

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under Sections 11(1) and 11B of Securities and Exchange Board of India Act, 1992 and Regulation 44 and 45 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with Regulations 32 and 35 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, in the matter of Saurashtra Cement Ltd. in respect of -

Sr. No.	Noticees
1.	Fawn Trading Company Private Limited
2.	Willow Trading Company Private Limited
3.	Pallor Trading Company Private Limited
4.	Fern Trading Company Private Limited
5.	Tejashree Trading Company Private Limited

The aforesaid entities are hereinafter referred to by their respective names/serial numbers or collectively as "the Noticees".

1. This Order is in continuation of SEBI Orders dated January 15, 1999 (*hereinafter referred to as "first SEBI Order"*), April 25, 2013 (*hereinafter referred to as "second SEBI Order"*) and December 31, 2014 (*hereinafter referred to as "third SEBI Order"*), the context of the noticees having acquired shares Saurashtra Cement Ltd. (*hereinafter referred to as "SCL"/"the target company"*) without complying the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("**SAST Regulations 1997**").
2. Since the facts of the case and the arguments of the noticees in previous proceedings have been summarised and recorded in the third SEBI order, in the interest of avoiding repetition and for the sake of brevity, relevant extracts from the said order, pertaining to the facts of the case, are reproduced hereunder:

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(a) *The target company was incorporated under the Companies Act, 1956, having its registered office at Agrima Business Centre, N. K. Mehta International House, 178, Backbay Reclamation, Mumbai - 400 020. The shares of the target*

company are listed on the Bombay Stock Exchange Limited ("BSE") and the National Stock Exchange of India Limited ("NSE").

(b) The target company convened an Annual General Meeting (AGM) on December 12, 1997 inter alia to pass a resolution under section 81(1A) of the Companies Act, 1956, to allot in the course of domestic and/or international offering, equity shares of ₹10/- each for a total of ₹400 crores including premium, at a price to be decided as per SEBI Guidelines on Preferential Issues, but not less than ₹30/- per share; to such class of persons being Indian financial institutions, banks, foreign companies, investment bankers, development institutions, mutual funds, FIIs, members, promoters or their associates etc, as the Board may decide, in one or more combinations thereof and in one or more tranches and on such terms and conditions incidental thereto. The resolution was passed in the AGM.

(c) The noticees applied for allotment of a total of 80 lakh shares and the target company had, on March 11, 1998, allotted 80,00,000 shares to five noticees, who are the wholly owned subsidiaries of a main promoter (i.e., Jagmi Investments Limited) of the Target Company, as under :

Name of the allottees	Number of shares allotted
Pallor	79,96,000 shares
Fern	1,000 shares
Fawn	1,000 shares
Tejashree	1,000 shares
Willow	1,000 shares
Total	80,00,000 shares

(d) The Target Company had, on March 27, 1998, further issued and allotted 40,00,000 shares to Tejashree. On March 31, 1998, the Target Company had also allotted 19,05,300 shares each to two different entities, namely, F. L. Smidth & Co., Denmark and Industrialisation Funds for Developing Countries.

(e) In the meanwhile, a public offer was made on March 19, 1998 by the 'Auto Riders Group'. This offer was stayed by an injunction order dated March 25, 1998 passed by a Civil Court in Porbander in a suit filed by Fawn. Thereafter, the Auto Riders Group had filed a complaint with SEBI alleging violation of

regulation 3(1)(c)(ii) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (since repealed) ("the Takeover Regulations").

(f) SEBI had initiated proceedings which culminated in the Order dated January 15, 1999, wherein it was observed that (1) the noticees are part of the promoter group; (2) the details required under regulation 3(1)(c)(ii) were not disclosed in the notice calling for the General Meeting ; (3) accordingly the regulations become applicable and the noticees were liable to make offer to the remaining shareholders of the target company; (4) price to be in accordance with the Takeover Regulations. In the interests of the shareholders of the target company and the securities market, SEBI vide the above order had directed the noticees to make a 'public announcement to acquire shares from the remaining shareholders (other than the promoters, their associates and person acting-in concert) of the target company an aggregate minimum of 20% of voting capital of the target company within a period of two months of the Order at a price in accordance with the regulations'.

(g) The SEBI Order was challenged by Fawn and the Target Company by way of two separate appeals before the Central Government. The Central Government (the appellate authority during that point in time) vide its Order dated April 05, 1999 rejected the appeals and upheld the SEBI Order dated January 15, 1999. Thereafter, Fawn and the other noticees challenged this SEBI Order by way of a Writ Petition (No. 1080 of 1999) before the Hon'ble High Court of Judicature at Bombay. The Hon'ble High Court while disposing off the said petition vide their Order dated March 03, 2011, observed / directed SEBI as follows :

" We have been informed that this order has also been confirmed by the Appellate Authority. This order admittedly was stayed by this court in the year 1999 itself and that stay continues to operate till today. After having heard the learned counsel appearing for both the sides, we find that due to passage of time and the circumstances have changed, it is for SEBI to consider whether even after lapse of so many years it still wants, the petitioner to make offer to the public, as is directed by the order impugned in the petition. In our opinion, due to passage of time and change in the circumstances, following order would meet the ends of justice.

(i) The petitioner shall be at liberty to make the representation to the SEBI within a period of six weeks from today seeking appropriate reliefs from SEBI. In case, such a representation is made, the SEBI shall consider it in accordance with law and make appropriate orders. In case, the representation is made within the

aforesaid period, the interim order passed by this court shall continue to operate till SEBI take a decision on the representation.

ii) In case, the decision of SEBI is adverse to the interest of the petitioner, the petitioner shall be entitled to adopt such remedies as may be available to them in law.

iii) All contentions of both the sides are kept open.

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3. Pursuant to the Order of the Hon'ble High Court, Fawn, vide letter dated April 14, 2011, filed representation (which was on behalf of all five noticees) before SEBI, wherein the following submissions/statements were inter alia made :

(i) The Target Company vide notice dated December 02, 1997 convened the Annual General Meeting (AGM) inter alia to consider issue of capital to the extent of ₹400 crore including premium to meet the cost of an expansion project. In the AGM, the resolution authorising the Board of Directors of the Target Company to issue and allot such number of equity shares in one or more tranches for an aggregate amount not exceeding ₹400 crore at a price not less than ₹30 per share, was passed.

(ii) Pursuant to the resolution, the noticees (who belong to the promoter group of the Target Company) applied for the allotment of 80,00,000 equity shares at a price of ₹30/- per share including ₹20/- per share as premium, for an aggregate amount of ₹2400 million.

(iii) On March 11, 1998, the Board of Directors of the Target Company resolved to issue 3,50,00,000 shares of ₹10/- each at a premium of ₹20/- to such class of persons viz., financial institutions, banks, foreign companies, promoters etc. In the same meeting, the Board of Directors allotted 80,00,000 shares, subject to a lock-in of three years, to the noticees.

(iv) The noticees are 100% subsidiary companies of Jagmi Investments Limited (a promoter of the Target Company).

(v) On March 17, 1998, one Auto Riders Group sent a notice to SEBI and the Target Company, of their public offer proposed to be made on March 19, 1998 through their merchant bankers, Ind Global Finance Private Limited. The Target Company observed that the said notice was defective and invalid inter alia for want of adequate notice to the company and also for failing to take into account the enhanced capital structure of the Target Company pursuant to the allotment of shares made on March 11, 1998.

(vi) Fawn Trading filed a civil suit against Auto Riders praying for an injunction. The Civil Court at Porbander passed an order restraining Auto Riders Group from acting pursuant to or in furtherance of or on the basis of the public offer dated March 1998 and also restraining the Target Company from acting pursuant to the said public offer.

(vii) Thereafter, authorised by the shareholders resolution dated December 31, 1997, 40,00,000 shares were resolved to be allotted to Tejashree Trading against part payment of 10% of the issue price including premium. Pursuant to the authority delegated by the shareholders in the meeting held on December 31, 1997, the Committee of Directors resolved to issue and allot 19,05,300 equity shares of ₹10/- each to F.L.Smitdth & Co., and Industrialisation Fund for Developing Countries against remittance of ₹30/- per share that is received in full.

(viii) On April 2, 1998, the merchant banker of Auto Riders Group made a complaint to SEBI inter alia alleging violation of regulations 23(1)(b) and 3(1)(c)(ii) of the Takeover Regulations, 1997, and requested SEBI to investigate and initiate action against the Target Company. Fawn Trading had written various letters to SEBI raising certain issues. Thereafter SEBI passed the Order dated January 15, 1999.

(ix) The whole controversy in this case is that the Takeover Regulations exempted preferential allotment from the requirement of making an open offer. According to regulation 3(1)(c) of the Takeover Regulation, preferential allotment would not attract the provisions of Regulation 10, 11 and 12 of the Takeover Regulations. Hence, the noticees were not required to make any offer to the public shareholders.

(x) The bone of contention is regarding certain disclosures in the notice dated December 2, 1997 issued to the shareholders. The notice issued for convening a general meeting stated that the allotment will be made to such class of persons - financial institutions, banks, foreign companies, promoters, associates. Therefore, it has been specifically stated that the allotment is to be made, amongst other persons, to the promoters. Preferential allotment was made to the noticees which were the subsidiaries of a promoter of the Target Company. Therefore, the five allottees (the noticees) were also the promoters of the Target Company. While the disclosure regarding identity of class of persons were made, the names of the promoters were not mentioned in the notice. Further, the specific price at which allotment would be made was also not mentioned.

(xi) As the preferential issue was exempt under regulation 3(1)(c) from the applicability of the regulations 10, 11 and 12, the direction of SEBI contained in the Order dated January 15, 1999 to acquire 20% of the voting capital from the shareholders is contrary to law. The basis of the said direction is non-disclosure of some information by the company in its notice dated December 2, 1997, which basis has no co-relation with the nature of direction (open offer) issued to them.

(xii) There was no change in control of the Target Company as the old management continued to remain in control and the acquisition by the noticees in the preferential allotment did not alter that position. The Takeover Regulations speak of "Takeover" and in the instant case there was no takeover by anybody and the existing management continued to be at the helm of affairs of the company and are continuing even today.

(xiii) The Takeover Regulations are based on the principle that if any person acquires voting rights beyond a threshold limit, then it is incumbent on that acquirer to make an open offer to acquire shares from other shareholders, subject to exceptions provided therein.

(xiv) Assuming, without admitting, that the requirements of proviso to regulation 3(1)(c) have not been complied with fully, the same would not take away the exemption granted under the said provision to a preferential allotment.

(xv) There was substantial compliance of disclosures on the part of the Target Company in the notice dated December 3, 1997 and thereafter in the filings made to the stock exchanges. No objection was raised with respect to the allotment of shares to the noticees.

(xvi) The Hon'ble Supreme Court in the case of Clariant International Limited has concluded that the shareholders who did not appear as such on the date when the impugned acquisition of the voting rights took place were not entitled to an open offer. Hence, in the present case the open offer will be more of a formality and will not serve any purpose. The shareholder base of the Target Company has reduced from 14,869 shareholders to 8,361 shareholders. Therefore, those who were shareholders at the relevant time and who could have been beneficiaries of their public offer (had it been made then) no more exist.

(xvii) The Target Company is registered with the Board for Industrial and Financial Reconstruction (BIFR) under the provisions of the Sick Industries (Special Provisions) Act, 1956. The BIFR is in the midst of considering a rehabilitation scheme for the Target Company and that any order by SEBI will have to take into account the fact that the Target Company is a sick company.

(xviii) The six monthly /two weeks average price prevailing on the BSE in the year 1999 was ₹30/- per share and the average price now (as on the date of reply) is ₹16.62/- per share. The share price has reduced by more than 45% and therefore the question that arises for consideration is - At what price the company is required to make a public announcement?

(xix) Except Pallor Trading (which is holding 25,136 shares as on February 29, 2008) all the other noticees have ceased to be the shareholders of the Target Company. Fastening any obligation to acquire shares now is devoid of logic. Further, the noticees do not have any resource to acquire shares from the shareholders. The SEBI direction has lost its significance and relevance in view of the passage of around 13 years during which several changes have taken place. In such circumstances, no coercive action against them at this point of time is called for and warranted.

(xx) The noticees cannot be regarded as having acted in concert as they are separate and independent entities. Considering all of them as a group is misconceived and directing all of them to make a joint offer without considering their individual acquisition is unfair and inequitable.

(xxi) The purported violation of disclosures in the notice dated December 2, 1997 was by the Target Company. However, the Order of SEBI dated January 15, 1999 was against the noticees. Therefore, there is a mismatch of parties. The acquirers (noticees) cannot be penalised for the lapse by the Target Company.

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5. Further to the consideration of the submissions of the noticees, SEBI vide its Order dated April 25, 2013 had inter alia concluded that -

a) The noticees are classified as promoters and have been allotted shares in the preferential issue.

b) The conditions prescribed under regulation 3(1)(c)(ii) of the Takeover Regulations were not complied with, and therefore the application of regulation 11 to such acquisition of shares by the noticees was not exempted.

c) Regulation 11(1) & (2) were therefore triggered on account of the acquisitions (on preferential allotment by target company) made on March 11, 1998 and March 27, 1998 by the noticees.

d) Directing the noticees to make a public offer would be appropriate and would meet the objectives of the scheme of the Takeover Regulations. The noticees were

accordingly directed to, jointly and severally, make a public announcement to acquire shares under the Takeover Regulations.

e) Direction for payment of interest on the consideration amount may not be reasonable as the Hon'ble Bombay High Court had stayed the SEBI Order dated January 15, 1999.

6. The noticees had challenged the above SEBI Order dated April 25, 2013 before the Hon'ble Securities Appellate Tribunal (Hon'ble SAT"), when the Hon'ble SAT had vide Order dated March 10, 2014 set-aside the SEBI Order with the directions as mentioned in paragraph 1 above. Pursuant to this Order of the Hon'ble SAT, SEBI advised the noticees to clarify as to how many are the present shareholders of the target company and their composition and out of the current shareholders, how many shareholders were there on the trigger date and their percentage holding at the time of trigger and also their present holding. In response, Fawn, vide letter dated May 09, 2014, while submitting the Shareholding pattern of the target company for the quarter ended on 31.03.2014, inter alia submitted that assuming the trigger date to be March 11, 1998 (date on which the board of directors of the target company resolved to allot shares), there were 14,998 shareholders holding 61,61,076 shares (51.38%) out of which as on date 4020 shareholders holding 15,99,279 shares (3.12%) are continuing to hold shares.

Fawn also submitted "... it is also pertinent to note that since 11.3.1998 to date, the shareholders of TC (target company) may have also traded in the shares of TC. At present, TC are unable to trace the very old records from 11.3.1998 to 26.2.2003. However, as per the records submitted by TC, from 27.2.2003 to till date, the said shareholders of TC have bought 15,94,250 shares and their holding should have been 77,55,326 shares, but as on date out of the aforesaid shareholders, 4020 shareholders are holding 15,99,279 shares. Thus, the eligible shareholders as on 11.3.1998 must have traded atleast in 61,56,047 shares of TC (ignoring bought and sold during the period). Since the shares are dematerialized and therefore fungible, it cannot be assumed that the said shareholders are still holding all or any part of the shares, which they were holding on 11.3.1998. Of course as and when TC trace the records from 11.3.1998 to 26.2.2003, we will arrange to get the information from TC and inform you"

3. After taking into consideration the written and oral submissions of the noticees, the following *inter alia* was decided in the third SEBI order -

- (i) The Hon'ble High Court had observed that 'due to passage of time' and the 'changed circumstances', it is for SEBI to decide whether even after lapse of many years, it still wants the noticees to make the public announcement. Further, a reading of the Order passed by the Hon'ble High Court would indicate that the findings and observations with respect to the violations/the liability incurred by the noticees, as found in the SEBI Order dated January 15, 1999 read with the Central Government's Order dated April 05, 1999, have not been set-aside. Accordingly, there is no reason to reconsider or revise the views taken by SEBI or the Appellate Authority (Central Govt.) in respect of the findings. Therefore, in terms of the Order of the Hon'ble High Court read with the Order dated March 10, 2014 passed by the Hon'ble SAT, SEBI is directed to only consider whether even after lapse of so many years it still wants the acquirers/noticees to make offer to the public, as directed vide SEBI Order dated January 15, 1999.
- (ii) The said SEBI Order dated January 15, 1999 had directed the five noticees to make a public announcement to acquire an aggregate minimum of 20% of voting capital/shares of the Target Company from non-promoter shareholders of the Target Company, within a period of two months from the date of the Order at a price in accordance with the Takeover Regulations. This SEBI Order has been upheld by the Central Government vide its Order dated April 05, 1999.
- (iii) In the case of the Nirma Industries Ltd. and Anr. v. SEBI, the Hon'ble SC did not grant any relief to the appellant on account of "passage of time" or "changed circumstances".
- (iv) As observed by the Hon'ble SAT in the case of Nirvana Holdings Pv. Ltd, v. SEBI, SEBI need not give any reasons while issuing a direction for a public offer and that only when such directions are not in the interest of the securities market or for the protection of interest of investors, could SEBI deviate from the normal rule.

- (v) In the present case, it was the noticees who had preferred the appeal against the SEBI Order dated January 15, 1999. The Central Government had, in the first appeal, upheld SEBI's Order. The findings in the SEBI Order had not been reversed by the Hon'ble High Court of Bombay. If passage of time is allowed as a ground, then it may make place for acquirers who had defaulted or delayed in making a public announcement of open offer to employ delay tactics, filing frivolous appeals and thereafter cite the delay that had ensued in evading their liability to make the open offer. It then would be unfair for the shareholders of that company who lose their valuable right to exit. As the 'passage of time' is only because of the continuous litigation pursued by the noticees, there should be no advantage of 'passage of time' or 'changed circumstances' that should accrue to them. The noticees cannot be termed as the victims of delay, rather they are the reason for the same.
- (vi) The noticees have also contended that the SEBI Order dated January 15, 1999 has lost its significance in view of the passage of time and in such circumstances, no coercive action against them is called for. An order directing an acquirer to make an open offer in a case of default, is not a coercive order. It is an equitable remedy to the shareholders. Therefore, such a direction cannot be equated with a penal direction. Monetary penalties imposed under adjudication proceedings or, fine or imprisonment imposed in a prosecution proceedings under section 24 of the SEBI Act read with the Takeover Regulations are penal in nature.
- (vii) The noticees have contended that their net-worth is in the negative and do not have resources for acquiring the shares of the Target Company in an open offer. As regards such claim of changed financial circumstances of the noticees, it needs to be appreciated that such grounds cannot be a valid defence. Further, it is not the case of the noticees that they have been declared as 'insolvent'. The noticees have also contended that the share price of the target company is reducing in value.
- (viii) The acquirers/noticees had acquired shares in a preferential allotment during 1998. When the acquirers have enjoyed such a benefit, they should ideally discharge all obligations that may be associated with such acquisitions. It is unfair to say that the company was profitable at the time of non-

compliance by the acquirers and it is now a sick company, when such obligation to make a open offer has to be made in terms of the law. These grounds are not cogent reasons for absolving them from their liability.

(ix) Another ground raised by the noticees is that except for Pallor Trading, all the other noticees have ceased to be the shareholders of the Target Company and therefore fastening any obligation on them to acquire shares now is devoid of logic. I am of the view that once a liability is incurred to make an open offer, such liability is not discharged till the open offer is made. The liability shall remain irrespective of whether that entity continues or ceases to be the shareholder.

(x) If the noticees make a public announcement of an open offer now, the same would be a delayed open offer. In this case, the noticees are also liable to pay interest on the offer price as provided under the Takeover Regulations, 1997 read with the Hon'ble Supreme Court's Order dated August 25, 2004 in *Clariant International Limited and another vs. SEBI* [Appeal (Civil) No. 3183/2003], to those shareholders who were holding the shares as on the trigger date and continue to hold the same and tender the shares in the delayed offer if made by noticees.

(xi) The noticees have argued that 90% of the earlier shareholders have off-loaded their stake in the Target Company and hence the public offer if made will be a mere formality and would involve huge costs to them. They have also contended that it is not possible to trace which shares were held by the shareholders in 1998 as shares are dematerialised. Under the scheme of the Takeover Regulations and the observations made by the Hon'ble Supreme Court passed in its judgment dated August 25, 2004 in *Clariant International Limited and another vs. SEBI* [Appeal (Civil) No. 3183/2003], in case of a delayed open offer, such open offer shall be made to all shareholders of the company at an offer price calculated in accordance with the Takeover Regulations and that the interest would be payable only to those original shareholders who held on to the shares as on the trigger date and continued to hold the same and tendered them in a delayed offer. An open offer shall be made to all shareholders of a target company. Determining the original shareholders would be relevant only

for the purposes of identifying who would be eligible for interest payment for the delayed open offer.

(xii) As informed by the noticees, the offer price along with interest would be payable only to 4020 shareholders (if their shares are tendered and accepted) as these shareholders held shares of the Target Company as on the trigger date and continue to hold them. The other shareholders (if they tender shares and the same are accepted) would be eligible only for the offer price calculated as per the Takeover Regulations.

(xiii) The directions mentioned in clauses (a) to (d) of regulation 44 (prior to the amendment) mentioned above are not 'exhaustive' directions which SEBI could order invoking regulation 44. Regulation 44 uses the expression "including", which naturally means that SEBI could pass any directions in the interest of securities market including those directions mentioned under clauses (a) to (d). By using the expression, SEBI has a wide scope with respect to the nature of directions it could pass in a matter in the interest of securities market. In this regard, I also refer to the observation inter alia made by the Hon'ble Supreme Court of India in the matter of Vinay Chandra Mishra [AIR 1995 SC 2348], that the expression "including" has been interpreted by courts, to extend and widen the scope of power." Therefore, the above argument of the noticees is without merit.

(xiv) The noticees have referred to a later Order passed by SEBI dated July 28, 2004 and submitted that in this case SEBI had considered the factors such as approval of shareholders in the AGM, no change in control or in the Board of Directors and decided not to give directions to make a public offer but instead adjudication proceedings were directed to be initiated for such violations in not making the required disclosures. I have perused this Order of SEBI and note that SEBI has observed that exemption from applicability of regulation 11 for such acquisition was not available to the acquirer as disclosures mandated under regulation 3(1)(c)(i) & (ii) were not made. It needs to be appreciated that under the scheme of the SEBI Act and the rules and regulations framed thereunder, directions under sections 11 and 11B could be issued simultaneously with further action in the nature of adjudication or prosecution

or a combination of all. The argument of the noticees that only adjudication proceedings could be invoked for such violations is therefore misplaced.

- (xv) Regarding 'change in circumstance', the noticees have not submitted any particular circumstance which would afford them any benefit, except for stating about the financial condition of the target company, reference to the BIFR, share price collapsing, noticees' net-worth is in the negative and that they do not have resource to make the open offer. These general submissions have already been dealt with and found to be of no relevance or merit.
- (xvi) As the present matter is with respect to acquisition of shares in a preferential allotment and with reference to regulation 3(1)(c) of the Takeover Regulations, I note that the said regulation was incorporated as per the recommendations made in the Report dated January 18, 1997 of the Justice Bhagwati Committee. The Committee had recommended that preferential issue of capital made with express consent of the shareholders to whom full disclosures about the proposal including the likely changes in the control of the company, if any, had been made, may be exempted if the said allotment has been made by way of explanatory statement to the notice to the general meeting in which the proposal is being put up for shareholders approval.
- (xvii) It is the case of the noticees that the non-compliance with the conditions would not take away the exemption and that their non-compliance cannot be the basis for directing them to make a public offer to acquire shares. These submissions cannot be accepted. If conditions are prescribed to avail a benefit, the person who wishes to avail such benefit should comply with all conditions. For claiming a benefit or exemption, the person should comply with all the conditions that are prescribed, else such benefit or exemption shall not be available.
- (xviii) The requirement of mentioning the names of the acquirers and the price at which shares are allotted is not a technical issue as contended by the noticees. The shareholders of the target company have the right to know as to who is coming in as a major shareholder, when they are passing a resolution with respect to the preferential allotment in the General Meeting. Therefore, the violation cannot be considered as trivial. Further, the noticees are subsidiaries

of the promoter of the target company and therefore cannot be considered as innocent third parties who should not be made liable for the fault of the target company. All the noticees/the acquirers are wholly owned subsidiaries of the promoter, who were in control of the target company at the time of issuance of notice to the shareholders. Thus, the acquirers through their holding company (promoter) could have easily ensured the disclosures as per the regulations in the notice.

(xix) The noticees have also contended that the disclosures under regulation 3(1)(c)(ii) was required only when there was a change in control of the target company. The submission is incorrect. The provision does not state that disclosures as required under regulation 3(1)(c)(ii) should be made only if such allotment results in a change of control as information with respect to whether such allotment would result in change in control over the company is one of the disclosures as required under regulation 3(1)(c)(ii) of the Takeover Regulations.

4. The noticees again filed an appeal against the third SEBI Order, upon which the Hon'ble SAT vide order dated September 06, 2016 read with order dated September 14, 2016 set aside the third SEBI Order with a direction to SEBI to *"pass fresh order on merits and in accordance with law without being influenced by the observation made in the earlier orders on April 25, 2013 and December 31, 2014 respectively."*

5. Accordingly hearing notice was issued to the noticees and opportunity of personal hearing was granted on April 16, 2018. For the noticees, Authorised representatives - AM Fadia and AP Rao were present in person. Submissions were made by Senior Advocate PN Modi and was accompanied by Advocate Neville P. Lashkari and Advocate Deepak Dhane from Joby Mathew and Associates. Summary of the oral submissions made are as follows:

- (i) Since the target company was in urgent need of funds, 80 lakh shares @ Rs 30 per share were issued to promoter entities. The impugned shareholder resolution and notice for AGM did in fact refer to the preferential allottees as 'promoters'. The only error was in not giving details of each of the allottees. Though the specific price of allotment was not mentioned, it was stated in the notice(s) that allotment would be made as per SEBI Guidelines and in no case would be lesser than Rs 30/- per share. Therefore there was

substantial compliance with the requirements of the automatic exemption laid out in regulation 3(1)(c)(ii) of the Takeover Regulations, 1997.

- (ii) No shareholders were prejudiced due to the actions of the noticees and no shareholder had made any complaint with respect to the acquisition of shares by the noticees.
- (iii) Several of the persons who held shares during the relevant point in time are no longer holding shares in the target company.

The learned Advocate also referred to earlier decisions of SAT and SEBI with respect to the aforesaid provision of Takeover Regulations, 1997 to support his submissions.

6. Later vide letter dated May 10, 2018, noticees filed their written submissions. Summary of the written submissions are as follows:

- (i) SEBI had no power to order an Open Offer under Regulation 44 of the Takeover Regulations 1997. It was only on 9.9.2002 that Regulation 44 was substituted and Regulation 44 (f) was added empowering SEBI to give such a direction. Under Section 15H of the SEBI Act as it was on the relevant date, only a monetary penalty of a maximum of Rs. 5 Lakhs could be imposed on a party for a violation of the Takeover Regulations 1997. There are Orders passed in cases where identical issues arose and there is no basis to distinguish the same from the facts of the present case. Therefore, it would also be discriminatory to now direct the Noticees to make an open offer, that too after the lapse of 21 years.
- (ii) As per the Bhagwati Committee Report, full disclosure under Reg. 3(1)(c)(ii) was required only when there was to be a change in control, and admittedly there was no such change in control in the present case. The promoter group already held 48.64% of the equity capital of the Target Company even before the said allotment and admittedly there was no change in control over the Target Company.
- (iii) The Noticees had not been identified as the allottees on the date of the said AGM notice dated 2.12.1997 issued by the Target Company. Therefore, the Target Company could not have disclosed their identity in the notice. The law does not require performance of impossible conditions.
- (iv) The Noticees are investment companies of the promoter group. Their specific name or identity would be of no relevance to the shareholders. The shareholders have not been prejudiced in any way. No complaint has been

filed by anyone other than "Autoriders", which as aforesaid, filed the complaint only because their hostile takeover bid was thwarted. No other investor / shareholder made any such complaint. No one has alleged that adequate disclosures were not made in the said 2.12.1997 AGM Notice of the Target Company, or that they were not aware of all relevant facts, or that they would not have unanimously passed the said resolution dated 31.12.1997 if they had been made aware that the shares would be allotted to the Noticees.

- (v) The proposed allotment price was in fact disclosed in the said AGM notice. The same clearly disclosed that the price would be fixed as per the SEBI Guidelines on Preferential Issues as was then applicable, but at a price of not less than Rs. 30 per share; i.e.; the minimum price would be Rs. 30/- per share (Rs. 10/- face value and Rs. 20/- premium). However, if the market prices moved up and therefore the price had to be revised upward, then the price would increase. However, if the prices moved down, the allotment price would not be reduced. Thus, the shareholders were to consider whether they would prefer to have a rights issue at Rs. 30/- per share instead of any such preferential issue. They unanimously approved the preferential issue at Rs. 30/- per share. That was the price at which the allotment was in fact made. Therefore it cannot be alleged that the disclosure was inadequate.
- (vi) At best the allegations are of small technical and venial defects / omissions, that too by the Target Company and not by the Noticees. The allottees / Noticees cannot be held liable for any alleged defect in the said 2.12.1997 AGM notice given by the Target Company and ought not to be made to suffer for the same.
- (vii) Regulation 3(1)(c)(ii) of the 1997 Takeover Regulations which was applicable at the relevant time, on a plain language interpretation thereof, stipulated only for disclosure of the class of the proposed allottees, and the other disclosures were required to be made only when the proposed allotment was to result in an increase "...to 5% or more..." i.e. the allottees must hold less than 5% before such proposed allotment and the proposed allotment must take their holding to 5% or more.
- (viii) Takeover Regulations prescribe tight time lines between the trigger dates and the open offer to be made and do not even remotely envision an open offer being made after 21 years. Therefore, even the Hon'ble Bombay High

Court and the Hon'ble SAT correctly held that the passage of time and changed circumstances were most relevant and called for a reconsideration of what action would be appropriate.

- (ix) It is now not possible to trace which shares were held by the shareholders in 1998 and are continued to be held by them to date since shares are dematerialized.
- (x) Out of the first, second and third SEBI Orders, only the 31.12.2014 Order calculated that the Offer Price should be at Rs. 33.94 per share. However, the said Order itself recorded that by then the market price was higher. Realizing that it would therefore be futile to direct any open offer to be made since no shareholder would offer shares, the said Order directed the Noticees to pay 10% interest to jack up the price. The Hon'ble SAT set aside the said Order inter alia on the ground that the previous Order of 25.4.2013 held that no Interest could be payable in view of the fact that the Hon'ble High Court had stayed the open offer which is also why the Hon'ble High Court directed SEBI to reconsider the matter in view of the "passage of time and changed circumstances".

Issues for Consideration

7. I now proceed to address the issues relevant for consideration and determination of this case. Issues listed for consideration are as follows:
- A. Whether SEBI is empowered to pass directions for making open offer in the instant case?
 - B. Whether the absence of an investor grievance would be a sufficient ground to absolve the noticees from the statutory obligation to make an open offer ?
 - C. Whether the noticees had triggered the open offer under the Takeover Regulations 1997 and whether an open offer is required to be made by the noticees?
 - Whether the preferential allotment of target company's shares to the noticees triggered applicability of section 11 of the Takeover Regulations?
 - Whether the noticees are eligible for exemption under regulation 3 thereof- are the conditions required to be fulfilled merely procedural in nature or necessarily to be satisfied?
 - D. Whether the passage of time, since the event of the alleged violation had taken place, has any bearing on the nature of directions?

- Whether directions for open offer are tenable considering that only one of the noticees continues to be a shareholder in the target company i.e. SCL?

E. Whether interest can be levied on the open offer amount?

SEBI's power to pass directions

8. The noticees' reliance on the limited ambit of regulation 44 as it existed prior to its amendment in 2002 to contest SEBI's power to issue directions to make open offer, is at best a weak one. Firstly, directions listed under regulation 44 of the Takeover Regulations, 1997 as it existed were inclusive in nature and did not restrict SEBI's power to order open offer. The amendment in 2002 to regulation 44 inserting *inter alia* clause(f) providing power to direct any person to make an open offer, can only be seen as a clarificatory one. It does not by itself denude SEBI's powers to do so under the Takeover Regulations. In any case, Section 11B of the SEBI Act is a provision that imparts an overarching ability to issue directions which are preventive and remedial in nature. A plethora of decisions including those by the Hon'ble Supreme Court support the wide scope of directions under section 11B. The decision of the Hon'ble Supreme Court in the case of *Clariant International Ltd. & Anr. v. SEBI* (2004) has also recognised the wide ambit of directions under section 11B even though in that case, directions were purported to have been issued also under regulation 44 of the Takeover Regulations, 1997. Sections 11(1) and 11B of the SEBI Act reiterate SEBI's founding principles and give it a free hand to take any measure that will serve the end objective of protecting investors in the securities market. Hence, I do not agree with the noticee's contention that SEBI has no powers to order open offer for the alleged violation in March of 1998. Also, I do not agree with the noticees' contention that only adjudication proceedings under section 15H would be relevant in the instant case. Proceedings for directing an open offer is an equitable and remedial measure while adjudication proceedings are penal in nature. Both measures are independent of each other with separate objectives.

Requirement of complaint

9. The noticees have contended that there was no investor complaint against the alleged infraction by the noticees with the exception of a motivated one by a set of entities which were trying to acquire shares of SCL by making an open offer, and that therefore SEBI should not take an adverse view. The noticees' contention

rests on the assumption that a breach of provisions of regulations which do not result in any investor grievances should not lead to any consequences under the regulations. Investors right to exit at a fair price in the event of a trigger of open offer obligations under the Takeover Regulations, is sacrosanct. SEBI functions both as an enforcer of the law and as a guardian to protect the investors interest. Merely because no investors have complained, cannot mean that investors interest are not damaged by the noticees' actions. A decision to enforce the regulations is not dependant on whether there are investor complaints or not. However the presence of investor grievances may serve to amplify the gravity of an individual case.

Liability to make open offer

10. The promoters of SCL (i.e. the target company) held 48.64% of the share capital of the company. By way of preferential allotment by SCL on March 11, 1998 in pursuance of an AGM resolution decided on December 12, 1997, 80,00,000 shares of SCL were allotted to the noticees. Since the noticees were part of the promoter group, the said allotment led to increase of shareholding of the promoter group from 48.64% to 69.19% shareholding, which typically would have triggered the need to make open offer in terms of regulation 11(1) of the Takeover Regulations. Regulation 11(1) of the Takeover Regulations as it then existed read as follows:

"Consolidation of holdings.

11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, not less than 10% but not more than 51% of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 2% of the voting rights, in any period of 12 months unless such acquirer makes a public announcement to acquire shares in accordance with the regulations."

Applying the aforesaid provision, any person who directly or with persons acting in concert, hold shares providing voting rights amounting to 10% or more, is required to make an open offer if he acquires more than 5% of voting rights of the target company. However, as per regulation 3(1)(c), preferential allotments made in favour of promoters or promoter group entities were exempt from the obligation to

make open offer in terms of regulation 11, provided the conditions stipulated thereunder were complied with. Regulation 3(1)(c), as it existed then are reproduced hereunder for ease in reference –

"3. (1) Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to:

...

(c) preferential allotment, made in pursuance of a resolution passed under Section 81 (1A) of the Companies Act, 1956 (1 of 1956):

Provided that,

(i) Board Resolution in respect of the proposed preferential allotment is sent to all the stock exchanges on which the shares of the company are listed for being notified on the notice board;

*(ii) full disclosures of the identity of the class of the proposed allottee (s) is made, and **if any of the proposed allottee (s) is to be allotted such number of shares as would increase his holding to 5% or more of the post issued capital**, then in such cases, the price at which the allotment is proposed, **the identity of such person(s)**, the purpose of and reason for such allotment, consequential changes, if any, in the board of directors of the company and in voting rights, the shareholding pattern of the company, and whether such allotment would result in change in control over the company are all disclosed in the notice of the General Meeting called for the purpose of consideration of the preferential allotment."*

(emphasis supplied)

The allegation against the noticees as elaborated in the first SEBI Order was that in the notice of the AGM called for the purpose of consideration of the preferential allotment, the noticees had not disclosed the identity of the persons to which SCL shares had been preferentially allotted and the price at which the allotment had been made was also not disclosed. In this context, the noticees contention is two fold- firstly, for regulation 11(1) to apply, the allottees must have held less than 5% before such proposed allotment and the proposed allotment must take their holding to 5% or more. Secondly, the noticees contend that they were in any case in compliance of regulation 3(1)(c).

11. The first contention is not acceptable for the reason that the logic ascribed thereto would lead to an absurd situation where the restriction on making preferential

allotment would only apply to persons holding less than 5% of the target company's voting capital. Rather the provision sought to address the possibility of the target company preferentially allotting shares to persons increasing the preferential allottee's shareholding significantly which necessitated adequate disclosures so that investors could be duly informed.

- 12.** With regard to the second contention, as can be seen from the extract of regulation 3(1)(c) above, for preferential allotments to promoters to be exempt from the obligation of making open offer, the condition of disclosing the details of the person/entity to which the allotment is proposed to be made and the price at which the allotment is proposed to be made, is required to be disclosed prior to the decision approving such allotment being taken at the AGM. Extract of the notice issued for the AGM (40th AGM of the company) and the Explanatory Statement annexed thereto, as submitted by the noticees are reproduced below for ease in reference:

Notice:

"To consider and if thought fit, to pass with or without modification, the following resolution as a Special Resolution :-

RESOLVED THAT In terms of Section 81 and all other applicable provisions, if any, of the Companies Act, 1956 (including any statutory modification(s) or re-enactment . thereof for the time being in force and as may be enacted from time to time) and in accordance with the provisions of the Articles of Association of the Company and the Listing Agreements entered into by the Company with the Stock Exchanges, where the shares of the Company are listed and subject to the consent of all concerned authorities, if and to the extent necessary and such other approvals, permissions and sanctions as may be necessary and subject to such conditions and modifications as may be prescribed under applicable laws or imposed while granting such approvals, permissions and sanctions, which may be agreed to by the Board of Directors(hereinafter referred to as 'the Board) of the Company and/or a duly authorized Committee thereof for the time being exercising the powers conferred by the Board at its absolute discretion, the consent of the Company be and is hereby accorded to the Board to offer/issue/allot in the course of domestic and/or international offering, equity shares of the face value of Rs. 10/- each, of an aggregate amount not exceeding Rs. 400 crores (Including premium) at a price as shall be decided by the Guidelines on Preferential

Issues issued by the Securities and Exchange Board of India, but on no account to be at a price less than Rs. 30/- per share (hereinafter for brevity's sake referred to as 'Securities') to such class of persons being either Indian financial institutions, banks, foreign companies, investment bankers, development institutions, pension funds, mutual and other funds, foreign institutional investors, members, promoters or their associates etc., as the Board may at its absolute discretion decide, (but provided that by such allotment there does not result in any change in control over the Company), in one or more modes of combinations thereof and in one or more trenches and on such terms and conditions incidental thereto...

'RESOLVED FURTHER THAT such of these Securities to be issued as are not subscribed may be disposed of by the Board/Committee thereof to such persons and in such manner and on such terms as the Board Committee in its absolute discretion think most beneficial to the Company including offering or placing them with any of the class of persons mentioned above as the Board/Committee thereof may in its absolute discretion decide.

..."

Explanatory Statement:

"The Company's strategy is to modernise and expand its production capabilities and to establish its Market leadership. In evaluating and deciding upon various related proposals, it has become necessary to look at various financing options with a view to reduce overall cost of capital. The Board is presently in dialogue with various persons in the class of person is mentioned in the resolution. The Board consider it necessary to. raise financial resources at appropriate times by further Issue of equity shares in the course domestic./international offering to such class of persons and in such manner as stated in the resolution.

The Company, if necessary, in consultations with appropriate authorities and advisors, will fix at the relevant time, the detailed terms of the issue. In particular, the price of the issue shall riot be at a price lower than Rs. 30 per shore, It shall be ensured that there is no change in the Board and control over the Company.

The said resolution is an enabling resolution conferring authority on the Board to cover all present and future contingencies and corporate requirements.

..."

13. As admitted by the noticees, the target company i.e. SCL failed to disclose the names of the entities to which preferential allotment was to be made and the exact price at which such allotment was to be made. However a broad stipulation of the type of the entities to which preferential allotment was to be made was disclosed. The noticees contend that under regulation 3(1)(c), it was sufficient to disclose the 'class' of shareholders, which has been appropriately done so in the notice for the AGM. As regards the price, the noticees contend that the AGM notice disclosed the lower end of the possible price at which allotment would be made and also assured that the allotment would be in accordance with the SEBI Guidelines on preferential allotment, and therefore complied with the requirements of clause (ii) of proviso to regulation 3(1)(c).

14. I am unable to accept the noticee's argument in this context. Since the strict terms of the disclosure were not complied with, the acquisition of SCL's shares by the noticees by way of preferential allotment was considered to be in violation of regulation 11 and therefore the noticees were required to make an open offer for SCL's shares in terms of the Takeover Regulations. The language of the regulations makes it clear that the exemption provision must be read and applied strictly. The requirement of mentioning the names of the acquirers and the price at which shares are allotted is not a technical issue as contended by the noticees. As envisaged by the regulations as it then existed, shareholders of a target company are empowered with the right to be aware of an incoming shareholder particularly since the allotment of shares is being done preferentially. It may be so that the allottees are part of the promoter group thereby not resulting in any change in control, but public shareholders can take an informed decision only when they are aware of the relevant information. It must also be noted that admittedly, one of the preferential allottee i.e. Pallor Trading Pvt. Ltd. was not part of the promoter group as on the date of the AGM notice and resolution, which aggravates the extent of the violation. Clause (ii) of the proviso to regulation 3(1)(c) specifically reads that the identity of the person to whom the allotment is proposed to be made is required to be disclosed if the allotment increases his

holding to 5 % or more. The requirement to make disclosure, in the notice of the AGM, regarding the identity of the preferential allottees, ensures that shareholders take a clear and informed decision on whether to participate in the AGM and vote for or against the resolution to preferentially allot the shares to the identified persons. It is possible for shareholders in such a scenario to participate in the AGM and reject preferential allotment beyond the stipulated threshold if they do not agree to the proposed allotment in favour of the identified persons. Having concealed this information in the notice to the AGM, the investors were deprived of taking a calculated judgment and/or an receiving an option of exit at a fair price. Further, the regulations also envisaged that public shareholders must be aware of the price at which the preferential allotment in order to ensure transparency and avoid discriminatory benefits by virtue of the promoters ability to control the company's decision to make preferential allotment. While the SEBI Guidelines on preferential allotment broadly take care of the concern that pricing must not be prejudicial to public shareholders, the principle behind the requirement to make this disclosure is equally important from a corporate governance point of view. Therefore, even from the point of view of the spirit of the regulations, it would not be appropriate to treat the breach of the procedural norms by the target company as being venial, as contended by the Noticees. In the facts and circumstances of the instant case, the contention of the noticee that the procedural error cannot be attributed to them but to the target company, is also unfounded. In the instant case, the preferential allottees were 100% subsidiaries of the promoter company i.e. Jagmi Investments Ltd. and therefore formed part of the promoter group. Therefore, the noticees were clearly only an extended arm of the said promoter and thereby cannot seek to shift the blame onto the target company which was controlled by their holding company. For the same reason, the contention that the noticees had not been identified as allottees as on the date of the AGM notice, is equally without merit.

- 15.** The legal position, that the conditions under regulation 3(1)(c) are necessary in order to avail of the exemption from making open offer in the event of preferential allotment of shares, has earlier also been considered by the Hon'ble SAT in several matters. In the case of Arya Holding Ltd V. P. Sri Sai Ram, Adjudicating Officer (2001) 31 SCL 549 the Hon'ble SAT held as under:

"..... it is clear from the provisions of regulation 3(1)(c) cited above that an acquisition pursuant to a preferential allotments simplicitor

will not be eligible for exemption unless the requirements stipulated in clauses (i) and (ii) are complied with. In this context it is pertinent to mention that since the law specifically provided that the exemption is subject to compliance of certain requirements specified there in, to avail the exemption it is absolutely necessary to comply with the specified requirements. It is therefore necessary to examine whether the appellants had fulfilled the requirements of clauses (i) and (ii) of regulation 3(1)(c)".

(emphasis supplied)

In the case of *Luxury Foams Ltd. v. SEBI* (Order dated 20.03.2002), the Hon'ble SAT held as under:

"It is to be noted that regulation 3 provides exemption from complying with the requirements of regulation 10, 11, 12 in respect of certain type of acquisitions stated in the said regulation. The requirement of compliance in terms of regulation 10, 11, 12 is by the acquirer. So if the acquirer is keen to avail of the exemptions, it is for him to satisfy as to whether the preconditions required to be complied with to avail exemption have been complied with or not. It is to be noted that the impugned order, is directed against the Appellants on account of their failure to comply with requirements of regulation 10 etc., and not directed against the company for not fulfilling the preconditions so as to qualify the preferential allotment to be exempted."

16. It is settled law that where law provides for any exception to/exemption from, a general mandate, then the conditions stipulated by law for such exception/exemption are required to be strictly complied with. Extract from the case of *Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal and Ors.* decided by the Hon'ble Supreme Court on 18.11.2010 - MANU/SC/0955/2010 reads as follows:

"22. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved."

Therefore based on the facts and circumstances before me, I find that since the noticees are not eligible for exemption in terms of regulation 3(1)(c) of the Takeover Regulations, 1997, they are liable to make open offer.

Change in Circumstances

- 17.** The Hon'ble Bombay High Court had vide its order dated March 03, 2011 concluded that it is for SEBI to consider whether after lapse of so many years and due to passage of time and change in circumstances, the noticees still need to make a public offer as directed in the first SEBI order. SEBI had reconsidered the issues concerned afresh twice but the orders of SEBI on both occasions were remanded back by the Hon'ble SAT for reconsideration. I have examined the facts of the case along with the applicable legal provisions attracted and find that there is no reason to differ with the findings and direction of the first SEBI order to the noticees to make an open offer. I note that in the particular facts of this case, the lapse of time and delay may be ascribed in large measure to the noticees themselves by resorting to multiple litigations. In the instant case, SEBI had passed the first SEBI order within a few months of having taken cognisance of the contravention. The directions to make an open offer were timely in nature and intended to repair a damage done by the noticees who had not made an open offer despite breaching the provisions of the Takeover Regulations, 1997. One of such noticees (i.e. Pallor Trading Pvt. Ltd.) was not even part of the promoter group at the time of the said breach. If directions were to be modified merely because of the efflux of time, due in large part to the noticees, it would set a dangerous precedent for those who infringe the rights of public shareholders and investors and incentivise such persons to avoid their duties under law by resorting to endless litigation. The only consideration for SEBI in such cases would be to evaluate whether such a direction would be in favour of the investors or not. Also, the lapse of time has not led to any change in the facts of the case with the exception that even Pallor Trading Pvt. Ltd subsequently became part of the promoter group. However as discussed earlier, the provision of law as it then existed does not discriminate whether the preferential allottees were already in control of the target company or not. In my view, any provision of law which confers a right on the investors (in this case, the right to receive an exit opportunity at the best possible price) must be interpreted strictly.

- 18.** Two other questions that remain to be answered in this context is whether the noticees continue to be shareholders of the target company and whether persons who were shareholders as on the date of the trigger of the open offer continue to be shareholders of the target company.
- 19.** With regard to the first question, I note that from the latest available shareholding pattern, one of the noticees i.e. Pallor Trading Pvt. Ltd. continues to be a shareholder in the target company, even though the other noticees are no longer shareholders of SCL as on date. Further as noted earlier, the noticees were also 100% subsidiaries of the promoter company i.e. Jagmi Investments Ltd., which continues to be a major shareholder in the target company. Therefore this is not a case where the acquirers are no longer associated with the company and are being unfairly cast with the liability to make open offer in a company in which they have no interest any longer. In any case, given the unambiguous language of the regulations and the beneficial intent towards the common investor, whether or not the offending noticee continues to be a shareholder in SCL or not is not relevant to determining his liability under the Takeover Regulations. Therefore, I do not agree with the contention that on account of the change in shareholding, the changed circumstances do not warrant an open offer.
- 20.** The second question was addressed to the noticees during earlier proceedings before SEBI. The third SEBI order records at para 6 of the said order that as on the date of the order, out of the persons who were shareholders on the date open offer was triggered, 4020 shareholders holding 3.12% of the company's shareholding continued to hold shares in the company. The same question was again posed to the noticees during the course of the hearing granted to them and by way of reminder an email dated December 27, 2018 was sent to the noticees. In its reply dated May 10, 2018, at page 12 thereof, the noticees have replied as follows: *"It is also now not possible to trace which shares were held by the shareholders in 1998 and are continued to be held by them to date since shares are dematerialised."* Subsequently, in the noticees' letter dated January 16, 2019, it has been submitted that as of December 31, 2018, 1836 shareholders holding 12,03,300 shares (1.74%) continue to be shareholders of the Target Company. Therefore it would be reasonable to presume that there are large number of persons, who were shareholders on the date of the open offer being triggered, continuing to hold shares in SCL as on date. These shareholders were obviously

the immediate victims of the lost opportunity to receive an exit offer, which the noticees failed to give. Even if there are limited number of shareholders who continue to hold shares in SCL, they must not be denied of their statutory right to be offered an exit at the best possible price. Whether that opportunity is seized of by any shareholder or not is a question that is not relevant to determine whether the opportunity itself needs to be given to the public shareholders of SCL.

- 21.** In view of the above, I do not find any reason to conclude that the passage of time warrants any change in the directions passed in the first SEBI Order. There are no circumstances that require a relook in this regard. Infact as observed earlier, a change in the directions based on the consideration of delay in this case, would be detrimental to the investors and set a retrograde precedent.

Interest on the Open Offer price

- 22.** In addition to the provisions of the Takeover Regulations, the legal sanctity of SEBI's directions imposing interest on delayed open offer has been affirmed by the Hon'ble Supreme Court in the case of Clariant International Limited and another vs. SEBI [Appeal (Civil) No. 3183/2003]. In the said case, the Hon'ble Supreme Court had held *inter alia* as follows:

"

Interest can be awarded in terms of an agreement or statutory provisions. It can also be awarded by reason of usage or trade having the force of law or on equitable considerations. Interest cannot be awarded by way of damages except in cases where money due is wrongfully withheld and there are equitable grounds therefor, for which a written demand is mandatory.

....

In Executive Engineer, Dhenkanal, Minor Irrigation Division, Orissa and Others vs. N.C. Budharaj (Deceased) by Lrs. And Others [(2001) 2 SCC 721], Raju, J. speaking for the majority held that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called, namely, interest, compensation or damages.

.....

Directions by the Board are required to be issued for the purpose of protecting the interest of the investors which would imply that such protection be

extended to the persons who are entitled thereto and not any other shareholder who would get the same by windfall. The shareholders contemplated under clause (i) of Regulation 44 must be those shareholders whose shares have been accepted upon public announcement of offer and who have suffered loss owing to blockage of amount by not being able to sell the shares held by them. The object of the said provision is to protect the interest of such shareholders who had suffered a loss for delay in making the public announcement and, thus, may have to be compensated. The very fact that the bench-mark as regard the rate of interest has been fixed is also a pointer to the fact that the interest is to be paid to such investors who had suffered some loss. While compensating a person, the court should see that he is not unjustly enriched. Interest is directed to be paid on the default of the acquirer occasioning loss suffered by an investor of his money. The question of paying interest by way of compensation to persons who had not suffered any loss, thus, would not arise. Interest was, therefore, payable only to such persons who were shareholders of target company as on the triggering date.

....

In view of our findings aforementioned, we are of the opinion that while calculating the amount of interest, the amount of dividend paid to the shareholders should be excluded. The shareholders who by reason of default on the part of acquirer have been deprived of interest payable on the difference of the offer price and market price would be entitled to interest as direction to pay interest being not penal in nature, they cannot make double gains."

- 23.** Since the persons who held shares on the date of trigger in 1998 were denied of their statutory right to exit, in light of the provisions of the Takeover regulations and the decision of the Hon'ble Supreme Court recorded above, I find that those shareholders are entitled to receive interest on the open offer price. Since the trigger date was March 11, 1998 (*being the date of the Board resolution preferentially allotting shares to the noticees*), and the open offer price calculated as on the date of the trigger was ₹ 33.94 (*based on the price data for 26 weeks prior to the board resolution date*), the interest amount for the period till date amounts to approximately ₹ 70.80 (*interest component @10%*). Therefore the cumulative offer price would be clearly higher than the current market price of SCL's shares and consequently an open offer in this context would certainly be feasible as well as in the interest of those persons who continue to hold shares in

SCL. The period when interest accrued cannot be reduced by any period during which any litigation was pending for the reason that this was a statutory right accruing to the shareholders and the noticees by not fulfilling the same are duty bound to compensate for the delay. While the period of litigation may have postponed the enforcement of this right, till date it cannot be said that the right itself was extinguished at any point.

DIRECTIONS

- 24.** In view of the foregoing, in compliance with the Order dated March 03, 2011 of the Hon'ble Bombay High Court and the Orders dated September 06, 2016 and September 14, 2016 of the Hon'ble Securities Appellate Tribunal, I hereby direct the noticees, namely, Fawn Trading Company Private Limited, Pallor Trading Company Private Limited, Fern Trading Company Private Limited, Tejashree Trading Company Private Limited and Willow Trading Company Private Limited, to make a public announcement of an open offer to acquire shares of the Target Company, Saurashtra Cement Limited as directed vide the first SEBI Order i.e. SEBI Order dated January 15, 1999 as upheld by the Order dated April 05, 1999 of the Central Government (Appellate Authority).
- 25.** In view of the delay in making the open offer in terms of the SEBI Order dated January 15, 1999, the above noticees shall, along with the consideration amount, pay interest at the rate of 10% per annum, from the date when they incurred the liability to make the public announcement (*i.e. March 11, 1998*) till the date of payment of consideration, to the shareholders who were holding shares in the Target Company on the date of violation and whose shares have been accepted in the open offer, after adjusting dividend, if any, that was paid.

DATE: January 17, 2019

PLACE: Mumbai

G. MAHALINGAM

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA