs Only)	Rs. 13,15,00,000/- (Rupees Thirteen Crores Fifteen Lacs Only)
2	Mr. Apurva M. Shah			
3	Mr. Ashni Shah			
4	Ms. Bhavna M.Shah			
5	Manish L.Shah			
6	Manish L. Shah(HUF)			
7	Mr. Chanchal Jain			
8	Ms. Rashi Jain			

I find that the said penalty is commensurate with the violations committed by the Noticees in this case.

44. The Noticees shall remit / pay the said amount of penalty within 45 days of receipt of this order either by way of Demand Draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, OR through online payment facility available on the website of SEBI, i.e. www.sebi.gov.in on the following path, by clicking on the payment link:

ENFORCEMENT → ORDERS → ORDERS OF AO → PAY NOW

45. The Noticees shall forward said Demand Draft or the details / confirmation of penalty so paid to "The Division Chief (Enforcement Department-1 DRA-4), Securities and Exchange Board of India, SEBI Bhavan 2, Plot No. C – 7, "G"

Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.” The Noticees shall also provide the following details while forwarding DD / payment information:

Case Name :	
Name of Payee :	
Date of Payment:	
Amount Paid :	
Transaction No. :	
Bank Details in which payment is made :	
Payment is made for: (like penalties/ disgorgement/ recovery/ settlement amount etc.)	Penalty

46. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, SEBI may initiate consequential actions including but not limited to recovery proceedings u/s 28A of the SEBI Act for realization of the said amount of penalty along with interest thereon, inter alia, by attachment and sale of movable and immovable properties.

47. In terms of Rule 6 of the Adjudication Rules, a copy of this order is sent to the Noticees and also to the Securities and Exchange Board of India.

Place: Mumbai **AMIT KAPOOR**

Date: December 20, 2022 **ADJUDICATING OFFICER**