

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA**

**CORAM : PRASHANT SARAN, WHOLE TIME MEMBER**

**ORDER**

Under regulation 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with regulations 32(1)(h) and 35(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

In the matter of Saurashtra Cement Limited in respect of Fawn Trading Company Private Limited, Willow Trading Company Private Limited, Pallor Trading Company Private Limited, Fern Trading Company Private Limited and Tejashree Trading Company Private Limited

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Date of hearing : December 27, 2012

**Appearances:**

**For the applicants :**

1. Mr. J. J. Bhatt, Advocate
2. Mr. A. M. Fadia, Representative
3. Mr. Yogesh Shah, Director of the applicants, and
4. Mr. Avinash More, Saurashtra Cement Limited

**For the Securities and Exchange Board of India :**

1. Mr. Anindya Kumar Das, Deputy General Manager
  2. Ms. Anitha Anoop, Deputy Legal Adviser
  3. Mr. Navpreet Singh, Assistant General Manager and
  4. Mr. T. Vinay Rajneesh, Assistant Legal Adviser
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1. Saurashtra Cement Limited (hereinafter referred as the "Target Company") is a company 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").

2. The Target Company had, on March 11, 1998, allotted 80,00,000 shares to five private limited companies, which are the wholly owned subsidiaries of a main promoter (*Jagmi Investments Limited*) of the Target Company, as under :

| Name of the allottees                                         | Number of shares allotted |
|---------------------------------------------------------------|---------------------------|
| Pallor Trading Company Private Limited (Pallor Trading)       | 79,96,000 shares          |
| Fern Trading Company Private Limited (Fern Trading)           | 1,000 shares              |
| Fawn Trading Company Private Limited (Fawn Trading)           | 1,000 shares              |
| Tejashree Trading Company Private Limited (Tejashree Trading) | 1,000 shares              |
| Willow Trading Company Private Limited (Willow Trading)       | 1,000 shares              |
| <b>Total</b>                                                  | <b>80,00,000 shares</b>   |

The Target Company had, on March 27, 1998, further issued and allotted 40,00,000 shares to Tejashree Trading. 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.

3. The shareholding and voting rights of the promoters of the Target Company before the first allotment on March 11, 1998 was 48.64%. The shareholding and voting rights of the promoter group increased to 69.19% and 57.20% respectively after the first allotment of 80,00,000 shares. Pursuant to the second allotment made on March 27, 1998, the shareholding and voting rights of the promoter group increased to 74.33% and 60.50% respectively. After the third allotment on March 31, 1998, the promoter group's shareholding came down to 64.14%. Since, disclosures as required to be made in terms of regulation 3(1)(c)(ii) of the SEBI(Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (*since repealed*) were not made in the notice of the General Meeting called for the purpose of consideration of the preferential allotment of shares, SEBI vide an Order dated January 15, 1999 ("the SEBI Order"), directed the five preferential allottees viz., Pallor Trading, Fern Trading, Fawn Trading, Tejashree Trading and Willow Trading to make a public announcement to acquire shares from the remaining shareholders (*i.e. other than promoters, their associates and persons acting in concert*) of the Target Company, for 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.

4. The SEBI Order was challenged by Fawn Trading and the Target Company by way of two separate appeals before the Central Government. The Central Government vide its order dated April 05, 1999 rejected the appeals and upheld the SEBI Order. Thereafter, Fawn Trading and the others challenged the 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.*

*..... "*

5. Pursuant to the Order of the Hon'ble High Court, Fawn Trading, vide letter dated April 14, 2011, filed its representation before SEBI. The representation was filed for itself and on behalf of Pallor Trading, Fern Trading, Tejashree Trading and Willow Trading. For sake of convenience, all the above said five entities would collectively be referred to as "the applicants" and individually by their respective names.

6. In their representation, the applicants *inter alia* made the following submissions :

- (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 applicants (*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 at ₹ 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 applicants.
- (iv) The applicants 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.Smidt & 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 applicants 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 applicants which were the subsidiaries of a promoter of the Target Company. Therefore, the five allottees (the applicants) 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 applicants 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 applicants.
- (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 applicants have ceased to be the shareholders of the Target Company. Fastening any obligation to acquire shares now is devoid of logic. Further, the applicants 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 applicants 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 applicants. Therefore, there is a mismatch of parties. The acquirers (applicants) cannot be penalised for the lapse by the Target Company.

7. In view of their submissions, the applicants sought the following relief :

- a) SEBI does not insist for implementation of its directions of public announcement to acquire 20% of voting capital of the Target Company from the shareholders,

i.e., the directions which was issued in its Order dated January 15, 1999 against them.

- b) SEBI does not enforce its Order dated January 15, 1999 against them and to terminate the proceedings by a suitable action /order and discharge them in the matter.
- c) Any other appropriate relief in the facts and circumstances of the case.

8. In the hearing held on December 27, 2012, the applicants were represented by Mr. J. J. Bhatt, Advocate. The learned advocate reiterated the submissions made by the applicants in their representation. The applicants were granted liberty to file written submissions, if any, within a period of two weeks, and the same was submitted vide letter dated January 10, 2013. In the written submissions, while reiterating majority of the submissions made in the representation, the applicants additionally submitted the following :

- a. The alleged violation of Regulation 3(4) is not very fatal and does not take away exemption. Further, exemption is not subject to the compliance of the conditions stated in this provision. The requirements of Regulation 3(4) are procedural and disclosure related, and applicable post acquisition. Non-filing of a report does not vitiate the allotment, nor takeaway the exemption.
- b. In this case, there was no violation of regulation 11, as the shares were acquired through preferential allotment, which is automatically exempt from the requirements of regulation 10, 11 and 12. The SEBI Order dated January 15, 1999 has termed the alleged violation of regulation 11(1) & (2) as hypothetical.
- c. Fern Trading, Willow Trading, Tejashree Trading and Pallor Trading were not the shareholders of the Target Company as on the date of allotment. Their acquisition of shares was not for consolidation as consolidation presupposes some existing holding. Regulation 11(1) covers consolidation of holdings by additional acquisition.
- d. There is no clarity in the SEBI Order as to the identity of the persons acting in concert with the applicants. It appears that the five applicants (*acquirers*) are treated as Persons Acting in Concert (PACs). Inclusion of PACs is only for the purpose of calculating aggregate shareholding of acquirers and PACs between 15 % and 75% under Regulation 11(1). The Target Company had allotted shares to each of five applicants separately on a standalone basis. Their acquisition was independent and separate and treating all of them as PACs is misconceived.

- e. The alleged violation of regulation 3(4) and non-compliance with regulation 3(1)(c)(2) cannot and ought not result in issuance of any directions to the applicants.
  - f. Four of the applicants already ceased to be the shareholders of the Target Company with effect from February 29, 2008 and therefore they could not be directed to acquire shares.
  - g. The net worth of the five applicants as on date is in the negative. They do not have funds or resources to acquire shares.
  - h. Since 90% of the earlier shareholders have offloaded their stake in the company, the public offer if made will be a mere formality and would involve huge costs to them. Further, the equity shares of the Target Company are traded in the dematerialised mode since the year 2000.
  - i. There was no economic loss caused to the then shareholders on account of the preferential issue and failure to make any public offer by the applicants.
  - j. If all the five applicants are treated as acquirers and PAC, then it is not clear as to how much of the 20% capital has to be acquired by each of the five applicants.
  - k. The definition /concept of '*Person Acting in Concert*' has undergone changes, refinement in the course of last few years.
  - l. The Takeover Code of 1997 has been repealed and the new Takeover Code of 2011 cannot be made applicable to their case.
  - m. The applicants relied upon the judgements of the Hon'ble Supreme Court in the matters of *Swedish Match* and *Clariant International* and of the Hon'ble Securities Appellate Tribunal in the matter of *Phiroze Sethna*.
  - n. The applicants submitted that no useful purpose would be served if the direction contained in the SEBI order is sought to be enforced now and therefore requested that they be discharged from the proceeding.
9. I have perused the SEBI Order dated January 15, 1999 and the Order of the Hon'ble High Court and have considered the representation made by the applicants, additional submissions made by them and other material available on record. The allotment of 80,00,000 shares and 40,00,000 to the concerned applicants and the resultant increase in the shareholding/voting rights of the applicants and the promoter group have not been disputed by the applicants. The applicants, while stating that the notice to the shareholders disclosed the identity of the class of persons to whom allotments would be made, have admitted that the same did not specifically mention the names of the promoters to whom allotments would be made or the price at which the allotment would be made. The applicants have also not contended that

they have fully complied with the conditions stipulated under regulation 3(1)(c)(ii). It is their case 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.

10. Before proceeding, it would be necessary to refer to the background in which regulation 3(1)(c) of the Takeover Regulations, 1997 came to be framed. I note that the Takeover Regulations, 1997 were framed on the basis of the recommendations of Justice Bhagwati Committee, mentioned in their Report dated January 18, 1997. In that Report, the Committee had mentioned a set of *General Principles* which should guide the interpretation and the operation of the Takeover Regulations. Such principles include equality of treatment and opportunity to all shareholders, protection of interest of shareholders, no action to be taken by the target company to frustrate an offer without the approval of the shareholders. In the Report, the Committee 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, 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. The aforesaid recommendation of Justice Bhagwati Committee was codified appropriately in regulation 3(1)(c) of the Takeover Regulations, 1997 and the said provision, as it stood during the relevant period, is reproduced below for 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]

*[It may be noted that clause (c) of regulation 3(1) was omitted with effect from 09.09.2002 from the Takeover Regulations, 1997.]*

Regulation 3(4) of the Takeover Regulations, 1997 required that in respect of acquisitions *inter alia* under clause (c), the acquirer shall within 21 days from the date of acquisition submit a report along with supporting documents to SEBI giving all details in respect of its acquisition.

11. Regulations 10, 11 and 12 of the Takeover Regulations, 1997 statutorily obligate an acquirer to make a public announcement to acquire shares in accordance with the regulations, if that acquirer exceeds the shareholding/voting rights levels (percentages) mentioned in regulations 10 and 11 or when it acquires control (*with or without acquisition of shares*) in terms of regulation 12. Regulation 3 provides exemption to an acquirer from complying with the obligation to make an open offer that is obligated under regulations 10, 11 and 12, if his shareholding/voting rights increase or if it acquires control, on account of certain transactions mentioned under various clauses of regulation 3. In terms of regulation 3(1)(c), nothing contained in regulations 10, 11 or 12 would be applicable to preferential allotment of shares, which is made in pursuance of a resolution passed under section 81(1A) of the Companies Act, 1956. However, it needs to be noted that this exemption is subject to the compliance with the conditions mentioned in *proviso* to regulation 3(1)(c), which are as follows :

- (i) The board resolution in respect of the proposed preferential allotment should be sent to all the stock exchanges on which the shares of the company (*whose shares are acquired through the preferential allotment*) are listed for being notified ; and
- (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.

12. Therefore, any increase of shareholding/voting rights or acquisition of control by an acquirer through allotment of shares in a preferential allotment made pursuant to section 81(1A) of the Companies Act, 1956, which triggers regulations 10, 11 or 12, would be eligible for

exemption from the obligation to make an open offer (mandated under the said regulations), only when the conditions mentioned in the proviso to regulation 3(1)(c) are complied with.

13. I note from the SEBI Order dated January 15, 1999 that the shareholding and voting rights of the promoters of the Target Company before the first allotment on March 11, 1998 was 48.64%. Pursuant to the allotment of 80 lakh shares on March 11, 1998, the shareholding and voting rights of the promoter group increased to 69.19% and 57.20% respectively. After the second allotment of 40 lakh shares on March 27, 1998, the shareholding and voting rights of the promoter group increased to 74.33% and 60.50% respectively. The said increase in the shareholding of the promoter group was on account of the allotment of shares to the applicants. Pursuant to the allotments made on March 11, 1998 and March 27, 1998, the shareholding of the applicants had increased by more than 5%. Therefore, it becomes necessary, in terms of regulation 3(1)(c)(ii) of the Takeover Regulations, to disclose the details such as 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 in the notice of the General Meeting called for the purpose of consideration of the preferential allotment.

14. The SEBI Order had, in page 21, reproduced a portion of the notice dated December 02, 1997 issued by the Target Company with respect to the preferential allotment. I have perused the said notice and note that the consent of the shareholders was sought for the issuance of equity shares of face value ₹10/- each for an aggregate amount not exceeding ₹400 crore (including premium) at a price as shall be decided by the Guidelines on Preferential Issues to such class of persons including promoters or their associates, in one or more modes or combinations thereof and in one or more tranches and on such terms and conditions. The notice mentions only the class of persons to whom the shares would be allotted and not the identity of the proposed allottees. Further, the price at which the allotment was proposed was also not specified except for a statement that the price would be decided by the Guidelines on Preferential Issues issued by SEBI and would not be less than ₹30/- per share. The shareholding pattern pursuant to the allotments were also not mentioned.

15. I also note from the SEBI Order dated January 15, 1999 that Pallor Trading, was not classified as a promoter at the time of the issue of AGM notice dated December 02, 1997 or at the time of passing the resolution for preferential allotment. Therefore, the shareholders did not

have the opportunity to consider whether the new entity (*Pallor Trading - which has been identified as a promoter entity at the time of issuance of shares in the preferential allotment*), be allotted a huge chunk of shares. In view of the same, the shareholders of the Target Company were not disclosed information in the said notice regarding the identity of the proposed allottees or the specific price of allotment. The applicants have themselves admitted that information such as identity of the allottees and the specific price at which the allotment would be made, were not mentioned in the notice to the shareholders. Such disclosures, mandated under regulation 3(1)(c), are envisaged to enable the shareholders to make informed and conscious decision on a proposal by the company to make a preferential allotment of shares. Thus, the conditions mentioned in *proviso* to regulation 3(1)(c) has not been fully complied with. The applicants have also not filed the report as required in terms of regulation 3(4) of the Takeover Regulations.

16. It now needs to be seen whether the increase in the shareholding/voting rights of the promoters including the applicants triggered regulations 10, 11 or 12. The applicants are, admittedly, part of the promoter group of the Target Company. They have been identified so when the allotment of shares were made to them. Moreover, they are admittedly the subsidiaries of a main promoter (*Jagmi Investments Limited*) of the Target Company. In terms of regulation 11(1) of the Takeover Regulations (*as applicable during the relevant period*), no acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, not less than 10 per cent but not more than 51 per cent 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 per cent 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. As mentioned above, the shareholding and voting rights of the promoters before March 11, 1998 was 48.64% and pursuant to the allotment of 80 lakh shares on March 11, 1998, the shareholding and voting rights of the promoter group increased to 69.19% and 57.20% respectively. The increase in the shares and voting rights of the promoters was definitely more than 2%, which required the acquirers (*the applicants*) to make a public announcement under regulation 11(1). Thereafter, the second allotment of 40 lakh shares made on March 27, 1998, which increased the shareholding and voting rights of the promoter group to 74.33% and 60.50% respectively, triggered regulation 11(2) of the Takeover Regulations. Since the applicability of regulation 11 was not exempted for the acquirers, for the reasons stated above, they were under a legal obligation to make a public announcement to acquire shares under the Takeover Regulations.

17. During the personal hearing, the learned counsel representing the applicants, referred to the orders passed by the Hon'ble Supreme Court in the matter of *Swedish Match AB vs. SEBI* and the order passed by the Hon'ble Securities Appellate Tribunal ("Hon'ble SAT") in the matter of *Phiroze Sethna Private Limited vs. SEBI* to submit that four conditions have been laid down by the Hon'ble Supreme Court and followed by the Hon'ble SAT, for determining whether regulation 11(1) of the Takeover Regulations are triggered or not. I have considered the submission. For sake of reference, I reproduce the four conditions listed out by Hon'ble SAT in the *Phiroze Sethna's case* :

- (a) the acquirer should have made acquisition of shares or voting rights in the target company during earlier financial years to the extent of more than 15% but less than 75%;
- (b) the acquisition of additional shares or voting rights that triggers Regulation 11(1) during the relevant financial year should provide the acquirer more than 5% of voting rights;
- (c) the same acquirer should be involved, in the acquisitions of both the initial shares as well as additional shares; and
- (d) such acquisitions should be either by the acquirer himself or with the persons acting in concert with him.

In this case, the promoters were holding 48.64% shares in the Target Company. Shares were allotted to the applicants in the preferential issue. Pursuant to the allotments made to the applicants, the promoters were able to exercise more than 2% of the shares/voting rights in the Target Company. Such increase of shareholding/voting rights of the promoter group of the Target Company had triggered regulation 11(1). Further, in the notice to the shareholders, the Target Company had informed that the shares would be *inter alia* issued to the promoters and subsequently, the applicants, who formed part of the promoter group, were allotted shares. The promoters have acquired shares/voting through the preferential allotment of shares to the applicants. Therefore, I am of the considered view that, all the four conditions are satisfied in this case. The applicants did not comply fully with the conditions mentioned in regulation 3(1)(c)(ii). Therefore, they, having not been exempted under regulation 3(1)(c), were under a liability to make an open offer in accordance with the Takeover Regulations, 1997 in respect of the increase in the promoter groups' holding/voting rights on account of preferential allotment of shares by the Target Company.

18. The applicants have contended that the basis for the direction contained in the SEBI Order dated January 15, 1999 is non-disclosure of some information by the Target Company in its notice dated December 02, 1997 and that such basis had no correlation with the direction to make open offer. As discussed above, the exemption from the obligation to make a public announcement to acquire shares, as mandated under regulations 10, 11 or 12, would be available to the applicants only when the conditions stipulated under regulation 3(1)(c) are strictly complied with. It has already been found above that the applicants had failed to comply with all the conditions stipulated under regulation 3(1)(c) that would make them eligible for an exemption from making the public offer. The applicants, in order to avail the benefit of exemption available under regulation 3(1)(c), could have ensured that the notice to the shareholders disclosed all those details that would have given them the said benefit. Since the law requires fulfilling the conditions under *proviso* to regulation 3(1)(c) for an exemption, I am not able to accept the said contention of the applicants.

19. With respect to the submission that the applicants were not PACs and acquired shares on a 'standalone' basis, I note that the applicants have themselves admitted that they are the subsidiaries of a promoter (*Jagmi Investments Limited*) of the Target Company and by virtue of the same, they also form part of the promoter group. All the five acquirers (applicants) are admittedly the wholly owned subsidiaries of the main promoter, i.e., *Jagmi Investments Limited* and in terms of the Takeover Regulations, such acquirers are deemed to be *persons acting in concert*. Further, it is an admitted position that the applicants have been classified as promoters and have been allotted shares in the preferential issue. Therefore, the submission cannot be accepted. Further, the submission that the Target Company is registered with the BIFR and that any order by SEBI would have to take into account such fact, is also without any merit, as the direction, if any, to make an open offer would be against the applicants (as acquirers) and not against the Target Company. Therefore, the financial status of the Target Company has no relevance in this regard.

20. Having arrived at such conclusion, the next question is what should be the nature of directions to be issued in this case against the applicants. Ideally, in the absence of any exemption for the said increase of shares/voting rights, the applicants (who were the allottees) being part of the promoter group of the Target Company, should be directed to make a public offer to acquire shares in accordance with the Takeover Regulations, 1997, as directed vide the SEBI Order dated January 15, 1999. The applicants have submitted that the shareholder base of the Target Company has reduced from 14,869 to 8,361 shareholders and that those shareholders who could

have been beneficiaries of their open offer exist no more. As observed by the Hon'ble Supreme Court in the matter of *Clariant International Limited*, only those persons who were the shareholders of a company as on the 'triggering date' would be entitled to benefit out of the open offer. However, the applicants have not shown with proper documentation as to how the present shareholders of the Target Company are new shareholders and were not holding shares in the Target Company as on the relevant date (triggering date). It goes without saying that if a public offer is directed against the applicants now, only the shareholders who were holding shares on the relevant date (*when the public offer of the applicants became due under the Takeover Regulations, 1997*) and eligible to participate in the public offer would be eligible to tender shares in the open offer. As regards the submission that the six monthly/two week average price in the year 1999 was ₹30/- per share and that the average price now is ₹16.62/- and that the share price has decreased by more than 45%, I note that the price at which the applicants would offer to purchase shares would be calculated as per the relevant provisions of the Takeover Regulations, 1997. Therefore, considering the interest of the eligible shareholders, the submissions of the applicants that their net worth is in the negative and they do not have funds or resources to acquire shares, becomes unpersuasive.

21. The applicants have stated that except Pallor Trading Company Private Limited all the other applicants have ceased to be the shareholders of the Target Company and therefore, any obligation to acquire shares now is devoid of logic. It is also submitted that the direction of SEBI is not tenable under the law and has lost significance due to passage of 13 years. I note that majority of the shares in the said preferential issue were allotted to Pallor Trading. This entity is still a shareholder in the Target Company, under the promoter group category. All the applicants (*being the subsidiaries of a main promoter*) are part of the promoter group of the Target Company. Regulation 11 is triggered once the shares or voting rights are acquired in excess of the percentages mentioned therein. As the applicants had lost the benefit of exemption available under regulation 3(1)(c), for the reasons stated above, they were under the obligation to make the public offer and that liability would still exist, even if three of the applicants have ceased to be the shareholders. Therefore, in my view, the said submissions are of no merit.

22. As the applicants were not exempted from making the public offer, the natural consequence was for them to make a public offer to acquire shares in accordance with the Takeover Regulations. The applicants have not made the public offer to acquire shares in accordance with the Takeover Regulations, 1997. Regulation 44 of the Takeover Regulations provides for various kinds of directions for enforcing the regulations in the interest of investors.

In this regard, I am convinced that an order directing the applicants to make a public offer would be appropriate and would meet with the objectives of the scheme of the Takeover Regulations. In this regard, I note the following observations of the Hon'ble Securities Appellate Tribunal made in its Order dated September 08, 2011 in the matter of *Nirvana Holdings Private Limited vs. SEBI (Appeal no. 31 of 2011)* :

*"It must be remembered that whenever an acquirer violates Regulation 10, 11 or 12 of the takeover code by not making a public announcement, he should be directed to comply with the provision by making a public offer. The words "unless such acquirer makes a public announcement" appearing in Regulations 10 and 11(1) make these provisions mandatory and a public announcement has to be made. Similar words appear in Regulation 12 as well. These provisions make the acquisition conditional upon a public announcement being made. The primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation. "*  
[emphasis supplied]

23. Further, for the reasons stated above, and considering the present facts and circumstances, I am of the considered view that a direction to the applicants to make a public offer in terms of the provisions of the Takeover Regulations, 1997 would meet the ends of justice. The applicants have contended that the Takeover Regulations 1997 have been repealed and that the new Takeover Regulations (2011) have no applicability to their case. I note that the acquisition by the applicants and their obligation to make a public offer arose when the Takeover Regulations, 1997 were in force. Regulation 35(2)(b) of the Takeover Regulations, 2011, provides that any obligation or liability acquired, accrued or incurred under the repealed Takeover Regulations, 1997 and any legal proceeding in respect of such liability shall remain unaffected as if the repealed regulations were never repealed. Therefore, the applicants shall be under the obligation to make the public offer under the Takeover Regulations, 1997, as provided for under regulation 35(2)(b) of the new Takeover Regulations. As regards payment of interest, I note that

the Hon'ble Bombay High Court had stayed (vide Order dated April 23, 1999) the SEBI Order and finally disposed off the matter, *inter alia* directing that the interim order would operate till SEBI decides on the representation (*if made within six weeks from the date of the Hon'ble High Court's Order*) of the applicants. Therefore, I am of the considered view that a direction for payment of interest on the consideration amount for the shares to be tendered by eligible shareholders to the applicants, may not be appropriate and reasonable. In view of the foregoing, each of the five applicants are jointly and severally responsible to make the public announcement, in accordance with the provisions of the Takeover Regulations, 1997, as directed herein below.

24. I, therefore, in exercise of powers conferred upon me under sections 19 of the Securities and Exchange Board of India Act, 1992 and regulation 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with regulations 32(1)(h) and 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereby direct the applicants, Pallor Trading Company Private Limited, Fern Trading Company Private Limited, Tejashree Trading Company Private Limited and Willow Trading Company Private Limited to make a combined public announcement to acquire, jointly and severally, the shares of the Target Company, Saurashtra Cement Limited, in terms of regulation 11 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and other relevant regulations thereof, within a period of 45 days from the date of this Order.

25. This Order shall come into force with immediate effect.

**PRASHANT SARAN**  
**WHOLE TIME MEMBER**  
**SECURITIES AND EXCHANGE BOARD OF INDIA**

**Date : April 25, 2013**

**Place : Mumbai**