BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. AK/AO-64/2017]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995

In respect of

Capetown Trading Company Private Limited
(PAN No. AACCC7099J)

In the matter of

Innoventive Venture Limited.
(Formerly known as Platinum Ocean Energy Ltd)

FACTS OF THE CASE

1. A letter of offer in compliance with Regulation 10 and 12 of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (hereinafter referred to as **'Takeover Regulations, 1997'**) was made by Chandu L. Chavan and 9 others (PACs) (Acquirer) to acquire upto 30,31,008 equity shares of Rs.10/- each representing 20% of post preferential voting equity capital of Innoventive Venture Limited, formerly known as Platinum Ocean Energy Ltd. (hereinafter referred to as '**the Company'**). The public announcement for the same was made on August 09, 2011 and the shares of the company were listed on Bombay Stock Exchange (hereinafter referred to as '**BSE**').

2. While examining the letter of offer, Securities and Exchange Board of India (hereinafter referred to as '**SEBI'**) observed that Capetown Trading Company Ltd. (hereinafter referred to as '**Noticee**') had acquired 30,000 shares (4.08%) of the company on March 31, 2006 and was shown as the promoter of the Company. It was alleged that the said transaction resulted in change in control of the Company, but, the Noticee had failed to comply with the provisions of Regulation 12 read with Regulation 14(3) of the Takeover Regulations, 1997.

3. Based on the aforesaid non-compliance of Takeover Regulations, 1997, adjudication proceedings under Chapter VI-A of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act'**) was initiated against the Noticee.

APPOINTMENT OF ADJUDICATING OFFICER

4. The undersigned was appointed as the Adjudicating Officer on September 02, 2013 under section 15-I of SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as **'SEBI Rules'**) to inquire into and adjudge under Section 15 H(ii) of the SEBI Act for the alleged violation Takeover Regulations, 1997.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. Show Cause Notice No. EAD-6/AK/VRP/4665/2014 dated February 11, 2014 (hereinafter referred to as '**SCN'**) was issued to the Noticee by Speed Post at the address: 153, Maker Chambers III, Nariman Point, Mumbai - 400021 under rule 4(1) of SEBI Rules communicating the alleged violation of Regulation 12 read with Regulation 14(3) of the Takeover Regulations, 1997. The SCN was returned undelivered. The SCN was then re-sent at an alternate address of the Noticee vide letter dated April 29, 2014 by hand delivery, which was duly accepted.

6. The Noticee vide letter dated May 12, 2014 stated that since the allegations in the show cause notice pertains to the year 2006 for which the details are not readily available, it may not be possible to file the reply within a period of 14 days from the date of receipt of SCN. The Noticee sought grant of additional two weeks time to make its submissions to the SCN. The Noticee's request was duly acceded to vide letter dated May 13, 2014 and the Noticee was given time till May 25, 2014 to make the submissions in the matter. Further, in the interest of natural justice and in terms of rule 4(3) of the SEBI Rules, the Noticee was also given opportunity to appear for hearing on May 30, 2014. The Noticee vide their letter dated May 29, 2014 citing non availability of advocates consequent to the ongoing court vacations, requested for two weeks time to file their reply. Vide letter dated May 30, 2014, the Noticee was given time till June 10, 2014 to make their submissions in the matter and another opportunity for hearing was granted to the Noticee on June 17, 2014.

7. The Noticee vide their letter dated June 09, 2014 *inter alia* submitted the following:

a. *That they had acquired 30,000 shares of the company on March 31, 2006 in the ordinary course of business from one Mr. Hanuman Mal Anchalia HUF (the Seller) at R.5.50 per share as a long term investment in the listed company, and not with the objective either of making substantial acquisition of shares or acquiring control over the Company. Further that the quantum of shares held by them was also negligible (i.e. around 4.08% being less than 5% of total equity / voting capital of the target company), whereas, there were various shareholders who were holding much larger percentage of shareholding in the Company. They sold their holdings in company (i.e. in November 2011) to Mr. Chandu L Chavan & Others. Post the said date they did not hold even a single share of the Company;*

b. *That the said seller i.e. Mr. Hanuman Mal Anchalia HUF was merely one of the ordinary shareholder of the company and was neither a promoter, nor, in control of the Company;*

c. *that post the said acquisition, the Noticee was not involved in any manner with the day to day management / operations / activities etc. of the company, either directly or indirectly. Admittedly, immediately post acquisition there was no change in the board of directors of the Company or in the auditors of the Company. The directors who were already there (viz. Mr. Manohar Lal Nangalia, Mr. Rajesh Mallik, Mr. Vinod Kapur and Mr. Nirmal Kothari) prior to the said acquisition, continued to manage the said Company. The same is evident from the Annual Report of the Company for the years 2005-06 and 2006-07. If they had acquired any control consequent to the aforesaid acquisition, the same would have manifested itself in change in Board of Directors of the Company, change in office bearers of the Company etc. which normally is the case wherein acquisition is accompanied by change in control, which admittedly did not take place;*

d. *That it was sometime in March 2008 and later in June 2009 that the following directors were appointed viz. Mr. Hanuman Mal Tater and Mr. Vaibhav Maloo respectively, however, the Noticee had no role in appointment of the said directors and that they were not their representatives or acting at their behest or directions. Thus it becomes clear that their said acquisition did not result in their acquiring control over the Company. Status quo remained in terms of the Board of Directors of the company till March 2008 (i.e. for two years post acquisition). Further, in March 2008 when new directors were appointed, then too, they had no role to play in their induction and they were not their representatives;*

e. *That the notice is silent as to how the Noticee has acquired control. Assuming that they were in control of the company merely because they were disclosed as promoters by the Company is*

legally untenable and unsustainable. It needs to be appreciated that reality on ground cannot be ignored and overlooked, in terms of exercise of voting rights, appointment of directors, role played in management of the Company, involvement in policy decisions of the Company etc. Designation (as a promoter) by itself is not a deciding factor of exercise of control. It is the role one plays in the management that matters. Further, as far as the quantum of shareholding is concerned, there were several other shareholders who were holding much higher number of shares than them;

f. *That at no point of time they had ever exercised any voting rights or attended any general meetings or participated in voting on resolutions passed by the Company. Further, at no point of time they had any representation on the Board of the Company. The expression control in Regulation 12 means effective control, which has to be established and the same cannot be presumed merely because a person is disclosed as a promoter by a company. There is nothing on record to even remotely suggest as to how they have exercised control over the company;*

g. *That the said acquisition was an investment made by the Noticee in a listed company and nothing beyond that;*

h. *That vide Order dated January 15, 2010 passed by the Hon'ble Securities Appellate Tribunal (hereinafter referred as 'SAT') in the matter of Subhkam Ventures (I) Private Ltd. V/s. SEBI, the following was observed:*

> *"The term 'control' has been defined in Regulation 2(1)(c) of the Takeover Code to "include the appoint majority of directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly including by virtue of their shareholding or management rights or shareholders agreement or voting agreement or in any other manner". This definition is an inclusive one and not exhaustive and it has two distinct and separate features : i) the right to appoint majority of directors or ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreement or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary where this terms has been defined as: Control – The direct or indirect power to direct the management and policies of person or entity, whether through ownership of voting securities by contract, or otherwise; the power or authority to manage, direct or oversee.*

Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather taking initiative. It is a positive power and not a negative power. In a board managed company, it is the board of directors that is in control. If an acquirer were to have power to appoint majority of directors, it is obvious that he would be in control of the company but that is not only the way to be in control. If an acquirer were to control the management or policy decisions of the company, he would be in control. This could happen by virtue of his shareholding or management rights or by reason of shareholders agreements or voting agreement or in any other manner. The test really is whether the acquirer is in driving seat. To extend the metaphor further the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these question is in affirmative then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."

i. *That without prejudice to the aforesaid, if it is construed that they had acquired control by virtue of acquisition of shares in the year 2006, then too no penalty be imposed in light of the following extenuating and mitigating circumstances:*
    i. *That their financial position was very weak over the years. During 2006 to 2011, they had continuously made losses. Post 2011, new management took over and they were slowly recovering;*
    ii. *That they had not traded in the shares of the Company. The investment made by them in the shares of the company was a dormant investment;*
    iii. *That they never exercised any control over the company in any manner and were never involved in the day to day affairs and management of the company. In fact there were various other shareholders who were holding much larger percentage of shares than the Noticee. Form should not be given precedence over substance. Mere disclosure by the company as promoter cannot result in automatic finding on they being in control, ignoring that they had no representatives in the board, no involvement in management of affairs*

of the company and that there were various shareholders who were holding much larger voting rights then the Noticee which is critical and decisive factor in determining control;

iv. *That the alleged violation pertains to a very old period and the same has not caused any loss to any investor and have also not adversely affected the shareholders of the company or the securities market in any manner. Admittedly, open offer has already been made by buyers to the shareholders of the company at price of Rs.10/- per share and they had also exited at the price of Rs.10/- per share (30,000 shares x 10 per share = Rs.3,00,000/-) by selling the shares to the buyers. Thus, there has been parity between them and other shareholders of the company;*

v. *That as per the Letter of Offer dated December 03, 2011 filed by the buyers, taking the date of March 31, 2006 as the trigger date and adding interest @10% p.a., the offer price would become Rs.8.62 per share only, which is far lower than the offer price of Rs.10/- per share which the buyers had been offered;*

vi. *That during the relevant period i.e. 2006-2011, there was no trading in the scrip of the company and the company was consistently making losses;*

vii. *That they have not made any gain or gained unfair advantage as a result of the alleged violations. The same has not even been alleged. Further, the allegations does not relate to fraud / unfair trade market practice / market manipulation / insider trading etc.;*

viii. *That they have a clean track record in terms of compliance. Their conduct has never been found to be violative of any of the provisions of SEBI Act or Regulations and no action has been taken against them by SEBI, save and except the matter under reference.*

8. The Noticee vide their letter dated June 17, 2014 informed their inability to appear for the hearing scheduled for the same date, as their counsel was engaged in a part heard matter before the Hon'ble High Court. Therefore, vide letter dated June 20, 2014, the Noticee was given another opportunity of hearing on July 07, 2014.

9. Mr. Vinay Chauhan, Advocate, Authorized Representative (hereinafter referred to as the **'AR'**) appeared on behalf of the Noticee on the date of the hearing and reiterated the submissions made vide letter dated June 09, 2014. During the course of hearing, the AR submitted a copy of the relevant pages of the Takeover Regulations, 1997 with respect to the definition of the promoter under Regulation 2(1)(h) applicable at the relevant point of time. The AR submitted that the case falls under

the definition of the promoter as defined under Regulation 2(1)(h)(ii) of the Takeover Regulations, 1997, however, the Noticee was not in control of the company. Hence, the Noticee by virtue of merely being the promoter of the company does not violate Regulation 12 of the Takeover Regulations, 1997 as alleged in the SCN.

10. During the hearing, the following was brought to the notice of the AR:
    a. That from the shareholding of the company from March 2006-2011 as available on BSE website, the Noticee was the only promoter of the company holding 4.08% of the paid up capital i.e. the entire promoter holding was held by the Noticee alone;
    b. further that from the Annual Report and Accounts of the company, it was observed that for the period 2006-07 and 2007-08, the company did not have any business operations;
    c. that further the company had not appointed any Managing Director or Whole Time Director during the said period;
    d. that Mr. Hanuman Mal Tater, who was the Director of the Noticee was subsequently appointed as the sole Director of the company w.e.f June 30, 2008, other two being Independent Directors;
    e. that the earlier Board of Directors comprising of Mr. Manohar Nangalia resigned from the Board w.e.f. March 25, 2008 and Mr. Rajesh Malik and Mr. Vinod Kapur resigned w.e.f. March 30, 2008;
    f. that Mr. Vaibhav Maloo, who was the director of the Noticee was also subsequently appointed as director of the company.

11. It was pointed out to the AR at the hearing that in view of the above, it is observed that the Noticee by virtue of being the promoter of the company had also acquired the control over the company, but, had failed to make the public announcement, thereby triggering Regulation 12 read with Regulation 14(3) of Takeover Regulations, 1997. The same was brought out in the offer document filed by Mr. Chandu L. Chavan and 9 other PACs. The AR was *inter alia* advised at the hearing to submit details of the Promoters and Directors of the Noticee from 2006 to 2010 along with supporting documents, if any. Also, details such as copy of agreement entered/ gift deed, as applicable, details when consideration was paid and when securities were received etc. in respect of 30,000 shares bought by the Noticee in the company were sought at the hearing.

12. The Noticee vide letter dated July 15, 2014 pursuant to hearing *inter alia* submitted the following:

a. *That the solitary charge in the SCN was that by virtue of acquiring 30,000 shares of the company on March 31, 2006 and being shown as promoter by the company, they have acquired control over the company and, thus, violated the provisions of Regulation 12 read with 14(3) of Takeover Regulations, 1997;*

b. *That merely because they had been disclosed as promoters cannot result in automatic finding that they had acquired control over the company on March 31, 2006 and in this context, during the hearing, attention was invited to the definition of "promoters" as it existed at that relevant time;*

c. *That there is nothing else in the SCN, except the fact that they were shown as promoters by the company in order to attribute acquisition of control on March 31, 2006;*

d. *That during the hearing, for the first time other factors were informed, based on which allegation of acquiring control over the company was sought to be supported. The Noticee submitted that said approach / procedure wherein allegations in the notice are sought to be supported not on the basis of foundation laid in the notice, but, based on certain extraneous material / grounds which find no mention whatsoever in the notice, is completely unknown to law and is legally untenable and unsustainable. It is well settled that no reliance can be placed on any such material which is not relied upon in notice to level the allegation;*

e. *That without prejudice to the above, the Noticee further submitted the following:*

    i. *That though they were being disclosed as promoters of the company from March 2006, they did not have any representation on the board of the company. Further, they never appointed any directors on the board of the company. At no point of time, any of the directors of the company were acting on their behalf or at their behest. And at the relevant time, there were various shareholders who were holding much more shareholding / voting rights than the Noticee. The said fact which goes to the root of the matter has been totally ignored and overlooked;*

    ii. *That though it is a matter of record that the company did not have any business operations during the period 2006-2007 and 2007-2008, however, the fact that the Company was not having business is totally irrelevant to determine whether the Noticee acquired control of the company on March 31, 2006;*

    iii. *That similarly though it is matter of record that the company did not have any Managing Director or Whole Time Director during the period 2006-2007 and 2007-2008, however, the*

fact that the company did not having any Managing Director or Whole Time Director during the period is totally irrelevant;

iv. *That merely because Mr. Hanuman Mal Tater, who was one of the Directors (Independent Director) of the Noticee was appointed as Director of company w.e.f. June 30, 2008, cannot result in inference that the Noticee acquired control over the company on March 31, 2006. The Noticee had no role in appointment of Mr. Hanuman Mal Tater as director in the Company on June 30, 2008. Further that Mr. Hanuman Mal Tater was not acting on the Noticee's behalf or at their behest and Mr. Hanuman Mal Tater did not have even a single share in the company;*

v. *That it is matter of record that the earlier Board of Directors comprising of Mr. Manohar Nangalia resigned from the Board w.e.f. March 25, 2008 and Mr. Rajesh Mallik and Mr. Vinod Kapur resigned w.e.f. March 30, 2008. The same goes to show that the Noticee did not acquire any control on March 31, 2006 as alleged. Further it is nobody's case that the said directors were at any point of time acting on the Noticee's behalf or behest;*

vi. *That merely because Mr. Vaibhav Maloo (one of the erstwhile directors of the Noticee) was appointed as one of the Independent Directors of the Company in June 2009, cannot result in inference that the Noticee acquired control over the company on March 31, 2006. The Noticee submitted that they had no role in the appointment of Mr. Vaibhav Maloo as director of the Company on June 2009. Further Mr. Vaibhav Maloo was not acting at the behest of the Noticee and that Mr. Vaibhav Maloo became the director of the Noticee only on January 17, 2008.*

13. The Noticee vide the said letter further *inter alia* submitted that there was no agreement or gift deed in respect of the 30,000 shares purchased from Mr. Hanuman Mal Anchalia (HUF) by way of off-market transaction at Rs. 5.50 per shares that resulted in alleged violation of Regulation 12 read with Regulation 14(3) of the Takeover Regulations, 1997. Further, the details of the promoters and directors of the Noticee from 2006-2010 along with the date of their appointment and their date of resignation was provided as below:

Sr. No.	Name of the Directors	Date of appointment	Date of Resignation
1	Ms. Vineeta Maloo	16.08.2005	25.02.2008
2	Mr. Hanuman Mal Tater	16.08.2005	12.11.2013
3	Mr. Hemant Sachetee	15.11.2006	11.07.2007

4	Mr. Ashok Kumar	04.09.2007	25.02.2008
5	Mr. Vaibhav Maloo	17.01.2008	12.11.2013
6	Mr. Santosh Narkar	17.01.2008	12.12.2013

Sr. No.	Name of the Shareholders	No. of shares	Percentage %	w.e.f.
1.	Mr. Vijay Dargar	5,000	50%	Since inception
2	Ms. Reena Dargar	5,000	50%	Since inception
3	Ms. Vineeta Maloo	9,000	90%	19.09.2005
4	Mr. Vaibhav Maloo	1,000	10%	19.09.2005

14. It was noted that the Noticee had vide its submissions/replies dated June 09, 2014, July 15, 2014 and submissions made at the time of hearing held on July 07, 2014 *inter alia* submitted that merely on the basis of being disclosed as the promoter, it cannot be alleged that the Noticee acquired control over the company. In view of the same, the alleged charge against the Noticee of triggering Regulation 12 read with Regulation 14(3) of the Takeover Regulations, 1997 by acquiring 30,000 shares (4.08%) of the company on March 31, 2006 and becoming the sole promoter of the company was further elaborated by issuing supplementary SCN dated August 22, 2014 in the matter.

15. Consequent upon the issue of supplementary SCN dated August 22, 2014, an opportunity of hearing was granted to the Noticee on September 29, 2014 vide hearing notice dated September 19, 2014. The Notice was delivered at the address of the Noticee, however, neither did the Noticee appear for the hearing, nor, any submissions were received from the Noticee. Hence another opportunity of personal hearing was granted to the Noticee on October 13, 2014 vide hearing notice dated September 30, 2014 and the Noticee was further advised to make its submission to the Supplementary SCN by October 07, 2014.

16. The Noticee vide letter dated October 09, 2014 while reiterating the submissions made earlier, *inter alia* further submitted the following:

    a) *That there is a complete dichotomy between allegations and charges leveled in the earlier notice which has been relied upon for the purpose of leveling the charge and the supplementary SCN. The supplementary SCN seeks to expand the basis of the charge to modify them. It is an unusual feature to issue supplementary SCN after the hearing. Normally once a SCN is issued and hearing is granted, necessary order is passed by the Adjudicating*

Authority. The reasons for departure from this established procedure is not clear and has not been explained;

b) *Further that it is a matter of record that as per the Annual Report of 2006-2007, the Company was planning long term strategy for revival of its business, secondly, the name of the Company was changed from Kayton Trade and Finance Ltd. to M/s. Platinum Ocean Energy Ltd. on June 15, 2006 and finally the company filed an application before the Reserve Bank for cancellation of NBFC certificate due to change in its name and object clause of the company. However, merely because they were the shareholders of the company during the relevant time cannot result in acquiring / exercising control over the company. The same is legally untenable and unsustainable. The notice has failed to explain as to how they acquired control over the company and secondly, there is no clarity as to how they exercised control in these changes;*

c) *That immediately post their acquisition there was no change in the Board of Directors of the Company or in the auditors of the Company. The directors who were already there (viz. Mr. Manohar Lal Nagalia, Mr. Rajesh Malik, Mr. Vinod Kapur and Mr. Nirmal Kothari) prior to their said acquisition, continued to manage the Company. The same is evident from the Annual Report of the Company for the years 2005-06 and 2006-07. If they had acquired any control consequent to the aforesaid acquisition, same would have manifested itself in change in Board of Directors of the Company, change in office bearers of the Company etc. which normally is the case wherein acquisition is accompanied by change in control which admittedly did not take place;*

d) *That merely because the name of the Company changed from M/s. Kayton Trade & Finance Ltd. to M/s. Platinum Ocean Energy Ltd., one cannot jump into conclusion that they had acquired the control of the Company;*

e) *That it is denied that Mr. Hanuman Mal Tater was appointed as the sole Director of the company with effect from June 30, 2008 as alleged. There is no reference with regard to the designation of Mr. Hanuman Mal Tater as director in the Company. The other two directors viz. Mr. Jagdish Mal Lodha and Mr. Deepak Bhandari being independent non-executive Director, it cannot be assumed that Mr. Hanuman Mal Tater was the sole Director of the Company. Further, it is submitted that Mr. Hanuman Mal Tater was a member of the Audit Committee and on the Shareholders / Investors Grievance Committee along with Mr. Jagdish Mal Lodha and Mr. Deepak Bhandari, wherein Mr. Jagdish Mal Lodha was the Chairman of*

both the Committee, whereas Mr. Hanuman Mal Tater was just a member of both the Committees;

f) *That further from the Annual Report of the Company for the period 2007-08, it appears that Mr. Hanuman Mal Tater was not a signatory to the Director's Report and Auditor's Report. In fact the same was signed by Mr. Jagdish Mal Lodha and Mr. Deepak Bhandari for and on behalf of the Board. Also by the perusal of the said Annual Report, it is evident that during the relevant period Mr. Hanuman Mal Tater was holding directorship in more than 15 companies (out which 2 are listed companies);*

g) *Thus, the allegation that Mr. Hanuman Mal Tater was appointed as the sole Director of the company with effect from June 30, 2008 is completely contrary to the factual position on record. Also, the notice has failed to explain as to how control was exercised by Mr. Hanuman Mal Tater in appointment of R. Kabra & Co. as statutory auditor of the Company, since the same was a decision taken by the Board;*

h) *That merely because Mr. Vaibhav Maloo (one of their erstwhile directors) was appointed on the Audit Committee and on the Shareholders/ Investor Grievance Committee in June 2009, cannot result in inference that the Noticee acquired control over the company on March 31, 2006. That Mr. Vaibhav Maloo was not acting on their behalf or their behest;*

i) *That further reality on the ground cannot be ignored and overlooked, in terms of exercise of voting right, appointment of director, role played in management of the Company, involvement in policy decisions of the Company etc. Designation (as a promoter) by itself is not a deciding factor of exercise of control. It is the role that is played in management that matters. And they had never exercised any voting rights or attended any general meetings or participated in voting on resolutions passed by the Company. Further, at no point of time they had any representation on the Board of the Company;*

j) *Also that it was not the case that soon after they acquired the shares of the Company, the Company decided to plan long term strategy for revival of its business which inter alia included diversification into lucrative areas. By analyzing the various Annual Reports (for the year 2006-07, 2007-08 and 2010-11) it appeared that the same wordings were getting repeated in all the Annual Reports under head "Future of business – company planning long term strategy for its business which inter alia included diversification into lucrative areas".*

k) *That status quo remained, in terms of Board of Directors of the company till March 2008 (i.e. for 2 years post their acquisition).* Further*, in March 2008 when new directors were appointed, they had no role to play in their induction and they were not their representatives;*

l) *That with regard to object and scheme of Act and Takeover Regulations, the expression control in Regulation 12 means effective control. The factum of control has to be established and same cannot be presumed merely because a person is disclosed as promoter by the Company;*

m) *There is nothing on record to even remotely suggest as to how they have exercised control over the Company. The said acquisition was an investment made by the Noticee in a listed company and nothing beyond that and the same was a dormant investment.*

17. The Noticee vide the said letter further reiterated the extenuating and mitigating circumstances brought out vide letter dated June 09, 2014.

18. Mr. Vinay Chuahan and Mr. K C Jacob, Authorised Representatives (ARs) appeared on behalf of the Noticee for the personal hearing held on October 13, 2015. During the course of the hearing, the ARs *inter alia* submitted that their reply to the Supplementary SCN has been filed and reiterated the submissions made therein.

19. Vide email dated December 11, 2014, the Noticee was requested to provide certified copies of the Board Resolutions appointing Mr. Hanuman Tater and Mr. Vaibhav Maloo as Directors of the company. In response, the Noticee vide email dated December 23, 2014 provided the Board minutes showing appointments of Mr. Hanuman Tater and Mr. Vaibhav Maloo as additional directors of the company.

20. Vide email dated May 23, 2016, the Noticee was further advised to clarify/ provide the following documents:

    a) the copy of the individual notices received by the company from Member(s) proposing the candidature(s) of each one of Mr. Jagdish Mal Lodha, Mr. Deepak Bhandari, Mr. Hanuman Mal Tater, Mr. Vaibhav Maloo and Mr. Hemant Kumar Sachetee for the office of Director of the company;

b) A copy of the resolution(s) passed and copy of the Minutes of the Board Meeting approving the appointment of aforesaid Directors;

c) A copy of resolution passed and Minutes of the Board meeting approving issue of 2,40,000 Redeemable Preference Shares at a premium of Rs. 90/- per share to M/s. Burlington Finance Ltd. (hereinafter referred to as **'Burlington'**) and 73,500 Redeemable Preference Shares at a premium of Rs. 90/- per share to M/s. Amrit Sales Promotion Pvt. Ltd. (hereinafter referred to as **'Amrit'**);

d) A copy of resolution passed and Minutes of the Board meeting approving taking of interest free loan of Rs. 3,25,00,000/- from M/s. Obident Exports Pvt. Ltd. (hereinafter referred to as **'Obident'**) and for giving interest free loan to Burlington and Amrit;

e) A copy of agreement entered, if any, by the company with Obident for taking interest free loan and copy of agreement entered, if any, by the company with Burlington and Amrit for giving interest free loan to them;

f) To clarify with details as to how and when the repayment of interest free loan of Rs. 3,25,00,000/- taken from Obident was made along with the supporting bank statement and other relevant supporting documents.

21. The Noticee vide reply email dated June 27, 2016 *inter alia* stated that the documents sought pertains to the company, and they were just a shareholder of the company, hence it was not possible for them to provide the said documents/ information, since the same did not pertain to them.

22. Vide letter dated July 07, 2016, the aforesaid information/ documents were, hence, sought from the company.

23. In response, vide undated letter received on August 08, 2016, the company in respect of Mr. Jagdish Mal Lodha, Mr. Deepak Bhandari, Mr. Hanuman Mal Tater, Mr. Vaibhav Maloo and Mr. Hemant Kumar Sachetee provided copies of forms filed with RoC, Consent letter issued by each of the aforesaid directors, Board Resolution along with copy of the approved Notice Directors Report for the year 2007-08/ 2008-09, as applicable, proposing their candidature for the Office of Director of the Company. A copy of the resolution(s) passed and copy of the Minutes of the Board Meeting approving the appointment of aforesaid Directors was also provided with the aforesaid letter. A copy of the resolution passed and minutes of the Board meeting approving issue of 2,40,000 redeemable preference shares at a premium of Rs. 90/- per share to Burlington and 73,500 redeemable preference

shares at a premium of Rs. 90/- per share to Amrit and copy of forms filled with RoC approving the allotment and return of allotment to the above mentioned shareholders were provided.

24. It was observed from the aforesaid reply of the company and the documents annexed therewith that the company had neither fully addressed the clarifications sought, nor provided all documents sought vide letter dated July 07, 2016. It was observed that the copies of specific notices received by the company from Members under section 257 of the Companies Act, 1956 proposing the candidature for the office of Director of the Company in case of following directors viz. Mr. Jagdish Mal Lodha, Mr. Deepak Bhandari, Mr. Hanuman Mal Tater, Mr. Vaibhav Maloo and Mr. Hemant Kumar Sachetee was not provided. Also, only the extract of the minutes of the Board meeting held on March 25, 2008 was provided, but, the signed copy of the minutes of the Board meeting approving the issue of 2,40,000 redeemable preference shares at a premium of Rs. 90/- per share to Burlington and 73,500 redeemable preference shares at a premium of Rs. 90/- per share to Amrit was not provided. Further, it was noted that the covering letter did not address at all the information/ documents sought at paras (5) & (6) of letter dated July 07, 2016 i.e. copy of resolution passed and Minutes of the Board meeting approving taking of interest free loan of Rs. 3,25,00,000/- from Obident and for giving interest free loan to Burlington and Amrit, copy of agreement entered, if any, by the company with Obident for taking interest free loan and copy of agreement entered, if any, by the company with Burlington and Amrit for giving interest free loan to them; clarification as to how and when the repayment of interest free loan of Rs. 3,25,00,000/- taken from Obident was made along with the supporting bank statement and other relevant supporting documents.

25. Hence, vide letter dated August 31, 2016, the Company was once again advised to provide the said information/ documents.

26. In response, the Company vide letter dated September 05, 2016 *inter alia* stated that they were unable to locate the copies of specific notices received by the Company from Members under section 257 of the Companies Act, 1956. The certified copies of Board Resolutions approving the appointment of the concerned directors and copies of forms filed with Registrar of Companies (RoC) in respect of their appointments were provided. With respect to issue of 2,40,000 redeemable preference shares at a premium of Rs. 90/- per share to Amrit, a copy of the Board Resolution approving allotment along with copy of Return of Allotment filed with RoC was provided. It was further stated that to meet the obligation to redeem the preference shares on due date, the Company in the interim raised a loan of

Rs. 3,25,00,000/- from Obident and the sum so raised were paid as advance against redemption to the preference shareholders viz. Burlington (Rs. 2,40,00,000/-) and Amrit (Rs. 73,50,000/-). Further that the said advances were adjusted against redemption of preference shares. It was also stated that the control and management of the company was transferred to them by the erstwhile management by way of open offer and with whatever records handed over, they were not in a position to lay their hands on the agreement entered, if any, in this regard. It was further stated that fresh equity was raised during 2011-12 to the extent of Rs. 14.42 crore (Rs. 10.42 crore by way of Swap and Rs. 4.00 crore in cash) and equity raised in cash was used for repayment of loan of Rs. 3,25,00,000/- raised from Obident in the interim. The letter further stated that bank statements supporting the same would be made available in due course of time. However, the same have not been provided.

27. During the course of the adjudication proceedings, the Hon'ble Supreme Court vide its Order dated November 26, 2015 in the matter of *SEBI v. Roofit Industries Ltd.* held that the Adjudicating Officer had no discretion under Section 15J in deciding the quantum of penalty under sections 15A(a), (b) and (c), 15B, 15C, 15D, 15E, 15F(b)& (c), 15G, 15H and 15HA for offences committed between 2002 and 2014. However, subsequently, another Bench of the Hon'ble Supreme Court in the matter of *Siddharth Chaturvedi v. SEBI* vide Order dated March 14, 2016 stated that the matter deserved consideration at the hands of a larger Bench. Accordingly, the Supreme Court directed that the papers of these appeals be placed before the Hon'ble Chief Justice of India for placing these matters before a larger Bench. Hence, the current Adjudication proceedings were kept on hold until determination of the issue of applicability of Section 15J to Sections 15A(a), (b) and (c), 15B, 15C, 15D, 15E, 15F(b)& (c), 15G, 15H and 15HA of the SEBI Act, for offences committed between 2002 and 2014.

28. However, subsequent to the amendment made vide the Finance Act, 2017 to Section 15J of the SEBI Act, 1992 (notified on April 26, 2017), the following *Explanation* has been inserted in Section 15J:

    ''*Explanation.—For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.''.*

29. Thus, it is now settled that Section 15J also applies to Sections 15A(a), (b) and (c), 15B, 15C, 15D, 15E, 15F(b)& (c), 15G, 15H and 15HA of the SEBI Act, for offences committed between 2002 and 2014.

Hence, the matter was proceeded with and the Noticee was afforded another opportunity of hearing on May 25, 2017 to make oral/ written submissions in the matter vide hearing notice dated May 05, 2017. In response, Capetown vide email dated May 24, 2017 *inter alia* replied that the submissions made in the matter may be considered as their final submissions in the proceedings.

30. Further vide email dated May 30, 2017, Capetown was required to provide the details along with supporting working in line with Takeover Regulations, 1997, of price at which it was required to make an open offer to the shareholders of the Company pursuant to acquisition of 30,000 shares (4.08%) of the Company on March 31, 2006. In response, vide return email of the same date, Capetown *inter alia* stated that that they had not made an open offer pursuant to acquisition of 30,000 shares (4.08%) of the Company on March 31, 2006. It was further *inter alia* stated that they had acquired the shares in the ordinary course of business at Rs. 5.50 per share as a long term investment in the listed company, and sold the said shares in November 2011.

31. It was observed that Intensive Fiscal Services Private Limited (hereinafter referred to as **'Intensive'**) were the Manager to the Open Offer made by Mr. Chandu L. Chavan & Ors. to the shareholders of the Company in December 2011. The said letter of Offer stated that the promoters of the Company had violated Regulation 12 of Takeover Regulations, 1997 due to acquisition of 30,000 equity shares (4.08%) of the Company on March 31, 2006. Hence vide email dated May 26, 2017, Intensive was advised to provide the price at which Capetown was required to make an open offer to the shareholders of the Company pursuant to acquisition of acquisition of 30,000 equity shares (4.08%) on March 31, 2006 along with the supporting working in line with Takeover Regulations, 1997. Vide reply email dated May 30, 2017, Intensive provided the calculation of Offer price at which open offer was required to be made by Capetown to the shareholders of the Company. As per the same, Open offer price as on March 31, 2006 in terms of Takeover Regulations, 1997 would have been Rs. 5.50.

32. Further vide various emails/ letters sent to the Company and to the Registrars of the Company viz. Karvy Computershare Pvt. Ltd. (hereinafter referred to as **'Karvy'**), details of shareholders of the Company who held shares as on March 31, 2006 and transferred shares from March 31, 2006 upto August 09, 2011 i.e. upto the date of public announcement made by Mr. Chandu L. Chavan & Ors. were sought along with number of shares sold, date when such shares were sold and the price at which the shares were sold in the format provided therein. Vide email dated June 08, 2017, Karvy forwarded the details received from the Company. On perusal of the said details, it was observed that

the details were not provided in the format in which they were sought. The Company had given the details of transfers done on March 13, 2006 and on October 01, 2011. It was not clarified whether the column 'Amount per Share' mentioned therein was the price at which the shares were sold or the face value of the shares. It was also not clarified whether any transfers had taken place from March 31, 2006 upto August 09, 2011. Hence vide email dated June 09, 2017, Karvy and the Company were advised to provide the details in the format provided. Vide email dated June 15, 2017, Karvy stated that the Company was not able to furnish the desired information for enabling them to provide the same.

33. Subsequently summons dated June 19, 2017 and July 12, 2017, by invoking the powers under Section 15I(2) of SEBI Act read with Rule 4(6) of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, was sent to the Company to *inter alia* provide the details of shareholders of the Company who held shares as on March 31, 2006 and transferred shares from March 31, 2006 upto August 09, 2011. Further, Karvy was advised to ensure that the details were forwarded by July 31, 2017. Vide email dated July 13, 2017, Karvy *inter alia* stated that the Company Secretary and the Compliance Officer of the Company has confirmed receipt of the letter and will provide the information accordingly as per time lines. Again vide email dated July 24, 2017, Karvy further stated that the Company Secretary of the Company had agreed to provide the details. However, no reply was received from the Company despite delivery of summons to the Company. Hence, summons dated August 04, 2017 was sent to Karvy to provide the said details in the format provided. Vide email dated August 10, 2017, Karvy forwarded its reply letter dated August 10, 2017, wherein it was stated that they had been appointed as the Registrar & Transfer Agent (hereinafter referred to as '**R&T'**) of the Company with effect from May 2012 with holding details as of that date of migration, and related records being maintained by the Company. It was stated that since the required data was pertaining to period prior to migration of account with Karvy, they had requested the Company Secretary of the Company to provide the details as per the prescribed format and supporting documents, however, they did not receive any response from the Company regarding the matter. Karvy *inter alia* stated that despite several efforts from their side, they did not receive any response from the Company, and in absence of related transaction history or documents which were processed prior to migration of R&T Agent services to Karvy, they were not able to provide the required information sought.

CONSIDERATION OF ISSUES

34. I have carefully perused the written submissions of the Noticee, the submissions made at the hearing and the documents available on record. It is observed that the allegation against the Noticee is that Noticee violated the provisions of Regulation 12 read with Regulation 14(3) of the Takeover Regulations, 1997 pursuant to acquiring 30,000 shares (4.08%) of the company on March 31, 2006 and thereby becoming the sole promoter of the Company.

35. The issues that, therefore, arises for consideration in the present case are:
    a. Whether the Noticee has violated the provisions of Regulation 12 read with Regulation 14(3) of the Takeover Regulations, 1997 pursuant to acquisition of 30,000 shares (4.08%) of the company on March 31, 2006 and thereby becoming the sole promoter of the Company?
    b. If so, do the violations, if any, attract monetary penalty under Section 15 H(ii) of the SEBI Act?
    c. If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in Section 15J of SEBI Act?

FINDINGS

36. Before moving forward, it is pertinent to refer to the definition of "Control" under the Takeover Regulations, 1997 and the relevant provisions of Regulation 12 read with Regulation 14(3) of the Takeover Regulations, 1997 which reads as under:

    DEFINITION OF "CONTROL"

    Definitions

    2 (1) In these Regulations, unless the context otherwise requires:

    (a)

    (b)

    (c) "control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

SUBSTANTIAL ACQUISITION OF SHARES OR VOTING RIGHTS IN AND ACQUISITION OF CONTROL OVER A LISTED COMPANY

Acquisition of control over a company.

12. *Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations:*

Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a 1[special resolution] passed by the shareholders in a general meeting:

Provided further that for passing of the special resolution facility of voting through postal ballot as specified under the Companies (Passing of the Resolutions by Postal Ballot) Rules, 2001 shall also be provided.

Explanation.—For the purposes of this regulation, acquisition shall include direct or indirect acquisition of control of target company by virtue of acquisition of companies, whether listed or unlisted and whether in India or abroad.]

Timing of the public announcement of offer.

14.*(1)….*

(2)……

(3) The public announcement referred to in regulation 12 shall be made by the merchant banker not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer.

37. Before examining the issues listed out as above, I note that the Noticee has stated that there is a complete dichotomy between allegation and charges leveled in the SCN and in the supplementary SCN. I find that the Noticee has contended that the supplementary SCN seeks to expand the basis of the charge to modify them and that it is unusual to issue supplementary SCN after the hearing. In the matter, I find that by issuing supplementary SCN, neither was the basis of the charges sought to be expanded, nor, were the charges amended. I find that SCN is generally issued based on an investigation or preliminary inquiry conducted by SEBI. An adjudicating officer so appointed, is required to conduct a quasi-judicial enquiry and accordingly penalize or acquit the persons charged. And during such quasi-judicial enquiry, it is likely that an Adjudicating Officer may come across such additional evidence which may further support the charge. The purpose of show cause notice is

primarily to enable the Noticee to meet the grounds on which the action is proposed against him. The same has been expressly brought out in the show cause notice. Also, the consequence if the Noticee does not satisfactorily meet the grounds on which an action is proposed, were brought out therein.

38. I note here that the Noticee has submitted that normally once a SCN is issued and hearing granted, necessary Order is passed by the Adjudicating Authority. The Noticee has contended that the reasons for departure from the established procedure is not clear and has not been explained. In the matter, I find that the basic principle of natural justice is that evidence used to prove the case must be disclosed to the Noticees concerned, so that the Noticees have an opportunity to show that it is untrue. In the given case, supplementary SCN was issued to the Noticee providing further evidence that supported the charge in the SCN. Also pursuant to issue of supplementary SCN, an opportunity was granted to the Noticee to submit their reply in the matter. Another opportunity of personal hearing was also provided to the Noticee. Further, all submissions made by the Noticee have been taken on record. Also, as can be seen from above, at every stage, an opportunity of personal hearing was given to the Noticee. Thus, I find that the proceedings were conducted as per the principles of natural justice, as such; the rights of the Noticee were duly safeguarded.

39. In the matter, I note that in the case of ***Ravi S. Naik vs. Union of India AIR 1994 SC 1558***, the Hon'ble Supreme Court had observed that while applying the principles of natural justice it must be borne in mind that they are not immutable but flexible and they are not cast in a rigid mould and they cannot be put in legal straight jacket. Whether the requirements of natural justice have been complied with or not has to be considered in the context of the facts and circumstances of a particular case *(emphasis supplied).* There are catenas of decisions on the aforesaid subject and the law settled on the point. And, I note that the ingredient of principles of natural justice varies from facts of each case and there is no straight jacket formula. Thus, in view of the above explanation, I note that the contention of the Noticee in the matter stands addressed.

40. With this in place, we now move ahead to examine whether there has been a violation of the provisions of Regulation 12 read with Regulation 14(3) of Takeover Regulations, 1997 by the Noticee. I find that SCN has alleged that the Noticee had acquired 30,000 shares (4.08%) of the Company on March 31, 2006, however, failed to make an open offer as required under Regulation 12 read with Regulation 14(3) of Takeover Regulations, 1997. On a perusal of the BSE website, I find that from

quarter March 2003 onwards upto quarter March 2006, the company did not have any identifiable promoter. The Noticee acquired 30,000 shares (4.08%) of the Company in March, 2006 and was classified as the sole promoter of the company in the filing made with BSE.

41. I find here that the Noticee has *inter alia* submitted that mere disclosure by the company as promoter cannot result in automatic finding that they were in control of the company, ignoring the fact that – (a) they had no representatives in the Board, (b) that they were never involved in the day to day affairs and management of the company, and (c) that there were various shareholders who were holding much larger voting rights then the Noticee, which is critical and decisive factor in determining control.

42. In the matter, I note here that in the case of ***Subhkam Ventures (I) (P) Ltd. Vs. SEBI, the Hon'ble Securities Appellate Tribunal (SAT) vide Order dated January 15, 2010 (***referred to by the Noticee as well) has observed as follows:

    "The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short, control means effective control."

43. With this in mind, let us now examine whether the Noticee in the facts and circumstances of the present case had acquired control of the company pursuant to acquisition of 30,000 shares (4.08%) in the Company In March, 2006 at Rs. 5.50 per share. I note from a perusal of the Annual Report and Accounts of the company for the period 2006-07 and 2007-08 that the company did not have any business operations during the said period. Also, that the company had not appointed any Managing Director or Wholetime Director during the said period. The said facts have been admitted by the Noticee also in its submissions.

44. Further, the Annual Report of the company for FY 2006-07 stated that the company was planning long term strategy for revival of its business which *inter alia* included diversification into lucrative areas. In the matter, I find that the Noticee has mentioned that by analyzing the Annual Reports for the year 2006-07, 2007-08 and 2010-11, it appeared that the same wordings were getting repeated in all the Annual Reports.

45. I note here that in the Annual Report of 2006-07, sub-para "Future Business Plans of the Company" under the Directors' Report read as follows: "*The Company has not received any order during the year under review. The Company is planning long term strategy for revival of its business which inter alia includes diversification into lucrative areas".* In the Annual Report of 2007-08, the said sub-para "Future Business Plans of the Company" under the Directors' Report got modified and read as follows: "*The company has considered various action plans and initiated talks for potential profitable businesses and is planning long term strategy for revival of its business which inter alia includes diversification into lucrative areas."* The said para as appearing in Annual Report of 2007-08, then remained unchanged during the later years upto 2010-11. Thus, I find that pursuant to the Noticee being appointed as the promoter of the Company, as a first step, the company started considering various action plans and initiated talks for potential profitable businesses.

46. I find further that the name of the company was changed from Kayton Trade & Finance Ltd. to Platinum Ocean Energy Ltd. vide Certificate of Change of Name dated June 15, 2006 issued by Registrar of Companies (hereinafter referred to as 'RoC'), Mumbai and the company had simultaneously filed an application before the Reserve Bank of India (hereinafter referred to as '**RBI**') for cancellation of NBFC Certificate due to change of name and object clause of the company. It also at the same time altered the Articles of Association and complied with the relevant provisions of the Companies Act. The said facts have been admitted by the Noticee too in its submissions. Thus, it is noted that company started orchestrating the change process by taking initial steps such as changing the company name, cancelling the NBFC certificate etc. and initiated talks to consider potential profitable businesses. The said momentum for change was received immediately after the Noticee acquired shares of the company on March 31, 2006 and was classified as the sole promoter in the filing made by the company with BSE, whereas, earlier the company did not have any identifiable promoter.

47. I find from the submissions made by the Noticee vide letter dated July 15, 2014 that Ms. Vineeta Maloo and Mr. Vaibhav Maloo were the promoters of the Noticee at the relevant point of time and they together held 100% shares of the Noticee. Further Ms. Vineeta Maloo was one of the directors of the Noticee from August 16, 2005 to February 25, 2008, Mr. Vaibhav Maloo was one of the directors of the Noticee from January 17, 2008 to November 12, 2013, and Mr. Hanuman Mal Tater was one of the directors of the Noticee from August 16, 2005 to November 12, 2013.

48. From the Annual Report of the Company for the period 2006-07, I find that Mr. Manohar Lal Nangalia, Mr. Rajesh Malik, Mr. Vinod Kapur and Mr. Nirmal Kothari (upto May 04, 2006) were the Directors of the Company. It is further observed from the Annual Report of the Company for the period 2007-08 that Mr. Hanuman Mal Tater, who was one of the Directors of the Noticee w.e.f. August 16, 2005 was appointed as an Additional Director of the Company with effect from March 25, 2008. Mr. Hanuman Mal Tater was also appointed as a Member on the Audit Committee and on the Shareholders/ Investors' Grievance Committee w.e.f. March 31, 2008. Besides, it was observed that the earlier remaining Board of Directors comprising of Mr. Manohar Lal Nanagalia, Mr. Rajesh Malik and Mr. Vinod Kapur also resigned from the Board around the same time. Mr. Manohar Lal Nanagalia resigned from the Board w.e.f. March 25, 2008. Mr. Rajesh Malik and Mr. Vinod Kapur resigned from the Board w.e.f. March 30, 2008. Further as per the Annual Report of 2007-08, I find that Mr. Jagdish Mal Lodha and Mr. Deepak Bhandari were appointed as Non-Executive, Independent Directors w.e.f. March 25, 2008. Thus, I find from the same that Mr. Hanuman Mal Tater, who was one of the Directors of the Noticee, became the director w.e.f. March 30, 2008, who was responsible for day to day management and operations of the Company, the other two directors at the relevant point of time being Non-Executive and Independent directors. It is pertinent to mention here that as per the Annual Report of period 2006-07, the Company had not appointed any Managing Director/ Whole Time Director/ Manager during the period. Neither did the company have any business operations since April 01, 2006. The company was planning long term strategy including diversification into lucrative areas during the relevant period and there were no actual business operations. I note that the new Board of Directors at its meeting held on June 30, 2008 proposed the appointment of R. Kabra & Co. as the statutory auditors in place of Jain Baid & Co. for the financial year 2008-09.

49. It was further also observed that Mr. Vaibhav Maloo, who was the promoter director of the Noticee w.e.f. January 17, 2008 as per the submissions made by the Noticee, was appointed as Director of the Company w.e.f. June 30, 2009 i.e. the same date when two directors viz. Mr. Hanuman Mal Tater and Mr. Jagdish Mal Lodha resigned from the Company. It is observed from Form 20B for filing of annual return by a Company downloaded from Ministry of Corporate Affairs (hereinafter referred to as **'MCA'**) website for the financial years ended March 31, 2009 and March 31, 2010 that Mr. Vaibhav Maloo had digitally signed the annual return of the Company for both the financial years ended March

31, 2009 and March 31, 2010. Also, Mr. Vaibhav Maloo was also appointed as the Chairman on the Audit Committee and on the Shareholders/ Investors' Grievance Committee.

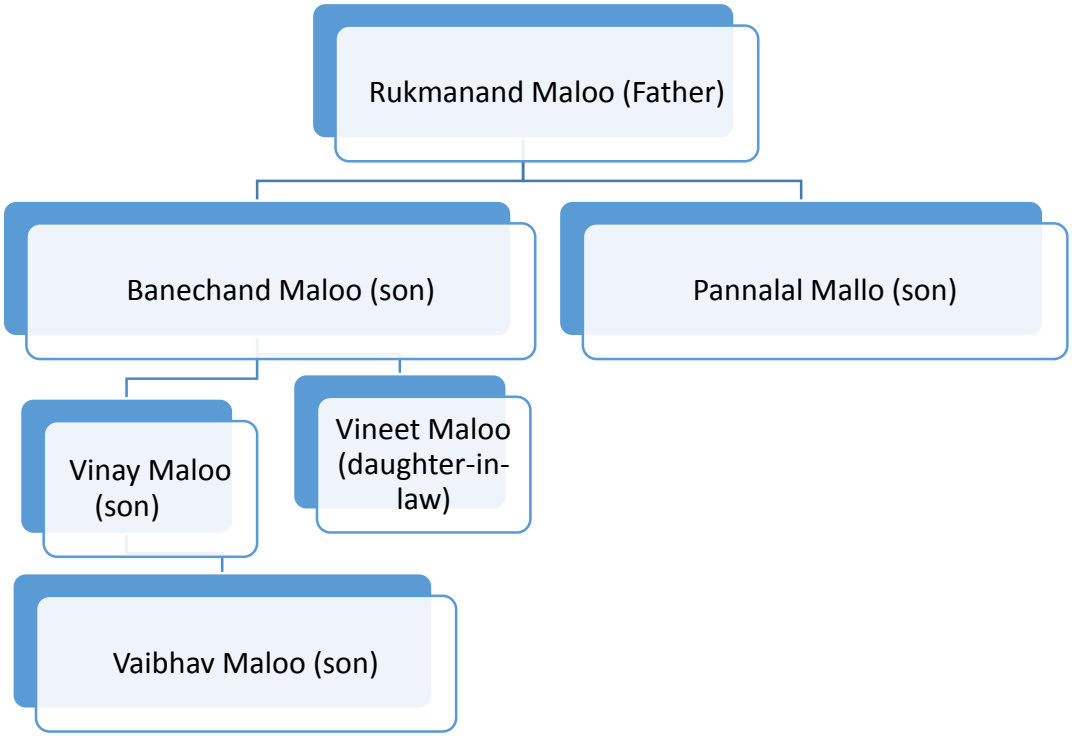
50. At this point of time, I further find that Mr. Hemant Kumar Sachetee, who was the director of the Noticee w.e.f. November 15, 2006 upto July 11, 2007, as per the director details downloaded from MCA website, was also appointed as director of the Company w.e.f. June 30, 2009.

51. I find here that the company had accumulated losses at March 31, 2006, which were more than 50% of the net-worth of the Company.

52. As on March 31, 2008, the Company issued 2,40,000 Redeemable Preference Shares at a premium of Rs. 90 per share to Burlington. I find from Form of Annual Return of Burlington downloaded from MCA website as at Annual General Meeting (hereinafter referred to as '**AGM'**) dates September 30, 2009 and September 30, 2010 that rabipaul@hotmail.com was the email address of Burlington mentioned on the said form for both the years. I find that the same email address rabipaul@hotmail.com has also been mentioned on Form 20B of Annual Return of the Company as downloaded from MCA website as at financial year ended March 31, 2009 (AGM date September 30, 2009) and at financial year ended March 31, 2010 (AGM date September 30, 2010), which has been digitally signed on behalf of the Company by Mr. Vaibhav Maloo. I find from the Annual Return of Burlington that Rabi Paul was one of the directors of Burlington from April 26, 2001 and was a director even as on AGM date September 30, 2010. I also note from DIN/ DPIN details of Mr. Hanuman Mal Tater downloaded from MCA website that Mr. Hanuman Mal Tater was one of the directors of Burlington from August 01, 1992 onwards and continued to be a director of Burlington even as on AGM date September 30, 2010. It is pertinent to mention here that Mr. Hanuman Mal Tater was the director of the Noticee from August 16, 2005 upto November 12, 2013 and director of the Company from March 25, 2008 upto June 30, 2009.

53. Further, I find that 73,500 Redeemable Preference Shares of the Company at a premium of Rs. 90 per share were also issued to Amrit. I note from Annual Return of Amrit as at AGM date September 20, 2008 downloaded from MCA website that Mr. Panna Lal Maloo was one of the Directors of Amrit from September 09, 2005 and Mr. Vinay Kumar Maloo was one of the directors of Amrit since January 03, 2008 upto March 07, 2008. Further, I note that that Mr. Panna Lal Maloo is a close relative of Mr. Vaibhav Maloo and Ms. Vineeta Maloo, the promoters/ directors of the Noticee at the relevant point

of time. And Mr. Vinay Maloo is the father of Mr. Vaibhav Maloo, who was the director of the Company, as also the Chairman of the Audit Committee and of the Shareholders/ Investors Grievance Committee at the relevant point of time. The said relation has been illustrated below:



54. Also, from the list of top 100 shareholders of Burlington as at September 29, 2007 and September 30, 2009 downloaded from MCA website, I find that the top 100 shareholders included the following:

Name (s)	Number of Shares held in Burlington
Amrit Sales Promotion Pvt. Ltd.	1,72,000
Mr. Panna Lal Maloo	30,000
Mr. Vaibhav Maloo	13,940
Ms. Vineeta Maloo	996

55. I further find from Annual Return of Amrit as at AGM date September 20, 2008 downloaded from MCA website that the shareholders of Amrit included Mr. Panna Lal Maloo holding 29,000 shares of Rs. 10 each, Mr. Sanjay Maloo holding 29,420 shares of Rs. 10 each, Burlington holding 1,55,000 shares of Rs. 10 each and 20,000 shares of Rs. 100 each.

56. Thus, I note here that Noticee through its promoters/ directors and their relatives had direct relationship with Burlington and Amrit, to whom Redeemable Preference Shares were issued by the Company.

57. From the Annual Report of the company for FY 2007-08, I find that the net-worth of the company was approx. Rs. 3.87 crore. Thus, I find that funds contributed by Burlington (Rs. 2,40,00,000) and Amrit (Rs. 73,50,000) for acquiring the redeemable preference shares of the company at a premium of Rs. 90 per share, constituted 80% of the net-worth of the company. However, subsequently the financial position of the company deteriorated to such an extent that as per the Annual Report of FY 2010-11, I find that the company had accumulated losses which were more than 100% of the net-worth of the company. Thus, I find that in accordance to provisions contained under section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), the Company deemed to be a sick industrial company in FY 2010-11.

58. At this stage, I find from the Annual Report of the company for FY 2010-11 that the company took interest free loan of Rs. 3,25,00,000 out of business expediency from Obident and gave interest free loan out of business expediency to Burlington and Amrit. This interest free loan that the company gave to Burlington and Amrit was equivalent to the funds contributed by these two firms for acquiring the redeemable preference shares, as per the details given below:

Sr. No.	Name of the Related Party	Amount (Rs.)
1	M/s. Burlington Finance Pvt. Ltd.	2,40,00,000
2	M/s. Amrit Sales Promotion Pvt. Ltd.	73,50,000
	Total	3,13,50,000

59. Thus, I find that at a stage where the company's financials had deteriorated completely, the company tried to protect the interest of the firms in which Noticee had an interest by providing them interest free loan equivalent to the funds contributed by them in the company by borrowing the said funds. I find it pertinent to mention here that Auditor's Report for FY 2010-11 had also highlighted the fact that interest free loans given by the company were prejudicial to the interest of the company. Thus, I note that the company which was deemed sick, instead of taking steps in the best interest of the

public shareholders and the company, acted in a manner that was prejudicial to the interest of the company, in order to protect the interest of firms in which the promoter Noticee had interest. Subsequently, as per the Annual Report of the company for FY 2011-12, I find that the company redeemed 3,13,500 redeemable preference shares of Rs. 10 each at premium of Rs. 90 each issued to Burlington and Amrit. I find further that the consideration was adjusted against the debit balance of the preference shareholders Burlington and Amrit. The Auditors Report of Obident for the year ended March 30, 2011 downloaded from MCA website showed Rs. 3.25 crore given and repaid during the year as loan transaction done with related parties (associate concern). Further, the Annual Report of the Company for FY 2011-12 at Note 5 to 'Notes to Financial Statements' shows an amount of Rs. 9231 payable to Elan Capital Advisors (i.e. earlier Obident).

60. **From all the above facts, it emerges that the Noticee was the only driving force behind the company, and the Noticee drove the company to protect the interest of the firms in which its interest existed, rather than adopting measures to revive and rehabilitate the potentially sick company. The Noticee subsequently sold the company to Mr. Chandu Chavan & Ors. Thus, it stands established that the promoter Noticee was effectively in control of the company.**

61. I find here that the Noticee has stated that immediately post their acquisition, there was no change in the Board of Directors or in the auditors of the Company. The directors who were already there prior to their said acquisition continued to manage the Company. It has been further stated that if they had acquired any control consequent to the aforesaid acquisition, same would have manifested itself in change in Board of Directors of the Company, change in office bearers of the Company etc., which normally is the case, wherein acquisition is accompanied by change in control which admittedly did not take place.

62. I find here that the Company is not in a position to provide the copies of specific notices received by the Company from members under section 257 of the Companies Act, 1956 proposing the candidature for the office of Director of the Company in case of following directors viz. Mr. Jagdish Mal Lodha, Mr. Deepak Bhandari, Mr. Hanuman Mal Tater, Mr. Vaibhav Maloo and Mr. Hemant Kumar Sachetee. The Company has stated that they were unable to locate the copies of specific notices received by the Company from Members under section 257 of the Companies Act, 1956. Also, the signed copy of the minutes of the Board meeting approving the issue of 2,40,000 redeemable

preference shares at a premium of Rs. 90 per share to Burlington and 73,500 redeemable preference shares at a premium of Rs. 90 per share to Amrit has not been provided by the Company. Further, I note that the Noticee has stated that there was no agreement in respect of the 30,000 shares (4.08%) purchased by it from Mr. Hanuman Mal Anchalia (HUF) by way of off-market transaction that resulted in alleged violation of Regulation 12 read with Regulation 14(3) of the Takeover Regulations, 1997.

63. Thus under the circumstances, conclusion has to be gathered from various circumstantial aspects that have been brought out as above. In my opinion, the test here has to be one of preponderance of probabilities as far as adjudication of civil liability arising out of violation of the Act or the provisions of the Regulations framed thereunder are concerned.

64. I find from the Annual Report of the Company for FY 2005-06 that the company had accumulated losses at March 31, 2006, which were more than 50% of the net-worth of the Company. Thus, I find that as on March 31, 2006, the Company was a potentially sick company. The company did not have any business operations. There were no fixed assets in the company. The Company did not have any identifiable promoter immediately prior to the Noticee acquiring shares in the company and being named as the promoter of the company. Upon Noticee being named as the sole promoter pursuant to its acquisition of shares, it is, however, observed that the company started considering various action plans and initiated talks for potential profitable businesses for its revival. It is further observed that pursuant to the Noticee acquiring 4.08% shares and becoming the sole promoter of the company, the business object of the company went through a major change, whereby the NBFC business was closed down and company started looking for lucrative opportunities in petroleum and exploration business.

65. Further by March 30, 2008, the entire earlier Board of Directors resigned. After the resignation of earlier Board of Directors, the director who was not Non-Executive and not Independent at the point of time, was one of the directors of the Noticee. He was also appointed as a Member of the Audit Committee and on the Shareholders/ Investors' Grievance Committee. The company at the point of time did not have any other Managing Director or Wholetime Director on the Board of Directors. Thus, it becomes obvious that the director of the Noticee, who was brought on the Board of the Company on March 25, 2008, was, in fact, the director handling day to day affairs of the company after all earlier directors resigned by March 2008. I find here that the Noticee has claimed that it was not involved in

any manner with the day to day management / operations / activities etc. of the company, either directly or indirectly. However, this is because the company in the first place did not have any business operations.

66. Further, on the day the director of the Noticee who was appointed director in the Company resigned (i.e. on June 30, 2009), on the very same day, the promoter director of the Noticee was appointed on the Board of Directors of the Company and was further made the Chairman of the Audit Committee and of the Shareholders/ Investors' Grievance Committee. The company did not have any business operations. However, it is seen from the preceding paras that the company in order to protect the interests of the firms in which Noticee had interest, had carried out acts prejudicing the interest of the company and its shareholders. And at such point of time, I find that the promoter director of the Noticee was the Director of the Company as also the Chairman of the Audit Committee & Shareholders/ Investor Grievance Committee.

67. Further, the copy of agreement entered, if any, by the Company with Obident for taking interest free loan and copy of agreement entered, if any, by the company with Burlington and Amrit for giving interest free loan to them was sought from the Company. The Company stated that the control and management of the company was transferred to them by the erstwhile management by way of open offer and with whatever records handed over, they were not in a position to lay their hands on the agreement entered, if any, in this regard. The Company stated that fresh equity was raised during 2011-12 to the extent of Rs. 14.42 crore (Rs. 10.42 crore by way of Swap and Rs. 4.00 crore in cash) and equity raised in cash was used for repayment of loan of Rs. 3,25,00,000/- raised from Obident in the interim. Though the Company stated that bank statements supporting the same would be made available in due course of time, however, the same have not been provided.

68. Thus, in absence of any agreement entered by the Noticee with the seller of shares pursuant to which Noticee was classified as the promoter of the company and due to absence of other crucial documents, the standard of evidence for proving the charge of change in control would be that of a person of prudence and practical good sense. I also note here that the Bhagwati Committee which was constituted to review the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994, had recommended a broad definition of control and opined that it should be left to SEBI to decide whether there has been an acquisition of control on the basis of facts of each case. I note

further that the Takeover Regulations Advisory Committee (TRAC), in its report dated July 19, 2010 had also reiterated the above views of the Bhagwati Committee.

69. And in the extant case, I find that an overall analysis of the facts of the case has established in a satisfactory and convincing manner on the yardstick of preponderance of probability that the Noticee had pursuant to acquisition of shares in the Company and being classified as the promoter of the company, acquired control over the potentially sick company. Besides, as per Regulation 2(1)(h) of Takeover Regulations, 1997, 'promoter' *inter alia* means any person who is in control of the target company. Since it is exceedingly difficult to prove whether an entity is in control of the company in absence of any agreement entered, absence of other related and crucial records/ documents, the legal proof in such circumstances partakes the character of a prudent man's estimate as to the probabilities of the case.

70. I find it relevant to mention here that the ***Hon'ble Supreme Court in Collector of Customs v/s D. Bhoormull (AIR 1974 SC 859)*** had held as follows:

"…The prosecution or the department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and- as Prof. Brett felicitously puts it – "all exactness is a fake". El Dorado of absolute proof being unattainable, the law, accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

…Since it is exceedingly difficult, if not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden."

71. In the extant matter, I find that "control" includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly. This right can be exercised at a time felt appropriate by such persons who acquire such right. **I find that there is no general rule that acquisition accompanied by change in control should result in immediate change in the entire Board of Directors, especially when the**

company was not having any business operations at the point of time, there were no fixed assets in the company and no inventory. However, the said intent was indeed set in motion in the extant case and carried out over time which becomes clearly evident from the details outlined as above.

72. **Hence in view of all of the above, I find that it stands established that the Noticee was in control of the Company pursuant to acquisition of shares in the Company, however, the Noticee failed to make the public announcement to acquire shares as required under Regulation 12 read with 14(3) of Takeover Regulations, 1997**.

73. The Hon'ble Supreme Court of India in the matter of ***SEBI Vs. Shri Ram Mutual Fund*** [2006] 68 SCL 216(SC) held that *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant…".* Further in the matter of Ranjan Varghese v. SEBI (Appeal No. 177 of 2009 and Order dated April 08, 2010), the Hon'ble SAT had observed *"Once it is established that the mandatory provisions of takeover code was violated the penalty must follow*.

74. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under Section 15H(ii) of the SEBI Act for the violation of Regulation 12 read with 14 of the Takeover Regulations, 1997 against the Noticee, which reads as under:

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

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

(i) …….

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

(iii) ……

(iv) ……

he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.

75. While determining the quantum of monetary penalty under Section 15H(ii) of the SEBI Act, I have considered the factors stipulated in Section 15-J of SEBI Act, which reads as under:-

Factors to be taken into account by the adjudicating officer

15J. *While adjudging quantum of penalty under Section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-*

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

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

(c) the repetitive nature of the default.

''Explanation.—For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.''.

76. In view of the charges as established, the facts and circumstances of the case and the judgments referred to and mentioned hereinabove, the quantum of penalty would depend on the factors referred in Section 15-J of SEBI Act and stated as above. It is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of such default by the Noticee. Further from the material available on record, it may not be possible to ascertain the exact monetary loss to the investors on account of default by the Noticee. However, the main objective of the Takeover Regulations is to afford fair treatment for shareholders who are affected by the change in control. Thus, the cornerstone of the Takeover regulations is investor protection.

77. I find that the Noticee has *inter alia* submitted that the alleged violation has not caused any loss to any investor and has also not adversely affected the shareholders of the company or the securities market in any manner. In this context, I note that ***the Hon'ble Securities Appellate Tribunal (SAT) in the matter of Komal Nahata Vs. SEBI (Date of judgment- January 27, 2014)*** has observed that:

"Argument that no investor has suffered on account of non disclosure and that the AO has not considered the mitigating factors set out under Section 15J of SEBI Act, 1992 is without any merit because firstly penalty for non compliance of SAST Regulations, 1997 and PIT Regulations, 1992 is not dependent upon the investors actually suffering on account of such non disclosure."

In view of the same, the argument put forth by the Noticee that they have not caused any loss to the investors is not relevant.

78. Further, I find that it has been *inter alia* also submitted by the Noticee that they have not made any gain or gained unfair advantage as a result of the alleged violation. In the matter, I note that in ***Appeal No. 78 of 2014 of Akriti Global Traders Ltd. Vs. SEBI, the Hon'ble Securities Appellate Tribunal (SAT) vide Order dated September 30, 2014*** *had observed that:*

> *"… Argument of appellant that the delay was unintentional and that the appellant has not gained from such delay and therefore penalty ought not to have been imposed is without any merit, because, firstly, penal liability arises as soon as provisions under the regulations are violated and that penal liability is neither dependent upon intention of parties nor gains accrued from such delay."*

In view of the same, the argument put forth by the Noticee that they have not made any gain or gain unfair advantage is also not relevant. It is for the same reason that the fact that the Noticee had not traded in shares of the Company, that the company was consistently making losses is not relevant for the case.

79. As per Section 15H(ii) of the SEBI Act, the Noticee is liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher. I have taken note of the fact brought on record by the Noticee that they had a clean record in terms of compliance.

80. I have taken note of the fact put forth by the Noticee that as per Letter of Offer dated December 03, 2011 filed by the buyers, taking the date of March 31, 2006 as the trigger date and adding interest @10% p.a., the offer price would have become Rs.8.62 per share only, which is far lower than the offer price of Rs.10 per share which the buyers had offered in 2011.

81. However, I find it pertinent to mention here that the shareholders are entitled to receive interest for the delay involved in receiving the payment of the consideration amount, for the period from the date on which it was due till the date on which the actual payment is made. The interest paid, as such, on a sum which is due to the shareholders is not a penalty, it is the legitimate claim of the shareholders for the delay involved in making payment to them. Thus, I note that the liability to pay interest is a part and parcel of the legal liability to pay compensation upon delay in making an open offer. Besides, I also note that the compensation to the shareholders of the Company was paid by the Acquirer Mr. Chandu Chavan & Ors. and not by the Noticee, who failed to make an open offer.

82. In order to ascertain the loss caused, if any, to the shareholders who would have sold shares pursuant to acquisition of shares in the Company by the Noticee on March 2006 and prior to the public announcement made by the Acquirer Mr. Chandu Chavan & Ors., the Company and its present Registrars were advised to provide such details along with the quantum and price at which the shares were sold. However, despite issue of summons to the Company and the present Registrars, the said details were not forthcoming from the Company. Hence, the exact loss caused, if any, to the shareholders who would have sold shares prior to the open offer by Acquirer Mr. Chandu Chavan & Ors could not be ascertained.

83. Public announcement as envisaged under Regulation 12 read with Regulation 14 of the Takeover Regulations, 1997 is the announcement of the open offer by the acquirers and the persons acting in concert, primarily disclosing their intention to acquire shares of the target company from the existing shareholders, thereby giving an opportunity of exit to the public shareholders at a specified price during a specified time. In fact, I find that the penalty provision under Section 15H (ii) of the SEBI Act also specifically refers to failure to: "*make a public announcement to acquire shares at a minimum price".* Thus, I conclude that failure to make public announcement to acquire shares at a minimum price is a serious matter, even if the transaction is otherwise in compliance, since the shareholders were deprived of an exit opportunity at the relevant point of time. And I find that there were about 30 shareholders holding 7,05,000 shares (95.92%), out of the total of 7,35,000 shares of the Company, who were denied an exit option by the Noticee by failing to make an open offer at the relevant point of time. This providing of an exit opportunity to the shareholders at the relevant point of time further assumes significance in light of the fact that the shares of the company were not traded on BSE since many years and the company had become a potentially sick company.

ORDER

84. After taking into consideration all the facts and circumstances of the case, I impose a penalty of **Rs. 50,00,000/- (Rupees Fifty Lakhs only)** on the **Noticee viz. Capetown Trading Company Private Limited** under the provisions of Section 15H(ii) of the SEBI Act for violation of Regulation 12 read with Regulation 14 of the Takeover Regulations, 1997. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the default committed by the Noticee.

85. The Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order either by way of Demand Draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, OR through e-payment facility into Bank Account the details of which are given below:

Account No. for remittance of penalties levied by Adjudication Officer	
Bank Name	State Bank of India
Branch	Bandra-Kurla Complex
RTGS Code	SBIN0004380
Beneficiary Name	SEBI – Penalties Remittable To Government of India
Beneficiary A/c No.	31465271959

86. The Noticee shall forward said Demand Draft or the details / confirmation of penalty so paid through e-payment to the Chief General Manager, Enforcement Department, SEBI. The Format for forwarding details / confirmations of e-payments made to SEBI shall be in the form as provided at Annexure A of Press Release No. 131/2016 dated August 09, 2016 shown at the SEBI Website which is produced as under:

1. Case Name :	
2. Name of Payee:	
3. Date of payment:	
4. Amount Paid:	
5.Transaction No:	
6. Bank Details in which payment is made:	
7.Payment is made for: (like penalties/disgorgement/recovery/Settlement amount and legal charges along with order details)	

87. In terms of rule 6 of the Rules, copy of this Order is sent to the Noticee and also to the Securities and Exchange Board of India.

Date: **September 29, 2017** **Anita Kenkare**

Place: **Mumbai** **Adjudicating Officer**