WTM/MPB/EFD-1-DRA-3/ 15 /2019

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

Under Sections 11 (1) and 11B of the Securities and Exchange Board of India Act, 1992

In the matter of Gremach Infrastructure Equipments and Projects Limited (presently known as Sancia Global Infraprojects Ltd.)

In re: Substantial Acquisition of Shares and Takeover Norms

In respect of:

Sl.No.	Name of the Entity	PAN
1.	Unnao Trading Private Ltd	AAACU3544Q
2.	Anarcon Resources Pvt. Ltd.	AADCA7352D
3.	Shri Hanuman Investments Pvt. Ltd.	AAGCS5378C
4.	Rishiraj Agarwal	AEQPA0755E
5.	Rishiraj Agarwal HUF	AADHR8823F
6.	Sangeeta Agarwal	ADAPA1962G
7.	Ratan Lal Tamakhuwala HUF	AAKHR4373K
8.	Ratan Lal Tamakhuwala	Flat no. 703/704, A Wing, Shiv Parvathi, Co-op HSG., PL No. RPD VER 18, Versova, Andheri West, Mumbai – 400053
9.	Lalita Agarwal	ACLPA2107R
10.	Vatsal Agarwal	APOPA5772J

11.	**Industrial Lamcoke Projects Ltd.**	**1st Floor, Upavan Building, Behind IOC 7/106, D.N. Nagar, Andheri (W), Mumbai – 400053**
12.	**Austral Coke & Projects Ltd.**	**Gremach House, Killedar Building #1, opp MTNL (near 24 Karat Cinema Hall), S.V.Road, Jogeshwari (W), Mumbai – 400102.**
13.	**Nordflex Textiles Pvt. Ltd.**	**Marwari Bazar Lane, Sujaganj, Bhagalpur, P S. Kotwali, Bihar – 812002**
14.	**Tirupati Niket Pvt. Ltd.**	**1st Floor, Upavan Building, Behind IOC 7/106, D.N. Nagar, Andheri (W), Mumbai – 400102**

1. Gremach Infrastructure Equipments and Projects Limited (presently known as Sancia Global Infraprojects Ltd.) (hereinafter referred to as the "**Target Company**") is a company having its registered office at Todi Mension, 32 Ezra Street, 10th Floor, Room No. 1060, 8th Floor ,Kolkata ,West Bengal ,700001, and its securities are listed on the BSE Limited ("**BSE**").

2. Securities and Exchange Board of India ("**SEBI**") observed that the promoters of the Target Company viz., Unnao Trading Private Ltd., Anarcon Resources Pvt. Ltd., Shri Hanuman Investments Pvt. Ltd., Rishiraj Agarwal, Rishiraj Agarwal HUF, Sangeeta Agarwal, Ratan Lal Tamakhuwala HUF, Ratanlal Tamakhuwala , Lalita Agarwal, Vatsal Agarwal, Industrial Lamcoke Projects Ltd., Austral Coke & Projects Ltd., Nordflex Textiles Pvt. Ltd. and Tirupati Niket Pvt. Ltd. (hereinafter referred to as "**Promoter group**") collectively held 54.90% of the paid up equity share capital of the Target Company as on March 31, 2009. During the financial year 2009-2010, promoter group

acquired, on gross basis, 6.87% shares of the target company which was more than the permissible threshold limit of 5% during the financial year 2009-2010 prescribed under the Regulation 11(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **"Takeover Regulations, 1997"**).

3. ***SCN and Allegations:*** The Target Company decided to allot 4,90,00,000 warrants to its promoters and some Foreign Institutional Investors (FIIs) on June 11, 2009 which entitled the holders to convert the same into equity shares within 18 months from the date of allotment. The said warrants were converted into equity shares on June 12, 2009, June 22, 2009, October 24, 2009 and December 08, 2009. By virtue of the conversion of warrants on June 12, 2009, June 22, 2009, and purchase of shares on April 23, 2009, by the promoter group entities, the promoter holding on gross basis, increased by 6.87% which had triggered obligation of the promoter group to make a public announcement to make an open offer for acquiring shares of the Target Company in terms of Regulation 11(1) of Takeovers Regulations, 1997. Since the promoters of the Target Company had allegedly failed to make the requisite public announcement, a Show Cause Notice ("**SCN**") dated September 22, 2017 was issued to Unnao Trading Private Ltd., Anarcon Resources Pvt. Ltd., Shri Hanuman Investments Pvt. Ltd., Rishiraj Agarwal, Rishiraj Agarwal HUF, Sangeeta Agarwal, Ratan Lal Tamakhuwala HUF, Ratanlal Tamakhuwala , Lalita Agarwal, Vatsal Agarwal, Industrial Lamcoke Projects Ltd., Austral Coke & Projects Ltd., Nordflex Textiles Pvt. Ltd. and Tirupati Niket Pvt. Ltd. (hereinafter referred to as **"the Noticees"**) calling upon them to show cause as to why suitable directions under Sections 11 and 11B of the SEBI Act, Regulations 44 and 45 of the Takeover Regulations, 1997 read with corresponding provisions of Regulations 32 and 35 of Takeover Regulations, 2011 should not be issued against them for the alleged violations of regulation 11(1) of the Takeover Regulations, 1997.

4. ***Service of SCN:*** The SCN sent to the Noticees viz., Rishiraj Agarwal, Rishiraj Agarwal

HUF, Sangeeta Agarwal, Ratan Lal Tamakhuwala HUF, Ratanlal Tamakhuwala, Lalita Agarwal, Vatsal Agarwal, Industrial Lamcoke Projects Ltd., and Tirupati Niket Pvt. Ltd. were served through hand delivery.

5. ***Hearings and Submissions:*** Vide hearing notice dated May 03, 2018, the Noticees were granted an opportunity of personal hearing on June 05, 2018. The hearing notices sent to the Noticees viz., Rishiraj Agarwal, Rishiraj Agarwal HUF, Sangeeta Agarwal, Ratan Lal Tamakhuwala HUF, Ratanlal Tamakhuwala, Lalita Agarwal, Vatsal Agarwal, Industrial Lamcoke Projects Ltd., and Tirupati Niket Pvt. Ltd. were delivered and acknowledgment received.

6. In response to the hearing notice dated May 03, 2018, Shri Hanuman Investments Private Limited, Anarcon Resources Private Limited and Ratan Lal Tamakhuwala vide their independent but identical letters each dated May 28, 2018 acknowledged the receipt of SCN and sought an adjournment of the hearing on the ground that the directors and promoters of the Noticee/the Noticee himself were out of town.

7. In reply to the SCN and in response to the hearing notice dated May 03, 2018, the Noticee viz., Vatsal Agarwal vide letter dated May 28, 2018 submitted that during the investigation period he was a minor and his holdings were of 50,000 equity shares which were monitored and controlled by the adult members of the family.

8. In reply to the SCN, Shri Hanuman Investments Private Limited vide letter dated June 06, 2018, *inter alia,* submitted as under:

    i. During the Investigation period Vatsal Agarwal was a minor and his holding of 50,000 equity shares were monitored and controlled by the Adult members of his family.

    ii. Vatsal Agarwal was not connected with any of acts and actions taken or carried out by the rest of the promoter group members.

    iii. The allotment of shares alleged in the SCN were on account of conversion of warrants into equity shares as approved by the members and allotted in tranches

and not through any market purchase.

iv. At the time of allotment of shares the promoters holding were above 15% but less than 55%. The promoter group holding consisted of 8,35,417 equity shares of face value of Rs 10/- each aggregating to 54.90%.

v. As per Regulation 11(1) the promoters has not acquired additional shares or voting rights entitling him to exercise more than 5% of the voting rights post acquisition shareholding or voting rights .The Noticees relied upon the netting concept as held by the Apex court in the matter of Kosha Investments Ltd. Vs. Securities & Exchange Board of India & Anr. The piecemeal approach to fit with the concept of acquisition of shares does not hold the true spirit of the regulation. Hence not applicable to the case.

vi. The concept of permitting creeping acquisitions by permitting not more than 5% of the shares or voting rights in a company limits the period for such acquisition to a financial year ending on 31st March.

vii. In the present case at the end of the financial year the promoter group holding was not more than 5% of their pre-holding.

viii. They have not acquired shares or voting rights entitling them to exercise more than 5% of the voting rights post acquisition shareholding or voting rights. The net holding was not more than their holdings at the beginning.

ix. All the ingredients of the regulation has not been considered by the Board namely:

- *"That acquirer had acquired shares in concert with another;*
- *Such acquisition was more than 15% but less than 50% of the shares or voting rights in a company;*
- *In the event, the acquirer intends to acquire such additional shares or voting rights which would allow him to exercise more than 5% of the voting rights within a period of 12 months;*
- *The entire financial year's allotment of shares on account of conversion of warrants in tranches;*

- *The concept and basis of reasons of conversion of warrants and its facilities as per ICDR read with SAST 1997;*
- *Holding of the promoter group at the beginning of the year and holding of the promoter group at the end of the year".*

x. Hence it is submitted that the show cause notice is devoid of merit on account of the above submissions.

9. I note that Unnao Trading private Limited vide letter dated July 27, 2018 has also filed reply to the SCN. From the perusal of the same, I note that the said Noticee has also made similar submissions as that of Shri Hanuman Investments Private Limited and the same is not reproduced herein for the sake of brevity.

10. I also note that SCN and hearing notice dated May 03, 2018 could not be delivered to three Noticees viz., Unnao Trading Private Ltd., Austral Coke & Projects Ltd. and Nordflex Textiles Pvt. Ltd. Further, three Noticees viz., Shri Hanuman Investments Private Limited, Anarcon Resources Private Limited and Ratan Lal Tamakhuwala sought an adjournment of the hearing scheduled on June 05, 2018. In view of the same, in the interest of principles of justice, a final opportunity of hearing was granted to all the Noticees on August 08, 2018. The hearing notice dated July 05, 2018 sent to the Noticees viz., Rishiraj Agarwal, Rishiraj Agarwal HUF, Sangeeta Agarwal, Ratan Lal Tamakhuwala HUF, Ratanlal Tamakhuwala, Lalita Agarwal, Vatsal Agarwal, Industrial Lamcoke Projects Ltd., and Tirupati Niket Pvt. Ltd. were delivered and acknowledgment received. Since the SCN and hearing notices sent to Unnao Trading Private Ltd., Austral Coke & Projects Ltd. and Nordflex Textiles Pvt. Ltd. were returned undelivered, the same were served by way of publication in the newspapers viz., 'Times of India' dated July 21, 2018 and 'Hamara Mahanagar' dated July 19, 2018 (Mumbai Editions) and "Times of India" dated July 19, 2018 and "Dainik Bhaskar" dated July 21, 2018 (Bhagalpur (Bihar) edition).

Hearing on August 08, 2018:

11. Mr. Loknath Mishra, Advocate along with Mr. Ramesh Mishra Authorised representatives

for the Noticee Shri Hanuman Investments Private Limited, Mr.Avinash Tiwari, Authorised Representative for Anarcon Resources Private Limited ("**ARs**") appeared before me and *inter alia* made the following submissions :

i. The ARs reiterated the submissions already made vide their earlier replies.

- That SEBI has not considered the net holdings of the promoters and considering the purchases of shares during the investigation period alleged that the Noticees had violated Regulation 11(1) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations 1997. The Noticees relied upon the Circular dated August 06, 2009 issued by SEBI and Judgment of the Hon'ble Supreme Court in the matter of Kosha Investments Limited Vs. SEBI and Anr.
- That their holding was 54.90%. Their Shareholding never increased post acquisition rather the same was decreased to 51.18%.
- That there was a clarificatory circular issued by SEBI on August 06, 2009 wherein SEBI clarified that acquisition of 5% for the purpose of Regulation 11 shall be calculated by aggregating all purchases, without netting the sale. The ARs submitted that the said clarificatory circular cannot be applied to the case of the Noticees retrospectively.
- Mr. Vatsal Agarwal one of the Noticee was a minor during the investigation period and was holding only 50,000 shares and his guardian Mr. Ratanlal Thamakuwala was also one of the Noticee.

ii. The Noticees were advised to submit the following details:

i. The price at which promoters sold their shares in the scrip of the target company.

ii. What was the logic behind the buy and sell of shares of the target company before the preferential allotment of shares.

iii. Whether they bought any shares during the investigation period?

iv. Confirm the guardianship of Mr. Vatsal Agawal.

v. At any point of time did promoter holding crossed 55% of the total shareholding of the Company before the last allotment? The day wise holding of the promoters shall be provided.

vi. Day wise trading details of the promoters during the period June 12, 2009 to June 22, 2009 along with the demat statement.

vii. The actual percentage of promoter holding till last allotment.

12. The Noticees were given two weeks' time (i.e. till August 27, 2018) to file additional written submissions along with supporting documents, if any. I note that no one appeared on behalf of remaining Noticees.

13. Thereafter, the Company vide letter dated August 27, 2018 submitted the following written submissions with respect to the queries made to the Noticees during the hearing:

- That the promoter Sangeeta Agarwal sold 10,000 shares at an average rate of Rs. 40.47 amounting to Rs. 4,04,729/-.
- The promoter group companies were in need of funds to run their businesses hence they sold the shares.
- The promoters did not sell any shares during the investigation period
- Mr. Ratanlal Tambakhuwala is the guardian of Mr. Vatsal Agarwal
- The promoter holding never crossed 55% of the aggregate shareholding of the Company till the last allotment and they were holding 51.18% of the shareholding of the Company.
- The Company enclosed the statement of transactions with respect to the trading of the promoters during the allotment period.

14. I have considered the allegations in the SCN, replies and submissions made by the Noticees and other material available on record. On perusal of the same, the following issues arise for consideration in the matter. Each question is dealt with separately under different headings.

i. ***Whether the Noticees having a collective shareholding of 54.90% as on April 1, 2009, acquired in concert, additional shares of 6.87% shares as on June 22, 2009, thereby attracted the provisions of regulation 11 (1) of the Takeover Regulations. If so, the requirements specified under regulation 11(1) of the Takeover Regulations have been complied with by the Noticees?***

ii. ***If issue No. (i) is determined in the negative, whether the Noticees are liable for any directions envisaged under regulations 44 and 45 of the Takeover Regulations, 1997 read with corresponding provisions of regulations 32 and 35 of Takeover Regulations, 2011 for the said violation?***

Consideration and Findings:

15. **Issue No.1:** The allegation in SCN is that during the financial year, the promoters who were collectively holding 54.90% shares in the target company had acquired 6.87% shares, on gross basis during the financial year 2009-2010 and thereby allegedly triggered the Regulation 11(1) of the Takeover Regulations.

16. I have perused the replies filed by some of the Noticees and also by the target company. None of them disputed the fact of acquisition of shares during the financial year 2009-2010. The said details of the acquisition by the promoter group as obtained from the stock exchange, RTA and depository, during the financial year 2009-2010 is brought out below:

Date of transaction	No. of shares acquired	No. of shares sold	Pre-promoter holding	Post-promoter holding	% change in promoter holding
23-Apr-09	12,109	-	83,54,175 (54.90%)	83,66,284 (54.98%)	0.08%
12-Jun-09	52,00,000 (Conversion of Warrants)	20,000	71,77,337 (47.16%)	1,23,57,337 (51.77%)	4.61%
22-Jun-09	60,00,000 (Conversion of Warrants)	87,287	1,16,94,939 (49.00%)	1,76,07,652 (51.18%)	2.18%
TOTAL					**6.87%**

17. I note from the submissions of the Noticees that admittedly as on April 01, 2009 the promoter group holding consisted of 83,54,175 equity shares of face value of Rs.10/- each aggregating to 54.90% of the paid up equity share capital of the Target Company. The Noticees submitted that the acquisition of shares were on account of conversion of warrants allotted by the Company in multiple tranches and not through any market purchase. In this regard, from the material available on record such as SCN, submissions of the Noticees and corporate announcements made by the target Company to the BSE, etc., I note that on June 11, 2009, the company approved to allot 4,90,00,000 warrants to its promoters and some Foreign Institutional Investors (FIIs). Each warrant entitled the holders to apply for one equity shares at a price of Rs. 31/- per share within 18 months from the date of the allotment. The target company made an announcement in this respect on BSE website on June 11, 2009. I also note from the subsequent corporate announcements made by the Company to the BSE dated June 12, 2009 and June 22, 2009 that the warrants allotted to its promoters viz., Anarcon Resources Private Limited, Shri Hanuman Investments Private Limited and Unnao Trading Private Ltd. were converted into equity shares. In view of this allotment, the percentage of acquisition of the shares by the promoter group coupled with the purchase by the promoter on April 23,2009, increased by 6.87% as on June 22, 2009 which was more than 5% limit as envisaged under Regulation 11(1) of the Takeover Regulations.

18. In this context Regulation 11(1) of Takeover Regulation 1997, is reproduced hereunder for reference:

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, 15 per cent or more but less than fifty five per cent (55%) 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 5% of the voting rights, in any financial year ending

on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations."

19. The Noticees contended that SEBI has taken into account the aggregate of purchases of shares and failed to consider the sale of shares during the period. In this regard they submitted that the concept of netting was clarified by SEBI vide circular dated August 06, 2009 and contended that the same cannot be applied to their case retrospectively. I do not find any merit in this argument as the same is with respect to clarification of Regulation 11(2) of the Takeover Regulations. I note that it is a settled position of law that if at any point of time during the financial year the acquisition is beyond 5% threshold limit, Regulation 11(1) would be triggered. I note that in order to calculate the extent of acquisition by an acquirer during any financial year, only gross purchase (ignoring any sales) has to be taken into account. I note that the above position on regulation 11(1) was upheld by Hon'ble Securities Appellate Tribunal and Courts in a catena of cases. In this regard, it is pertinent to mention the following observation of the Hon'ble Supreme Court in the matter of Kosha Investments vs. SEBI (Civil Appeal No. 3219 of 2006 decided on September 18, 2015):

> *"The main contention of the appellant before the Tribunal is recorded in paragraph 7 of the impugned judgment and is as follows : "Learned counsel for the appellant argued that KIL had been regularly purchasing and selling shares of SIL. He also argued that KIL had not acquired 5% or more than 5% shares or voting rights in respect of shares of SIL at any point of time in the period of 12 months. He submitted that out of 11,36,700 shares which were purchased during June, 1999 to August, 1999 during the same period KIL also sold number of shares of SIL. He pointed out that KIL was not holding more than 5% shares of SIL at any point during the year and therefore the provisions of Takeover Code did not trigger. He further argued that even if SEBI did not take into account the repurchases of pledged shares as return of shares, SEBI should accept that KIL did not acquire 5% or more shares at any point of time since sale and purchase of shares was being done simultaneously and did not trigger*

the Takeover Code. He argued that SEBI ought to have taken into account that KIL also sold shares during the relevant period.

...

We are in agreement with the finding of the Tribunal on this issue and find no merit in the contentions of the appellant. If the plea of appellant will be accepted then an acquirer can keep on violating Regulation 11(1) with impunity on as many occasions as he/it wants and avoid letting the public have the required knowledge through public announcements by simply making subsequent sale or transfer to another entity so as to reduce the so-called net acquisition in a financial year to within 5%. This interpretation will defeat the purpose of Regulation 11(1) and shall also render Regulation 14(1) otiose. The concept of permitting creeping acquisitions by permitting not more than 5% of the shares or voting rights in a company limits the period for such acquisition to a financial year ending by 31st March. But such concept does not dilute the requirement of making a public announcement within the time mentioned in Regulation 14(1) if the acquisition even if only once made and divested, is of more than 5% of shares or voting rights in the target company. In other words, even if such acquisition is followed by sale in the same financial year, the liability of making the public announcement would remain unaffected and shall attract action, as in this case."

20. In view of the above factual and legal position, I find that the contention of the Noticees as regarding netting shares sold to be considered while calculating threshold limit of 5% additional acquisition of shares, as envisaged in Regulation 11(1) of Takeover Regulations is devoid of any merit. Therefore, the contention of the responding Noticees that the collective shareholding of promoters at the end of financial year should be considered is not tenable.

21. I note from the submissions of the replying Noticees that they have contended that SEBI should consider whether promoters are acting in concert or not before proceeding to take

action for violation of Regulation 11(1) of Takeover Regulations. Admittedly, as per the disclosure made to the Stock Exchange, the promoter group of the Target Company included Unnao Trading Private Ltd., Anarcon Resources Pvt. Ltd., Shri Hanuman Investments Pvt. Ltd., Rishiraj Agarwal, Rishiraj Agarwal HUF, Sangeeta Agarwal, Ratan Lal Tamakhuwala HUF, Ratanlal Tamakhuwala, Lalita Agarwal, Vatsal Agarwal, Industrial Lamcoke Projects Ltd., Austral Coke & Projects Ltd., Nordflex Textiles Pvt. Ltd. and Tirupati Niket Pvt. Ltd. I note that the said facts are not disputed by the Noticees. As per Regulation 2(h) of the Takeover Regulations, 1997 *"Promoter", unless otherwise provided elsewhere, means- ... (ii) any person named as promoter in any document for offer of securities to the public or existing shareholders or in the shareholding pattern disclosed by the company under the provisions of the Listing Agreement, whichever is later;...*" I note that though the acquisition of some of the promoters triggered the Regulation 11(1) of the Takeover Regulations, the remaining Noticees are collectively responsible as persons acting in concert to make the public announcement. At this juncture, it is relevant to reproduce the observations made by the Hon'ble Securities Appellate Tribunal in Rajesh Toshniwal Vs. SEBI (Appeal No. 139 of 2011 decided on 1.6.2012) in the context of the homogenous promoters being considered as persons acting in concert:

"13. The next issue to be considered is whether the entire promoter group has to be considered as a homogenous unit and, therefore, acting in concert in the acquisition of shares. It is the basic principle of corporate law that promoter group is a homogenous class. It is the normal practice to club the entire promoter group into one class unless otherwise proved by the acquirer. The acquirers have always filed their shareholding as belonging to the promoter group. In the disclosures made to the stock exchanges and the Board, the promoters' shareholding consisted of the group as a whole. Even though there is a mention in the offer document that the acquirers by themselves are responsible to the offer to the exclusion of other promoter group the conduct of the promoters as a whole suggests that their behaviour was always united. The appellant's learned counsel made a

pointed reference to para 1.2 of the second public announcement (Page 49 of the appeal paper book) and stated that there is an unequivocal mention therein that there is no person acting in concert with the acquirers and all purchase in the public offer will be made by the acquirers. He also referred to a few other conditions laid down in the public announcement to highlight his contention and support his view. It is interesting to note that an identical statement is made in the same terminology in the first public announcement also. Merely because a statement is made in the public announcement document the statutory position cannot be altered. The statement contained in the public announcement relates to only the formalities connected with the purchase of shares in the instant case. It cannot govern the general statutory position of the promoters. The promoters, as a rule, belong to a homogenous group unless otherwise proved by attendant circumstances to be otherwise. In the present case, except the statement contained in the public announcement no circumstance is pointed out which would prove that a set of promoters are a class apart. It is a matter of record that the shareholding of the entire promoter group was always disclosed as a group holding to the regulators. In the public announcement document also the shareholding of the entire promoters group is specifically grouped together. The objective of the open offer was consolidation of shareholding and this could be achieved only by grouping the acquirers and other promoters together. When the shares got pledged with the merchant banker towards escrow obligation in the open offer all the promoters had given their consent. The other promoters also participated by giving their shares as pledge or security. The decision of the Supreme Court in Daiichi case relied on by the appellant may not be of any assistance to him since it deals with a different set of facts relating to common object underlying the acquisition of shares. In the case of K.K. Modi, again relied upon by the appellant, the shareholders were admittedly a divided house. In the present case the various statements furnished by the promoter group and the conduct of the parties show that they acted together. Perhaps the appellant has introduced the above argument with a view to diluting the percentage of shareholding which is reckoned in the acquisition of shares and

consideration for public announcement. We cannot appreciate the stand taken by the appellant in this regard."

22. I also place reliance on the observations of Hon'ble Securities Appellate Tribunal ("**SAT**") in the matter of Bikramjit Ahluwalia Vs. SEBI (Appeal No. 485 of 2015 decided on 20.11.2017)

> *"It is, thus, pertinent to note that an "Acquirer" defined under Section 2(1)(b) includes a person acting in concert with the acquirer where the acquirer is a promoter and persons acting in concert with him are also promoters. There is a presumption in law that they are all acting in concert with each other unless the contrary is proved and this was what was held by this Tribunal in its order in Rajesh Toshniwal's case after considering the judgment of the Hon'ble Supreme Court in Daiichi and K. K. Modi's case."*
>
> *"In this connection, it is pertinent to note that the Adjudicating Officer has categorically mentioned in the impugned order that the appellants are part of the promoter group and have all along been making disclosures before the Stock Exchanges and SEBI as common promoter group. The appellants have not brought on record anything either before the Learned Adjudicating Officer or this Tribunal to point out that there were differences among the promoters in acquiring more than 5% shares either by Mr. Bikramjit Ahluwalia or by any other Promoter. Therefore, the contention of the appellant as regards non-meeting of minds in the acquisition of shares in violation of SAST Regulation cannot be countenanced"*

In view of the above factual and legal position, I find that the Noticees are promoters and persons acting with concert for the impugned acquisitions.

23. I note the factual position that the promoter group was holding 54.90% (which is between 15% and 55% as stated under Regulation 11(1) of Takeover Regulations., 1997) as on April 1, 2009 and acquired additional 6.87 percentage of shares of target company as on June 22, 2009, on gross basis in the financial year 2009-2010. I also note that by virtue of

subsequent sale from April 23, 2009 by the promoters and increase in the paid-up capital of shares, the holding of Promoter group came down to 51.18% as on June 22, 2009 post conversion of warrants. However, the same is inconsequential as long as the promoters acquired more than five percent in a financial year. I also further note the factual position of acquisition of shares, by promoters, on April 23, 2009 and acquisition of shares through conversion of warrants as discussed above by the Noticees while acting in concert, and that the promoter group, acquired 6.87% shareholding as on June 22, 2009 which was more than the 5% limit during the financial year of 2009-2010. In the light of legal position discussed above, I conclude that the impugned acquisitions made by the promoter group triggered the Regulation 11(1) of the Takeover Regulations.

24. Perusal of Regulation 11 (1) of Takeover Regulations, 1997 further states that where the shareholding of the acquirer along with persons acting in concert is already within the limits prescribed under the said Regulations i.e. 15% or more but less than 55%, then such an acquirer on purchase of additional shareholding, in concert, amounting to more than 5% in a financial year, must mandatorily make a public announcement. However, as mandated under regulation 11(1) of the Takeover Regulations, 1997, the promoter group have not made any public announcement to acquire shares.

25. In this regard, it is pertinent to mention the observations of the Hon'ble Supreme Court of India in the matter of *Swedish Match AB & Anr. Vs SEBI* (C.A. 2361 of 2003 decided on 25.08.2004) wherein Court held *"..Indisputably, the purport and object of which a regulation is made must be duly fulfilled. Public announcement is at the base of Regulations 10, 11 and 12. Except in a situation which would bring the case within one or the other 'exception clause', the requirement of complying with the mandatory requirements to make public announcement cannot be dispensed with..."*. In the instant matter, I note that the Noticees have not claimed any of the exception clauses of Takeover Regulations.

26. I also place reliance on the observations of Hon'ble Securities Appellate Tribunal ("**SAT**")

in the matter of Bikramjit Ahluwalia Vs. SEBI (Appeal No. 485 of 2015 decided on 20.11.2017) wherein Court held *"It is worthwhile to note that the participants in the securities market are allowed to actively indulge in trading and other related activities because SEBI, as the market regulator, is given assurances by these market players that they understand the law and regulations as laid down by the Legislature and the SEBI respectively. If the Legislature and SEBI, acting on such assurances, give companies and other market participants the right to execute their decisions in the manner these entities deem fit, it goes without saying that there is a corresponding duty placed on the market participants to ensure that such mistakes as acquiring more than the acquisition limit of 5% without making the necessary public announcement are not committed."*

27. I have perused the material available on record and submissions of the Noticees. I note that the Noticees did not place any documentary evidence to show that they had made a public announcement as envisaged in Regulation 11 read with Regulation 14 of the Takeover Regulations when the same was due to the triggering tranche of conversion of warrants and consequent acquisition of shares on June 22, 2009 by the promoter group. In view of the foregoing, I find that the Noticees failed to make any public announcement in terms of Regulation 11(1) and the charges in the SCN against the Noticees stand established.

Issue 2: whether the Noticees are liable for directions envisaged under regulations 44 and 45 of the Takeover Regulations, 1997 read with corresponding provisions of regulations 32 and 35 of Takeover Regulations, 2011 for the aforesaid violation?

28. I proceed to deal with the liability of the Noticees for the violation of Regulation 11(1) of Takeover Regulations. Admittedly, the Noticees had not made any public announcement when the promoter group acquired 6.87% and trigged the threshold limit of 5% as prescribed in Regulation 11(1) of Takeover Regulations.

29. Before dealing with the issue of liability of the Noticees for the violation of Regulation 11(1), I would like to deal with the submissions of one of the Noticee Vatsal Agarwal. I

note that vide letter dated May 28, 2018 it was submitted that during the investigation period he was a minor and his holdings were of 50,000 equity shares which were monitored and controlled by the adult members of the family. I note that the said fact was also admitted by the Noticees who attended the hearing as well as through their written submissions by the responding Noticees. In this context, I note that the Target Company vide their letter dated August 27, 2018 confirmed that Vatsal Agarwal was a minor and his guardian was Ratanlal Thamakuwala, one of the Noticees herein. From the perusal of the PAN of Vatsal Agarwal, I note that he was a minor during the relevant period of trigger of open offer obligations. In order to ascertain the liability, if any of Vatsal Agarwal, reference may be made to the powers of the guardian mentioned in Section 8 of The Hindu Minority and Guardianship Act, 1956 which read as follows:-

"8. Powers of natural guardian.--

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,--

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in the case of necessity or for an evident advantage to the minor."

30. It is also appropriate to discuss observations made by the Hon'ble Delhi High court, in

Daiichi Sankyo Company Limited vs Malvinder Mohan Singh And Ors in the context of fraud committed by the guardian. It observed as follows:-

> *"However, no guardian would have the power to carry out a fraud for and on behalf of the minor so as to jeopardize the estate of a minor. There is nothing in Section 8 which would show that the natural guardian can when selling shares of the minor carry out a fraud on a third party and expose the estate of a minor to grave risk and prejudice and a liability for the fraud played by him. Any such act done by the natural guardian would be beyond his powers under Section 8 of the Hindu Minority and Guardianship Act and cannot bind or fasten any damages or liability on the estate of the minor."*
>
> *"...Clearly the acts of fraud said to have been committed by Mr.Malvinder were beyond the scope of his powers under section 8 of the Guardian and Wards Act. These acts cannot bind respondent No.5 and no award could be passed against respondent No.5..."*

31. The Hon'ble Delhi High court, in *Daiichi Sankyo Company Limited vs Malvinder Mohan Singh And Ors* while making the above observations also made reference to the Hon'ble Supreme Court judgment in *Ritesh Agarwal vs. Securities and Exchange Board of India,* [2008] 144 CompCas 12 (SC). The said observations are as follows:-

> *"29. Ritesh Agarwal and Deepak Agarwal are said to be minors. As they were minors having regard to the provisions of the Contract Act, they could not have been proceeded against strictly in terms of the provisions of the said Act. Apart from the actions taken by the Board, the persons who undertook those fraudulent actions may also be held to be guilty of making a misrepresentation and commission of fraud not only before the prospective purchasers of the shares but also before the statutory authority. The same, however, would itself not mean that a minor would not (sic) be penalised for entering into a contract which per se was not enforceable. A contract must be entered into by a person who can make a promise or make an offer. If he cannot make an offer or in his favour an offer cannot be made, the contract would be void, as an agreement which is not enforceable in law would be void. Section 11 of the Contract Act provides that the person who is competent to contract must be of the age*

of majority. If Ritesh Agarwal and Deepak Agarwal were minors, as would appear from their birth certificates, they could not have entered into the contract

32. The above discussion makes it clear that the minor cannot be held liable for the fraud committed by the guardian.

33. Keeping the above proposition of law in respect of fraud committed by guardian in mind, I proceed to discuss the power of guardian in respect of aspects other than fraud. While dealing with the powers of the guardian for entering into contract on behalf of the minor, Hon'ble High court of Orissa in its judgment dated April 05, 1982 in the matter of *Laxman Hota* vs *Rama Chandra Hota*;, AIR 1982 Ori 194 observed as follows:-

"... it would be useful to begin with a reference to the following important decisions which deal with the powers of the guardian of a Hindu minor. In AIR 1956 Andh Pra 33 (FB) (Vadakattu Surya-prakasam v. Ake Gangaraju) the question which arose for consideration was whether a contract entered into by a guardian of a Hindu minor for sale or for purchase of immovable property was specifically enforceable against the minor. The opinion of the Full Bench was delivered by the learned Chief Justice. As pointed out in AIR 1969 Bom 140 (Popat Namdeo Sodanver v. Jagu Pandu Govekar) the principles and points made out in the Full Bench decision of the Andhra Pradesh High Court may be stated as follows:--

"(1) A minor has no legal competency to enter into a contract or authorise another to do so on his behalf. A guardian, therefore, steps in to supplement the minor's defective capacity;

(2) Capacity is the creation of law, whereas authority is derived from (nature of) the act of parties;

(3) The limit and extent of the guardian's capacity (authority) are conditioned by Hindu law. They can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor;

(4) Even the personal liability arising out of the guardian's contract is a liability of the minor's estate only;

(5) Since the guardian under the Hindu law has the legal competency to enter into a contract on behalf of the minor for necessity or for the benefit of the estate, the contract is valid from the time of its inception, and since either party can enforce the contract, the test of mutuality is satisfied;...."

34. The principles laid down in Vadakattu Surya-prakasam vs. Ake Gangaraju (*Supra)* was further referred to in the judgment dated 17 September, 2004 passed by Hon'ble Allahabad High court in *Rajiv Nath Agrawal vs. Ankur Agrawal*, 2005 (1) AWC 259.

35. The Hon'ble Supreme court, while dealing with the powers of the guardian in *Manik Chand And Anr vs Ramachandra son of Chawriraj*; 1981 AIR 519, held the following:-

"It is unnecessary to go into this question any further as after the passing of Hindu Minority Act, 1956, the guardian of a Hindu Minor has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for realisation, protection or benefit of the minor's estate. This provision, makes it clear that the guardian is entitled to act so as to bind the minor if it is necessary or reasonable and proper for the benefit of the minor..."

"...A minor has no legal competence to enter into a contract or authorise someone else on his behalf to enter into a contract. But under the Hindu Law the natural guardian is empowered to enter into a contract on behalf of the minors and the contract would be binding and enforceable if the contract is for the benefit of the minor. While referring to One of the earliest cases which dealt with the right of the guardian to enter into a contract on behalf of the minor, the Hon'ble Supreme court referred to the full bench decision of the Hon'ble Madras High court in Krishnaswami v. Sundrappayyar wherin it was held that S.11 of the Contract Act does not exclude the power of the guardian of a minor to represent him and enter into contracts on his behalf either beneficial or necessary to the minor under Hindu Law and that the English Law that a minor cannot claim specific performance which proceeds on the ground of want of mutuality, has no application to this country..."

36. Similarly, while dealing the dispute in hand in its judgment dated January 31, 2018, the Hon'ble Delhi High court, in *Daiichi Sankyo Company Limited vs Malvinder Mohan Singh And Ors observed as follows:-*

"What follows is that a natural guardian can for the benefit of the minor, protection of the minor's estate take steps which are reasonable and proper regarding the estate of the minor. Sale of shares belonging to the minor of a company when a good price is being received could ordinarily be part of the power that a natural guardian can exercise under section 8 of the Act".

37. It may be noted that, in the context of the matter in dispute, the Hon'ble Bombay High court in *Popat Namdeo Sodanver v. Jagu Pandu Govekar*, AIR 1969 Bom 140 (paragraph 18), while making comparison between sale and purchase transactions carried out on behalf of the minor, has observed that the purchase transaction provides less onerous obligation.

38. In view of the legal position above discussed, it becomes clear that Guardian can enter into contract on behalf of minor, within the extent permissible by law. The limit and extent of the guardian's capacity (authority) are conditioned by Hindu law. They can only function within the doctrine of legal necessity or benefit.

39. Therefore, the further question, that arises for consideration is whether the open offer obligation is falling within the extant of guardian's authority. It may be argued that open offer is an offer made to the eligible shareholders of Target Company and the same becomes a binding contract on acceptance as per the Takeover Regulations. In this sense it may be argued that the open offer is a first step towards the binding contract in case of acceptance by the eligible shareholders. In view of the above discussion of law, the points that arises further for consideration is whether the guardian can make such offer on behalf of the minor. As discussed above, the guardian has the power to make such an offer and complete post offer obligations on behalf of minor provided, the said offer and other sobriquet obligations are arising out of "legal necessity". It is noted that making an open offer is a mandatory legal obligation on the acquirer/PAC if the acquisition falls under Regulation 11(1) of Takeover Regulations, as is the case herein. In view of the mandatory

obligation of making open offer, the requisite element of legal necessity is also complied with in this case. Looking from another perspective if such mandatory obligation is not complied with, it may also entail penal consequences which would affect the estate of the minor. Therefore, in that sense, making an open offer and following the related procedures in fact benefits the estate of the minor. In view of this, I hold that the making of open offer and following the related procedures by the guardian satisfy the requirement that either is out of legal necessity or out of benefit to the estate of the minor.

40. Alternatively, the open offer obligation can also be considered as not falling within the pure contractual obligation. The fact that the open offer itself is mandated by law and the acquirer/PAC has no contractual choice not to make open offer dilutes the nature of open offer obligation as pure contractual obligation. Regulations 13 to 29 of Takeover regulations, further mandates various stipulations during different stages from public announcement till payment of consideration by acquirer/PAC further illustrates, realm of open offer and related obligations fall as statutory obligation. Since, the guardian has power to do "all acts" within the permissible extant, I hold that even if the required mandate of making open offer and following related procedures, is not considered as contractual but statutory, the guardian has power to discharge the statutory requirements under the Takeover Regulations, as the same is arising out of "legal necessity" or for the benefit of minor/estate of minor.

41. It would not be out of place to deal with a related aspect on whether requirement of payment of consideration for shares accepted in the open offer is in the nature of guardian creating a personal covenant for payment against the minor, thereby falling beyond the powers of guardian. The Hon'ble Supreme court in *Manik Chand and Anr vs. Ramachandra son of Chawriraj*; 1981 AIR 519 dealt with a similar argument that the contract for purchase of immovable property by the guardian which binds the minor to make a payment would be in the nature of a personal covenant. However, the Hon'ble Court dismissed the argument stating that liability to pay the money is the liability of the

minor under the Transfer of Property Act, 1882. It may be noted that Section 55(5) (b) of the Transfer of Property Act, 1882 creates such a statutory liability on the buyer.

42. Vatsal Agarwal vide letter dated May 28, 2018 submitted that during the investigation period he was a minor and his holdings were of 50,000 equity shares which were monitored and controlled by the adult members of the family. The target company stated that Mr. Ratanlal Thambakuwala is the guardian of Mr. Vatsal Agarwal. In view of the above discussion, I hold that the guardian of Mr. Vatsal Agarwal was liable to make open offer in the instant case at the time of triggering of the open offer obligations.

43. However, I find from the copy of the PAN of Mr. Vatsal Agarwal that his date of birth is January 18, 1994 and the SCN is dated September 22, 2017. Therefore, the SCN has been issued to Mr. Vatsal Agarwal as major.

44. Therefore, the question that arises for consideration is whether the said open offer obligation was to be discharged at present by Mr. Vatsal Agarwal who has attained majority. In this respect though the provisions of the Civil Procedure Code was not applicable to this proceedings, as a guiding principle on the aspect as to when a guardian gets discharged I refer to the judgment dated February 7,1985 passed by Hon'ble High court of Calcutta in *Paritosh Kumar Ganguly vs. Sitala Bala Ghosh and Ors*. The relevant observations of the Hon'ble Court is as follows:-

"But the legal position that follow from the provisions of Sub-rule (5) to Rule 3 of Order 32 of the Code has been clearly set out in the decision of the Division Bench of the Patna High Court reported in AIR 1939 Pat 601 as referred to earlier and it is consistent with the view taken by the decision of this Court reported in AIR 1926 Cal 1053. In the present case, it was the duty of the defendant Paritosh Ganguly after attainment of majority to appear in the suit and apply for discharge of the guardian to enable him to defend the suit personally. As he failed to do so and allowed the suit to proceed as though he was still a minor without bringing to the Court's notice the fact of his attaining majority, the decree passed against him is binding on him and it cannot be challenged as a nullity."

45. As matter of guidance on the general principle of discharge of guardian before the

proceedings, I note that the above observations indicate that the guardian of the minor in the proceedings gets discharged on the date when the minor attains the majority and there is an obligation on the minor to initiate discharging the guardian. Therefore, even if the proceedings were initiated when Mr. Vatsal Agarwal was a minor, his guardian would have been discharged when Vatsal Agarwal attains majority. However, in the present case, the proceedings started through the SCN dated September 22, 2017 when Mr. Vatsal Agarwal was a major. Therefore, Mr. Vatsal Agarwal was competent to defend the proceedings against him. I further note that SCN was duly served upon him on September 27, 2017 and vide letter dated May 28, 2018 Mr. Vatsal Agarwal acknowledged the same and filed his reply. The hearing notices dated May 03, 2018 and July 05, 2018 were also duly served and acknowledgment received by SEBI. Therefore, Mr. Vatsal Agarwal was granted sufficient opportunities for defending the allegations against him as major. Therefore, in view of his attaining majority, as on the date of this order, Mr. Vatsal Agarwal is liable to make the open offer as PAC jointly and severally with other promoters who are held to be PACs in this case.

46. I note that regulation 44 read with regulation 45 of the Takeover Regulations, 1997 give flexibility to SEBI to enforce regulations 10 and 11(1) by way of several directions including (a) making public announcement (b) disinvestment of shares acquired in breach of regulations; (c) transfer of any proceeds or securities to the investors protection fund, etc. The guiding principles for the directions as provided in these regulations are the interest of the investors and securities market which are the statutory guiding principles as inbuilt in the SEBI Act, the Takeover Regulations, 1997 and the Takeover Regulations, 2011. In this context, I note that the Hon'ble Securities Appellate Tribunal ("SAT"), vide order dated September 08, 2011 in the matter of *Nirvana Holdings Private Limited vs. SEBI* (Appeal no. 31/2011) observed as follows:

> *"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."

47. I note that by virtue of acquisitions of shares by the promoter group, in concert, on gross basis, the Noticees collectively triggered the requirement of making a public announcement of an open offer under regulation 11(1) of the Takeover Regulations, 1997. The Noticees were therefore required to make a public announcement as envisaged under Reg. 14(1) of the Takeover Regulations. In view of the discussion above, appropriate action in accordance with law needs to be initiated against the Noticees. In the facts and circumstances of the present case, I do not find any reason to deviate from the normal rule to direct a public announcement to acquire shares of the target company in accordance with the provisions of Takeover Regulations, 1997, and issue any other direction as envisaged in regulation 44 and 45. Therefore, Unnao Trading Private Ltd., Anarcon

Resources Pvt. Ltd., Shri Hanuman Investments Pvt. Ltd., Rishiraj Agarwal, Rishiraj Agarwal HUF, Sangeeta Agarwal, Ratan Lal Tamakhuwala HUF, Ratanlal Tamakhuwala, Lalita Agarwal, Vatsal Agarwal, Industrial Lamcoke Projects Ltd., Austral Coke & Projects Ltd., Nordflex Textiles Pvt. Ltd. and Tirupati Niket Pvt. Ltd.are liable to make public announcement as per the provisions of Takeover Regulations. I also note that since the public announcement now would provide a delayed exit opportunity to the shareholders of the target company, the abovesaid entities should pay interest on the consideration amount to the shareholders who tender their shares in the open offer and who are eligible for interest as per law.

48. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11(1) and 11B of the SEBI Act and Regulations 44 and 45 of the Takeover Regulations, 1997 read with Regulations 32 and savings clause mentioned in Regulation 35 of the Takeover Regulations, 2011, hereby issue the following directions:

    i. Unnao Trading Private Ltd., Anarcon Resources Pvt. Ltd., Shri Hanuman Investments Pvt. Ltd., Rishiraj Agarwal, Rishiraj Agarwal HUF, Sangeeta Agarwal, Ratan Lal Tamakhuwala HUF, Ratanlal Tamakhuwala , Lalita Agarwal, Vatsal Agarwal, Industrial Lamcoke Projects Ltd., Austral Coke & Projects Ltd., Nordflex Textiles Pvt. Ltd. and Tirupati Niket Pvt. Ltd. shall jointly and severally make a public announcement to acquire shares of the target company in accordance with the provisions of the Takeover Regulations, 1997 read with the corresponding provisions of Takeover Regulations, 2011 within a period of 45 days from the date of this order;

    ii. The entities mentioned at paragraph 48 (i) shall, on acquisition of shares pursuant to public announcement pay the consideration amount along with the interest at the rate of 10% per annum from June 22, 2009 till the date of payment of consideration. The said payment of interest shall be made only to the shareholders who were holding

shares in the Target Company on the date of violation and whose shares are accepted in the open offer, after adjustment of dividend paid, if any and not to any other shareholders.

iii. The Noticees, except for the purpose of compliance of abovementioned directions, and any other consequent obligations, are restrained from accessing the securities market and shall also be prohibited from buying, selling or otherwise dealing in securities market, until they discharge their liability by making public announcement to acquire shares of the Target Company and make the consideration as per the provisions of Takeover Regulations with the interest at the rate of 10% per annum. The said direction shall cease to have effect on production of proof of compliance or discharge of the obligation by the Noticees.

49. The above directions shall come into force with immediate effect.

50. The SCN dated September 22, 2017 issued to the Noticees is disposed of with the abovementioned directions.

DATE: February 06, 2019
PLACE: Mumbai

Madhabi puri buch

MADHABI PURI BUCH
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA