BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO.AK/AO-90-99/2015]

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

M/s. Subhkam Capital Ltd. (Now known as M/s. Aagam Capital Ltd.PAN-AAACP3134B),**Mr. Rakesh S Kathotia (**PAN-AJJPK1926B), **Ms. ArtiKathotia (**PAN-AGSPK0722H), **Ms. KamladeviKathotia (**PAN-AKPPK9141B) and **M/s. Rakesh S Kathotia - HUF (**PAN-AADHR5907E)**, M/s. Subhkam Monetary Services Pvt. Ltd.**(PAN-AANCS3565L),**M/s. Subhkam Properties Pvt Ltd. (**PAN-AAACD3558R**),M/s. Milton Securities Ltd. (**PAN-AAACM5965H)),**M/s. Subhkam Ventures (I) Pvt. Ltd. (**PAN-AAACW1624M),**M/s. Subhkam Securities Pvt. Ltd. (**PAN-AADCS4498N)

Inthe matter of

M/s.Subhkam Capital Limited
(Now known as M/s.Aagam Capital Limited)

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 M/s. S R Jute Traders Private Limited (**Acquirer**) to acquire 10,00,000 fully paid equity shares of Rs. 10/- each (representing 20% of the paid up and voting equity share capital) of M/s. Subhkam Capital Limited (hereinafter referred to as the**'Company'**) at an offer price of Rs. 94.08/. The Public Announcement of the same was made on October 22, 2011 and the shares of the company were listed on Bombay Stock Exchange Ltd (hereinafter referred to as '**BSE'**), Ahmedabad Stock Exchange Ltd. (hereinafter referred to as '**ASE'**) and Jaipur Stock Exchange Ltd. (hereinafter referred to as '**JSE'**).

2. While examining the letter of offer document,Securities and Exchange Board of India (hereinafter referred to as '**SEBI'**) observed that the Company and the erstwhile promoters of the company, viz.Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Mr. Rakesh S Kathotia–HUF,M/s. Subhkam Monetary Services Pvt. Ltd., M/s. Subhkam Properties Pvt. Ltd., M/s. Milton

Securities Ltd., M/s. Subhkam Ventures (I) Pvt. Ltd. and M/s. Subhkam Securities Pvt. Ltd.(hereinafter collectively referred to as **'the PromoterNoticees')** had violated certain provisions ofthe Takeover Regulations, 1997.

3. Based on the aforesaid information with respect to non-compliance of Takeover Regulations, 1997, as applicable, Adjudication proceedings under Chapter VI-A of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act'**) were initiated against the Company and the Promoter Noticees.

APPOINTMENT OF ADJUDICATING OFFICER

4. The undersigned was appointed asthe Adjudicating Officer on September 02, 2013under section 15-I of SEBI Act read with rule 3 of Securities and Exchange Board of India (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 15A(b) of the SEBI Act for the alleged violation of the Takeover Regulations, 1997.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. Show Cause Notice (hereinafter referred to as '**SCN'**) Ref. No. EAD-6/AK/RSL/32309/2013 dated December 12, 2013 was issued to the Company under rule 4(1) of SEBI Rules communicating the alleged violation of Regulation 7(3) and Regulation 8(3) of the Takeover Regulations, 1997 within the due date during the years 2006 and 2011 respectively.

6. SCNs Ref. No. EAD-6/AK/RSL/32310/2013, EAD-6/AK/RSL/32311/2013, EAD-6/AK/RSL/32312/2013, EAD-6/AK/RSL/32314/2013, EAD-6/AK/RSL/32317/2013, EAD-6/AK/RSL/32318/2013, EAD-6/AK/RSL/32320/2013, EAD-6/AK/RSL/32321/2013,and EAD-6/AK/RSL/32323/2013dated December 12, 2013were issued to the Promoter Noticeesunder rule 4(1) of SEBI Rules communicating to the Promoter Noticees, viz.Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Mr. Rakesh S Kathotia - HUF,M/s. Subhkam Monetary Services Pvt. Ltd. (hereinafter referred to as **'Subhkam Monetary'**), M/s. Subhkam Properties Pvt. Ltd. (hereinafter referred to as **'Subhkam Properties'**), M/s. Milton Securities Ltd. (hereinafter referred to as **'Milton'**), M/s. Subhkam Ventures (I) Pvt. Ltd. (hereinafter referred to as **'Subhkam**

Ventures'), M/s. Subhkam Securities Pvt. Ltd. (hereinafter referred to as **'Subhkam Securities'**), who were the erstwhile promoters of the company,the violation ofRegulation 3(3), Regulation 3(4), Regulation 7(1) read with regulation 7(2) and/ or Regulation 7(1A) read with regulation 7(2) of the Takeover Regulations, 1997, as applicable.

7. The SCN sent to one of the Promoter Noticee Subhkam Ventures by speed post was returned undelivered with remark 'Left'. The said SCN was thereafter resent to the new address available on the website of the Noticee Subhkam Ventures.

8. The Company and the Promoter Noticees were called upon to show cause as to why an inquiry should not be initiated against them and penalty be not imposed under Section 15A(b) of the SEBI Act for the alleged violations committed by them. The copies of the relevant pages of the letter of Offer were sent along with the respective SCNs.

9. The Noticee Company vide letter dated January 20, 2014 *inter alia* submitted as follows:
   - *That admittedly, disclosures have been made under Regulation 7(3) and Regulation 8(3) of the Takeover Regulations, 1997, and it is SEBI's own case that these disclosures were made, albeit with a minor delay;*
   - *That in making belated disclosures, there was no malafide intention of withholding of any information, but minor delay in making disclosure was caused purely due to inadvertence;*
   - *That in making the delayed disclosure, no unfair benefit or advantage has been derived by the company or by the Promoters or any other person;*
   - *That except the two instances of minor delays as brought out in the SCN, there has not been any delay by the company in making disclosures under Regulation 7(3) and 8(3) of Takeover Regulations, 1997. Further, regarding alleged delay of 11 days in making disclosure under Regulation 8(3), disclosures were made on time on April 29, 2011, but, due to inadvertent error in the disclosure so filed on April 29, 2011, a revised disclosure was made after a gap of 11 days upon noticing of the error;*
   - *That the Merchant Banker M/s. VC Corporate Advisors Pvt. Ltd in its letter dated February 10, 2012 to SEBI under para 3 (referring on para 5.1.7 of Draft Letter of Offer) has also stated to this effect as under:*

"SCL has duly complied with the disclosure requirement under Regulation 8(3) for the year 2003 to 2011, except a revised disclosure filed under Regulation 8(3) for 2011 on 11.05.2011 due to inadvertent error in the report filed on 29.04.2011".

- *That through the said letter dated February 10, 2012 under para 3 (referring on para 5.1.7 of Draft Letter of Offer), it has further been stated regarding the alleged delay of 17 days as under:*

  "Further, the Target Company has timely complied with the disclosure requirements under Regulation 7of the Regulations except a delay of 17 days in respect of disclosure required to be filed on 13.03.2006."
- *That from the aforesaid, it becomes quite clear that minor delay in making disclosures under Regulation 7(3) and 8(3) were caused purely due to inadvertence without any deliberate intentions;*
- *Further, the Hon'bleSupreme Court in VasudevRamchandraShelatv.PranlalJayanandThakar AIR 1974 SC 1728 has observed that "There is nothing in Regulation 18 to indicate that without strict compliance with some rigidly prescribed form, the transaction must fail to achieve its purpose. The subservience of substance of a transaction to some rigidly prescribed form required to be meticulously observed, savors of archaic and outmoded jurisprudence."*
- *In light of the decision of the Supreme Court in Hindustan Steel v State of Orissa, as the breach in the present case was unintentional, technical and no benefits had accrued to the promoter entities as a result of the contravention, no penalty ought to be imposed;*
- *That in the present case,in the first instance, there is no question of any gain or advantage that has accrued to the company, let alone any disproportionate gain or unfair advantage; no loss has been caused to any investor as a result of the alleged delayed disclosures; and there have been no instances in past where any regulatory action has been initiated against the Noticee company.*

10. The Promoter Noticees vide individual letters dated December 24, 2013sought for extension of time till January 15, 2014to make theirsubmissions to the SCN. Vide individual letters dated January 15, 2014the Promoter Noticeesexcept Milton *inter alia* submitted as follows:

Submissions made by Promoter Noticees viz. Subhkam Monetary, Subhkam Properties, Subhkam Ventures, Subhkam Securities, Mr. Rakesh S Kathotia, Ms. ArtiKhathotia, Ms. KamladeviKhatodia and Rakesh S. Kathotia – HUF:

- *With regard to the individual acquisitions made, wherever applicable, it was submitted that they were one of the entities who had acquired shares of the Company pursuant to the Share Purchase Agreement (hereinafter referred to as **'SPA'**)which triggered an open offer.Pursuant to the same, they had made an open offer to acquire the shares from the public shareholders of the Company and their merchant bankers had filed the 45 days report in respect of Open Offer with SEBI in compliance of the acquisitions made by them through the SPA and from the public through the Open Offer;*
- *That the effect of the acquisition was disclosed by their Merchant Banker by filing 45 days Report in respect of open offer and further through the quarterly filings filed with the stock exchange by the Company pursuant to Clause 35 of the Equity Listing Agreement entered with Stock exchange. Thus the effect of acquisition was always under public domain and known to all shareholders. Therefore, it is not as if the public and the shareholders of the Company were in the dark about the Acquisition;*
- *That under these circumstances, it was submitted that the alleged failure to disclose the effect of the Acquisition in the form prescribed under Regulation 7(1) read with Regulation 7(2) of the Takeover Regulations, 1997, if any, is bona-fide, technical and venial and the imposition of a penalty is not warranted given that the substance of the Acquisition and its effect on the shareholding of the Target Company was disclosed to the public;*
- *That with regard to the Sale Transactions, wherever applicable, admittedly, disclosures were made under Regulation 7(1A) read with 7(2) of the Takeover Regulations, 1997 and it is SEBI's own case that the disclosures were made, albeit with minor delay. Further, the effect of the Sale Transactions was disclosed to the public by the Target Company pursuant to Clause 35 of the Listing Agreement. Thus, the alleged failure to make disclosures in the prescribed form was bonafide, at best technical, inadvertent and no unfair benefit or advantage had been derived by the promoter Noticees for the alleged failure to make filings;*
- *That the Hon'bleSupreme Court in VasudevRamchantShelat v. PranlalJayanandThakar AIR 1974 SC 1728 has observed that "There is nothing in Regulation 18 to indicate that without strict compliance with some rigidly prescribed form, the transaction must fail to achieve its*

purpose. The subservience of the substance of a transaction to some rigidly prescribed form required to be meticulously observed, savors of the archaic and outmoded jurisprudence".

- *That in light of the decision of the Supreme Court in Hindustan Steel v State of Orissa, as the breach in the present case was unintentional, technical and no benefits have accrued to the promoter Noticees as a result of the contravention, hence no penalty ought to be imposed on the promoter Noticees;*
- *That in the first instance, there is no question of any gain or advantage that has accrued to the promoter Noticees, let alone any disproportionate gain or unfair advantage; no loss has been caused to any investor as a result of the delayed disclosure of the Acquisition; and there have been no instances in past where any regulatory action has been initiated against the Promoter Noticees;*
- *That without prejudice to the submissions above, it has been further submitted that Regulation 7(1A) of the Takeover Regulations, 1997 is not applicable to the Sale transactions.*
- *It has been stated that a pre-requisite for the application of Regulation 7(1A) of the Takeover Regulations, 1997 is that an acquirer should have acquired shares or voting rights of the company either under (i) sub regulation (1) of Regulation 11 or (ii) the second proviso to sub regulation (2) of the Regulation 11 of the 1997 Regulations;*
- *That without prejudice to the submission above it is submitted that in the present case in terms of Regulation 11(1, the acquisition of "additional shares or voting rights" refers to those shares acquired post the initial acquisition of shares of the Company i.e. acquisition of 33,50,767 shares of the company, (29,78,497 shares acquired pursuant to the SPA and 37,22,70 shares acquired pursuant to open offer made under Regulation 11(1) of the Takeover Regulations, 1997 (Collectively the "Initial Acquisition"). And in the present case, the additional shares or voting rights within the meaning of Regulation 11(1) of Takeover Regulations, 1997 regulations were acquired for the first time in the financial year 2007-08 on February 05, 2008 after the Initial Acquisition. Therefore, the provisions of Regulation 7(1A) read with Regulation 7(2) became attracted or applicable in the instant case only after February 2008, and the acquisitions made by the acquirers after February 04, 2008, technically, cannot also be termed as acquisition either under the provision of Regulation 11(1) or Regulation 11(2) as it then stood; and hence the provisions of Regulation 7(1A) read with Regulations 7(2) are not attracted or applicable;*

- *With regard to the alleged violation of Regulation 3 of Takeover Regulations, 1997 by Subhkam Securities, where the provisions of Regulations 10, 11 and/ or 12 are attracted, an exemption from making an offer would be available if the conditions set out in Regulation 3 are met. As a corollary, unless the provisions of Regulation 10, 11 and/ or 12 are applicable, there would be no requirement to meet the conditions contained in Regulation 3. Therefore where the provisions of Regulation 11 are inapplicable, there is no need to meet the requirements under Regulation 3 to claim an exemption from Regulation 11;*
- *That as brought out above, acquisition of 2,63,412 shares of the company on March 23, 2011 did not constitute acquisition of "additional shares or voting rights" within the meaning of Regulation 11(1) of Takeover Regulations, 199 ;*
- *That further through the said acquisition there was no change at all to the total shareholding of the promoter group of the company;*
- *That in view of no acquisition of any additional shares or voting rights having taken place within the meaning of Regulation 11(1), the provisions of Regulation 11(1) of Takeover Regulations, 1997 were not at all applicable or attracted;*
- *Thus unless the charging provisions were attracted, there was no need to be exempted from. Further that Regulation 10 and 12 have no bearing on this case. Regulation 11 which deals with those holding more than 15% and acquires additional shares or voting rights in any financial year, comes to play if there was any additional acquisition by them. Since there was no additional acquisition at all within the meaning of Regulation 11(1) as stated above, there was no filing made under Regulation 3(3) or Regulation 3(4) of Takeover Regulations, 1997;*
- *That since the Merchant Banker handling the open offer advised to file the details of the transaction under Regulation 3(3) and reports under Regulation 3(4), as a matter of abundant caution and to avoid unnecessary delay in the open offer by the acquirer, a filing was made under Regulation 3(3) in respect of details of interse transfer and report under Regulation 3(4) "under protest and without prejudice"(making it clear that they were not required to be filed in view of what has been stated above). The same was filed on June 13, 2012 and June 22, 2012.*

11. The Promoter NoticeeMilton vide letter dated January 15, 2015 *inter alia* submitted as follows:
    - *That the SCN pertains to the transactions allegedly undertaken by the acquirers / promoters of the company at the relevant time pursuant to the SPA dated October 25, 1999;*

- *That the allegation is factually erroneous as they did not acquire shares pursuant to the SPA that led to the triggering open offer in 1999/2000. Hence the question of making any disclosure in any event does not and cannot arise. Therefore, neither Regulation 7(1), 7(1A) or 7(2) of the Takeover Regulations, 1997 are applicable to them;*
- *For the reasons stated above, the proceedings ought to be dropped.*

12. In the interest of natural justice and in terms of rule 4(3) of the SEBI Rules, an opportunity of personal hearing was granted to the Company and the Promoter Noticees on January 29, 2014 vide individual hearing Notices dated January 16, 2014. Vide letters dated January 22, 2014,the Company and the Promoter Noticees cited that their legal counsels were unavailable on January 29, 2014and requested the personal hearing to be adjourned and scheduled to a later date. The Promoter Noticees further requested to reschedule the hearing to February 04 or 06, 2014 or any suitable date in the month of March 2014. Hence vide e-mail dated January 24, 2014,the Company and the Promoter Noticees were informed that that the personal hearing was rescheduled to February 06, 2014 in the matter.

13. During the personal hearing, Mr.Somasekhar Sundaresan, Mr. RavichandraHegde and Mr. AbishekVenkatraman, Authorized Representatives (hereinafter referred to as**ARs**)appeared on behalf of the Company and the Promoter Noticees and reiterated the submissions made vide individual letters dated January 20, 2014 and January 15, 2014 respectively. The ARs provided copies of filing made by the company to the stock exchange. The ARs were advised to submit *inter alia* the purpose of the acquisition / transfers, as applicable, whether the same was pursuant to any agreement, details of receipt/ transfer of funds, details of receipt/ transfer of securities etc.

14. Vide letter dated February 17, 2014, the Promoter Noticees and the Company*inter alia*made the following submissions:

Open Offers not covered by these disclosures:

- *That vide a SPA dated October 25, 1999, the promoters of the company agreed to acquire (59.57%) of the equity share capital of the company from the erstwhile promoters of the company, thereby triggering Regulation 10 read with Regulation 12. An open offer to acquire the shares of the company was therefore duly made and the promoters thereby came into control of the company under Regulation 10 and 12;*

- *Regulation 10 and 12 inherently provide for a public announcement at the first available opportunity i.e. immediately upon the agreement triggering an open offer is signed. At every stage after the public announcement, the scheme of the Takeover Regulations, 1997 envisages an explicit requirement to disclose every acquisition thereafter culminating in the post open offer position also being reported in a report to be filed 45 days after the completion of the open offer(under Regulation 24(7));*
- *Each of these provisions underlines and emphasizes the fact that the disclosure regime for transactions that attract the obligation to make an open offer is distinct and separate from the disclosure regime for ongoing disclosures under Regulation 7 and Regulation 8. Regulation 7 and 8 entail disclosures that enable policing and administration of the Takeover Regulations, 1997 as also providing an advance warning to the target company about a potential increase in shareholding and the buildup of holdings in the company. On the other hand, the disclosures made upon triggering an open offer, during the open offer and after completing the open offer are spelt out in the scheme of Takeover Regulations, 1997 from differently nuanced stand point;*
- *That even the thresholds set out in Regulation 7 i.e. 5%, 10%, 14%, 54% or 74% explicitly stop short of the thresholds that would trigger an open offer under Regulation 10 and 11;*
- *Consequently, the disclosure regime under Regulation 7 would not apply to acquisitions that are otherwise disclosed in the public domain under Regulations 10, 11 and 12. In the instant case, all the requisite public announcements, public disclosures and public filling were made. Therefore, the legislative intent and scheme of Regulation 7 have no bearing on and do not get attracted in the case of open offer transactions. Therefore, no violations can be alleged to have taken place and the promoters as a whole cannot be accused of violating disclosure obligations under the Takeover Regulations, 1997 and no regulatory intervention in the form of penalty or otherwise is warranted.*

Milton only a deemed PAC like many others:

- *That in the open offer, disclosures had been made as required in the Takeover Regulations, 1997 about the target company, the acquirer, the persons acting in concert as also the persons deemed to be acting in concert. Persons deemed to be acting in concert, including the companies which had common directors were listed out with an explicit assertion that they were being listed by reason of them falling in the category, although they were not in fact acting in concert with the acquirer with any common objective or purpose of acquisition;*

- *That Milton is one such entity that was named in the letter of offer making it clear that the said entity was in fact not a person acting in concert. Therefore, the identification of Milton as one of the Noticees is in fact untenable.*

Jurisdiction under Regulation 7 not attracted:

- *That the jurisdiction of Regulation 7(1A) would be attracted only in relation to acquirers who have acquired shares under Regulation 11(1) of the Takeover Regulations, 1997. The jurisdiction of 7(2) would be attracted only when Regulation 7(1A) of the Takeover Regulations, 1997 would be attracted. In the instant case, neither of the provisions are attracted for the reasons summarized below:*
  - *Regulation 7(1A) imposes an obligation to disclose purchases or sales aggregating to 2% or more in a target company by explicitly specified persons;*
  - *Such explicitly specified persons are those identified by the legislation itself, as those acquirers who have acquired shares or voting rights under Regulation 11(1) or Regulation 11(2);*
  - *The intention behind the clear, explicit and categorical delineation of the jurisdiction of Regulation 7(1A) would be quite understandable viz. to require disclosures by those who avail of creeping acquisitions under Regulation 11(1) or 11(2);*
  - *The acquisitions by such persons are acquisitions of those who avail of the head-room made available under Regulation 11 for increasing their stake without triggering another open offer;*
  - *It is therefore clear that the jurisdiction and coverage of Regulation 7(1A) is aimed at monitoring purchases and sales by persons being acquirers, who having acquired more than 15% in accordance with law, avail of creeping acquisitions by making additional acquisitions of shares or voting rights beyond what they had got earlier triggering the open offer;*
  - *At the end of the open offer referred to above, the acquirer in the Company, came to acquire [67.02%] per cent as set out in the 45-day report published after the completion of the open offer. Thereafter, these acquirers have only consistently sold their shares and had not made any acquisition of additional shares / creeping acquisitions under Regulation 11, beyond what they had got earlier triggering the open offer. Therefore, the jurisdiction of Regulation 7(1A) would not get attracted.Unless and until any fresh acquisition is made under*

Regulation 11, the provisions of Regulation 7(1A) would have no application and therefore no penalty may be imposed;

- *If Regulation 7(1A) does not get attracted, Regulation 7(2) would have no bearing either;*

- *that the filings that the Promoters indeed made, fall in the nature of being voluntary compliance without there being a legal obligation to do so. Consequently in the eyes of law, there ought not to be any allegation of any alleged delay in compliance necessitating imposition of a penalty. Against this backdrop, any purported delay in such voluntary compliance can never be the basis of proceedings to impose penalty;*
- *that when a certain provision of law is itself inapplicable, and any voluntary compliance also does not point to any social condition that warrants an extrapolated application of inapplicable law with a view to effect some intervention, it only stands to reason that there is no room for even remedial intervention, leave alone punitive intervention;*
- *that it is a settled law that if more than one view is possible in interpreting a penal provision, the interpretation that would not lead to penalty should be adopted. In other words, penal provision should be strictly construed and if more than one view is possible, the benefit of doubt should work to the favour of acquittal from penalty and not in furtherance of imposing penalty. The* ***Supreme Court in TolaramRelumal v. State of Bombay 1955(1) SCR 158*** *has held that "if two possible and reasonable constructions can be put up on a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the legislation in order to carry out the intention of the legislation."*
- *That in the circumstances, in view of the bona fide interpretation of the provision by the Noticees, a view in favour of acquittal from penalty rather than a view in favour of imposing penalty be adopted.*

Regulation 3 not attracted:

- *Regarding the allegation of violation of Regulation 3(3) and Regulation 3(4) in respect of inter-se transfers among Promoters without any change in the shareholding of persons acting in concert effected in March, 2011:*
    - *Regulation 3 provides that nothing contained in Regulations 10, 11 and 12 would apply if the provisions of Regulation 3 and their ingredients are complied with;*

- *Thus, should an open offer be otherwise triggered under Regulation 10, 11 or 12, an exemption from the obligation to make an open offer may be relied upon by meeting the requirements of Regulation 3;*
- *As a corollary, if the provisions of Regulations 10, 11 or 12 are not even attracted in the first place, there would be no requirement to comply with the ingredients of Regulation 3, since no exemption would be necessary;*
- *Even in such instances, if the requirements of Regulation 3 are not met, the consequence would be that an obligation to make an open offer would be attracted. It can never be a consequence that a failure to comply with Regulation 3 would lead to the imposition of penalty;*
- *In the instant case, nothing contained in Regulation 10, 11 or 12 was at all attracted by the transactions executed in June 2012;*
- *Consequently, no open offer obligation was triggered at all;*
- *There was no requirement to avail of any exemption from any open offer;*
- *Consequently, there was no requirement to comply with the ingredients of Regulation 3 at all;*
- *Consequently, there was no requirement to file any report under Regulation 3(3) or Regulation 3(4) of the Takeover Regulations, 1997;*

➢ *That the filings eventually made under these provisions were made under protest because the merchant banker for a subsequent open offer made pursuant to public announcement dated October 22, 2011 simply would not agree with the aforesaid clear interpretation of law and without prejudice and in full disagreement with the stance adopted, the filings were made under protest;*

➢ *That therefore submitted that the charge of alleged violation under Regulation 3(3) and 3(4) is unsustainable.*

Submissions on behalf of the target company:

➢ *That as regards disclosures on behalf of the Target Company and the alleged violation of Regulation 7(3) and Regulation 8(3), only disclosures made under Regulation 7(1A) need to be disclosed under Regulation 7(3) of the Takeover Regulations, 1997. If regulation 7(1A) is itself inapplicable, Regulation 7(3) can have no application;*

- *That in any case, the two alleged violations are of alleged delay in compliance and not of non-compliance per se. In one of two instances, there was in fact no delay inasmuch as filings were indeed made but subsequently, an error was identified and then rectified. It is the rectified filing made immediately upon being noticed that is being regarded as a delayed filing in the Company SCN;*
- *That it is in fact discovery of the error that led to the need to rectify the error and such rectification was done immediately;*
- *That the rectified filing was made within a short span and the alleged delay is of 17 days in the case of Regulation 7(3) and 11 days in the case of Regulation 8(3). Both these periods are technical and narrow in nature and it would not be just or fair to impose a penalty in the circumstances.*

15. It was noted from the submissions made that one of the promoter Noticee viz. Milton in its letter dated January 15, 2014 had submitted that it had not acquired shares pursuant to the SPA and hence, the allegation of disclosure under Regulation 7 of the Takeover Regulations, 1997 does not arise against it. Hence vide email dated September 30, 2014, the Merchant Banker to the Offer M/s. VC Corporate Advisors Pvt. Ltd. was advised to provide the evidence based on which the name of promoter Noticee Milton was included for the violation of Regulation 7(1) of the Takeover Regulations, 1997. The Merchant Banker vide email dated October 13, 2014 *inter alia*submitted that they had included the name of promoter Noticee Milton along with the other promoters forming part of the Acquirers to the Open Offer made in the year 2000 based on the information/disclosures provided to them. It was also *inter alia*observed from the copies of declaration made by the company in terms of Regulation 8(3) of the Takeover Regulations, 1997 as provided by the Merchant Banker that the Noticee Milton's name appeared in the Promoter Shareholding for the financial years ending on March 31, 2000, March 31, 2001 and March 31, 2002 along with the names of other promoters against whom adjudication proceeding under Regulation 7(1) of the Takeover Regulations, 1997 had been initiated for the year 2000. In view of the same vide letter dated November 05, 2015, the Promoter Noticee Milton was advised to offer its comments in the above matter.

16. The promoter Noticee Milton vide letter dated November 13, 2014 reiterated the submissions made vide letter dated January 15, 2014 and also vide reply dated February 17, 2014 filed

pursuant to hearing and submitted a copy of the open offer document made in 2000.The specific reference in the open offer document as under was *inter alia* highlighted in the reply:

"Subhkam Securities P Ltd, Sweet Infosys Ltd, Milton Finance Ltd, Milton Securities Ltd. and Milton Stocks and Shares Ltd, have vide their respective letters dated 6th December, 1999 confirmed to the Managers to the offer, that they do not have any participation, concern or relation with the open offer made by the PACs, to the shareholders of PCML (the Target Company) in accordance with the SEBI (STAT) Regulations, 1997."

17. Vide email dated February 26, 2015, the Company and the Promoter Noticees were given an opportunity to make additional written submission in the matter, if any, while communicating that all the earlier written submissions made vide their letters and the submissions made during the personal hearing shall be given due consideration in the matter.

18. Further, it was observed from the submissions made vide letter dated January 15, 2014 and 'Note on Submissions' of arguments made at the personal hearing filed vide letter dated February 17, 2014 that the Noticee viz. Subhkam Securities had *inter alia* submitted that nothing contained in Regulation 10, 11 or 12 of Takeover Regulations, 1997was attracted by its acquisition of 2,63,412 shares of the company on March 23, 2011. It was also noted that the Noticee viz. Subhkam Securities had specifically stated therein that the said acquisition did not constitute acquisition of 'additional shares or voting rights' within the meaning of Regulation 11(1) of Takeover Regulations and that Regulation 10 and 12 had no bearing on this case.

19. In view of the same, it was *inter alia*clarified to the Noticee Subhkam Securities vide letter dated June 25, 2015 that the promoter shareholding prior to the *inter se* transfer of shares between Subhkam Securities and Subhkam Ventureswas 34.63%. Therefore, acquisition of 5.27% shares by Subhkam Securities would have triggered Regulation 11(1) of the Takeover Regulations, 1997, but, for the exemption provided under Regulation 3(1)(e)(i) of the Takeover Regulations, 1997 relating to *inter se* transfer of shares within the definition of group as defined under the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as '**MRTP Act'),** where persons constituting such group have been shown as related parties in the Annual Report of the company for the Financial Year 2009-10**.**The NoticeeSubhkam Securities was advised to make additional comments,if any,by July 06, 2015. The Noticee vide letter dated July 01, 2015 *inter alia*sought to

make the submissions by July 22, 2015. The letter also remarked about the inordinate delay in concluding the proceedings.

20. Vide letter dated July 22, 2015 the Noticee Subhkam Securities *inter alia*made the following additional submissions:

- *that sixteen months after the personal hearing, the letter purportedly issued as an additional Notice seeks to expand and prolong these proceedings and that the Letter has not raised anything new and purports to raise a query for the first time on the core of the submissions made by the Noticee in their Reply and the Note on Submissions;*
- *that the aforesaid process of issuing the captioned Letterpurportedly based on "additional material" (all of which was always available withSEBI when the SCN was issued) is incorrect and impermissible in law. In this regard,reference was drawn to the Order datedJanuary 15, 2015 passed by the Hon'ble Securities Appellate Tribunal in the matter ofPurshottamBudhwani v SEBI (Appeal No. 53 of 2013), wherein the Hon'ble Tribunalfound fault with a similar procedure adopted by SEBI and set aside the order of theAdjudicating Officer;*
- *That the allegations in the Letter are untenable and could have well been raised in the SCN. The SCN contained no reference to the inter-se transfer triggering Regulation 11(1) and did not explain how "additional shares or voting rights", within the meaning of Regulation 11(1), was acquired. If SEBI is allowed to endlessly amend show cause notices and seek to justify a charge that foundationally is unsustainable, the very purpose of issuance of an SCN is rendered superfluous and results in a mockery of the principles of natural justice;*
- *That their Reply and the Note on Submissions had already explained why the inter-se transfer did not constitute an "additional acquisition of shares or voting rights" within the meaning of Regulation 11(1) or Regulation 11(2). Strictly without prejudice to what has been stated in the earlier submissions, Regulation 11(1) or Regulation 11(2) has not been triggered;*
- *That vide a SPA dated October 25, 1999, the acquirers had agreed to acquire approximately sixty per cent of the equity share capital of the Company from the erstwhile promoters of the Company, thereby triggering Regulation 10 read with Regulation 12. An open offer to acquire the shares of the Company was therefore duly made and the Acquirers thereby came into control of the Company under Regulations 10 and 12way back in 1999. Pursuant to the open offer, the Acquirers held approximately sixty seven percent of the total share capital of the Target Company i.e. over fifty five percent ("Initial Acquisition");*

- *That the threshold of fifty five percent under Regulation 11(1) was introduced pursuant to the SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2005 which came into force on January 03, 2005. Any acquisition of "additional shares or voting rights"by the Acquirers would not be governed by Regulation 11(1) since the Acquirers had already acquired in excess of fifty five percent of the total share capital of the Company pursuant to the Initial Acquisition. The fact that the Acquirers may subsequently have held less than the fifty percent threshold, at the time of the additional acquisitions including at the time of the inter-se transfer, would not be relevant as Regulation 11(1) uses the words "an acquirer who has acquired".Therefore, for purposes of Regulation 11(1), if the acquirer together with persons acting in concert has already acquired in excess of threshold offifty five percent of the shares or voting rights in the target company, Regulation 11(1) would not govern any additional acquisitions regardless of whether at the time of the additional acquisition, there is a fall in the holdingsof the acquirer below the threshold of fifty five percent. Hence the subsequent acquisitions including by way of the instant inter-se transfer would not be governed by Regulation 11(1);*
- *That Regulation 11(2) would also have no application to the inter-se transfer. Regulation 11(2) applies to an acquirer holding fifty five percent or more but less than seventy five percent of the shares or voting rights in the Target Company at the relevant time. At the time of instant inter-se transfer, the holding of the acquirer i.e. the Promoters and persons acting in concert with the Promoters was always less than fifty five percent. Regulation 11(2) uses the words an acquirer who "holds" unlike Regulation 11(1) which uses the words "an acquirer who has acquired". Therefore for the purpose of Regulation 11(2), the holding of the acquirer at the time of the additional acquisition would need to be reckoned, unlike in the case of Regulation 11(1);*
- *That since Regulation 11(1)and Regulation 11(2) are not applicable, the fundamental charge in the SCN that there occurred a breach of Regulation 7(1A) read with Regulation 7(2), cannot arise. The jurisdiction of Regulation 7(1A) would be attracted only in relation to acquirers who have acquired shares under Regulation 11(1) or Regulation 11(2) of the Takeover Regulations, 1997 as already been explained in the earlier submissions. In this regard, reliance has been placed on the order dated January 29, 2014 of the Adjudicating Officer of SEBI in respect of Vibhu Agarwal in the matter of Technical Associates Infrapower Limited where it was held that the provisions of Regulation 7(1A) are applicable only where the acquisition is made under*

Regulation 11(1). Since Regulation 11(1) is not applicable, necessarily the charge under Regulation 7(1A) and 7(2) would not be sustainable;

- *Further, Regulation 3 provides that nothing contained in Regulations 10, 11 and 12 would apply if the provisions of Regulation 3and their ingredients are complied with. In short, should an open offer be otherwise triggered under Regulation 10, 11 or 12, an exemption from the obligation to make an open offer may be relied upon by meeting the requirements of Regulation 3. As a corollary, if the provisions of Regulations 10, 11 or 12 are not even attracted in the first place, there would be no requirement to comply with the ingredients of Regulation 3, since no exemption would be necessary;*
- *Even in such instances, if the requirements of Regulation 3 are not met, the consequence would be that an obligation to make an open offer would be attracted. It can never be a consequence that a failure to comply with Regulation 3would lead to the imposition of penalty. In the instant case, nothing contained in Regulation 10, 11 or 12 was at all attracted by the transactions executed in 2011. Consequently, no open offer obligation was triggered at all and there was no requirement to avail of any exemption from any open offer;*
- *Hence, there was no requirement to comply with the ingredients of Regulation 3 at all including the requirement to file any report under Regulation 3(3) or Regulation 3(4);*
- *The extensive analysis in the Letter on the concept of "group" under the erstwhile Monopolies Restrictive Trade Practices Act, 1969, the Competition Act, 2002 and the implications of the repeal of the MRTP Act and its bearing under the Takeover Regulations, 1997 are purely academic and irrelevant in the present matter;*
- *Moreover, the question of delay in making the requisite filings either under Regulation 3(3) or 3(4) or under 7(1A) does not arise, absent a determination by SEBI on whether the charging provisions of the Takeover Regulations, 1997 were indeed triggered. Section 15 A(b) of the SEBI Act, 1992 which is invoked applies where "any person, who is required under this Act or any rules or regulations made thereunder to file any return or furnish any information, books or other documents within the time specified therefor in the regulations", fails to make the filing within the time prescribed;*
- *It was necessary for SEBI to first demonstrate that the Promoter Noticees were required under the Takeover Regulations, 1997 to make the filings under Regulation 7(1A) or Regulation 3(3) and 3(4) in relation to the inter-se transfers. The fact that the filings were made by the Noticees*

(by way of abundant caution) cannot be the basis for SEBI to invoke a penal provision, without establishing the existence of a duty to make the filing.

21. The Noticee Subhkam Securities vide their aforesaid letter had requested grant of an opportunity of personal hearing. Accordingly vide hearing notice dated August 07, 2015, an opportunity of personal hearing was granted on August 21, 2015. Mr. Somasekher Sundaresan, Mr. Ravichandra Hedge, Mr. HathimalNahata, Ms. ArchanaPareek and Mr. Abhishek Venkatraman(Authorised Representatives) (hereinafter collectively referred to as '**ARs'**) appeared on behalf of the Noticee Subhkam Securities and reiterated the submissions made vide letter dated July 22, 2015. During the personal hearing, it was brought to the notice of the ARs that the letter dated June 25, 2015 sent to the Noticee Subhkam Securities was only to clarify the charge of Regulation 3(3) and 3(4) of the Takeover Regulations, 1997 already incorporated in the SCN dated December 12, 2013 and was not based on any new facts.

22. The Noticee Company and the Promoter Noticeesviz. Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Mr. Rakesh S Kathotia– HUF,Subhkam Monetary, Subhkam Properties, Milton and Subhkam Venturesvide letter dated August 19, 2015 were also given an opportunity to make additional written submission in the matter, if any. The Promoter Noticees vide email dated August 24, 2015 confirmed that they had nothing new to add in the matter.

CONSIDERATION OF ISSUES

23. I have carefully perused the written submissions of the Company& the Promoter Noticees, thesubmissions made at the hearing and the documents available on record. It is observed that the allegation against the Company and the Promoter Noticees is that they have failed to make the relevant disclosure/ file reports as required under the provisions of the Takeover Regulations, 1997.

24. The issues that, therefore, arises for consideration in the present case are:

a. Whether the Company has violated the provisions of Regulations 7(3) and Regulation 8(3) of the Takeover Regulations during the years viz. 2006 and 2011 respectively?

b. Whether the Promoter Noticees, viz. Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Mr. Rakesh S Kathotia– HUF,Subhkam Monetary, Subhkam Properties and Milton have violated the provisions of Regulation 7(1) read with Regulation 7(2) of the Takeover Regulations, 1997?

c. Whether the Promoter Noticees, viz. Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Mr. Rakesh S Kathotia– HUF,Subhkam Monetary, Subhkam Properties, Subhkam Ventures and Subhkam Securities have violated the provisions of Regulation 7(1A) read with Regulation 7(2) of the SAST Regulations, 1997, as applicable?

d. Whether the NoticeeSubhkam Securities has violated the provisions of Regulation 3(3) and 3(4) of the Takeover Regulations, 1997?

e. Do the violations, if any, attract monetary penalty under the SEBI Act?

f. 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

25. Before moving forward, it is pertinent to refer to the relevant provisions of Regulations 3(3) and 3(4), Regulations 7(1) and Regulation 7(1A) read with 7(2), Regulation 7(3) and 8(3) of the Takeover Regulations, 1997 which reads as under:

Applicability of the regulation.

3(1) (e) inter se transfer of shares amongst—

[(i) group coming within the definition of group as defined in the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) where persons constituting such group have been shown as group in the last published Annual Report of the target company;]

3(3) *In respect of acquisitions under clauses [***] (e), (h) and (i) of sub-regulation (1), the stock exchanges where the shares of the company are listed shall, for information of the public, be notified of the details of the proposed transactions at least 4 working days in advance of the date of the proposed acquisition, in case of acquisition exceeding [5] per cent of the voting share capital of the company.*

3(4) *In respect of acquisitions under clauses (a), (b), [***] (e) and (i) of sub regulation (1), the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to the Board giving all details in respect of acquisitions which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him) would entitle such person to exercise [15] per cent or more of the voting rights in a company.*

Regulation 7(1) and 7 (2) of Takeover Regulation, 1997 prior to Amendment wef 9-9-2002

Acquisition of 5 per cent and more shares or voting rights of a company.

7. (1) *Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent shares or voting rights in a company, in any manner whatsoever, shall disclose the aggregate of his shareholding or voting rights in that company, to the company.*

7 (2)*The disclosures mentioned in sub-regulations (1) shall be made within [four working days] of,—*

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

Regulation 7(1A) and 7 (2) of Takeover Regulation, 1997 after Amendment wef 9-9-2002

7(1A) *Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11 [1][or under second proviso to sub-regulation (2) of regulation 11], shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.]*

7 (2)*The disclosures mentioned in sub-regulations (1) [and (1A)] shall be made within [two days] of,—*

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

Regulation 11(1) at the relevant point of time

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, [15per cent or more but less than[2][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, [3][with post acquisition shareholding or voting rights not exceeding fifty five per cent] [in any financial year ending on 31st March], unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.*

[1] Inserted by SEBI (Third Amendment) Regulation, 2009, wef 6-11-2009

[2] Substituted for 75 per cent by the SEBI Amendment Regulation, 2005, w.e.f. 03-01-2005

[3] Inserted by the SEBI Amendment Regulation, 2009, w.e.f. 6-11-2009

Regulation 7(3) and 8(3) of Takeover Regulation, 1997

7 (3) *Every company, whose shares are acquired in a manner referred to in [sub regulations (1) and (1A)], shall disclose to all the stock exchanges on which the shares of the said company are listed, the aggregate number of shares held by each of such persons referred above within seven days of receipt of information under [sub-regulations (1) and (1A)].*

Continual disclosure.

8 (3) *Every company whose shares are listed on a stock exchange, shall within 30 days from the financial year ending March 31, as well as the record date of the company for the purposes of declaration of dividend, make yearly disclosures to all the stock exchanges on which the shares of the company are listed, the changes, if any, in respect of the holdings of the persons referred to under sub regulation (1) and also holdings of promoters or person(s) having control over the company as on 31st March.*

26. We will first examine the allegation of Regulation 7(3) and 8(3) of the Takeover Regulations, 1997 against the Company. The SCN has alleged that the Company failed to comply with Regulations 7(3) and 8(3) of the Takeover Regulations, 1997 within the due dates during the years 2006 and 2011 respectively, details of which are as given below:

Regulation violated	Due Date of compliance	Date of compliance	Delay (number of days)
7(3)	13.03.2006	30.03.2006	17
8(3)	30.04.2011	11.05.2011	11

27. As per Regulation 7(3) of the Takeover Regulations, 1997, the Company was required to disclose to the stock exchanges within seven days of receipt of information under Regulation 7(1) and/ or 7(1A), the aggregate number of shares held by each of such persons who had acquired shares under Regulation 7(1) and/ or 7(1A). As per Regulation 8(3) of the Takeover Regulations, 1997, the Company was required to make yearly disclosure to the stock exchanges on which the shares of the company were listed,within 30 days from the financial year ending March 31, as well as the record date of the company for the purposes of declaration of dividend, the changes, if any, in respect of the holdings of the persons referred to under sub regulation (1) and also holdings of promoters or person(s) having control over the company as on March 31.

28. I find that the Company in its submission dated January 20, 2014 and February 17, 2014 have admitted the delayed disclosure under Regulation 7(3) and 8(3) of the Takeover Regulations,

1997during the years 2006 and 2011 respectively. The company, I find, has stated that the minor delay in making disclosure was caused purely due to inadvertence. Further, regarding alleged delay of 11 days in making disclosure under Regulation 8(3), I find that the Company has stated that it had made the disclosure on time on April 29, 2011, but, due to inadvertent error in the disclosure filed on April 29, 2011, a revised disclosure had been made by the Company after a gap of 11 days upon noticing of the error. The Company has stated that it is the rectified filing made immediately upon being noticed that is being regarded as the delayed filing in the SCN, however, there was in fact, no delay in as much as the filings were indeed made, but, subsequently an error was identified and then rectified. I have perused the disclosure made by the company under Regulation 8(3) of the Takeover Regulations, 1997 for the year ended March 31, 2011 vide letter dated April 27, 2011, which was received byBSE on April 29, 2011.I have also perused the revised disclosure made under Regulation 8(3) vide letter dated May 10, 2011, which was received by the stock ExchangeBSE on May 11, 2011. I note from such perusal that acquisition of 2,63,412 shares constituting 5.27% of the paid-up capital of the company by Subhkam Securities from its group company Subhkam Ventures on March 23, 2011 was missing from the filing made by the company under Regulation 8(3) for the year ended March 31, 2011 vide its earlier letter dated April 27, 2011.I note thatin the matter of***Kemefs Specialties Pvt. Ltd. v. SEBI (Appeal No. 54/2011)***, ***the Hon'ble SAT vide Order dated July 21, 2011***has *inter alia*held that if information furnished is incorrect, it could be considered as failure to furnish the required information. Thus, the argument made on behalf of the Noticee Company that there was no delay in filing under Regulation 8(3) for the year 2011, as the filing was indeed made, cannot be considered in view of the fact that the information provided through the said filing was incorrect. Hence, I conclude that the company had made delayed compliance by 11 days in respect of annual disclosure that was required to be filed by April 30, 2011.

29. I note further that the Noticee Company has *inter alia*stated that only disclosures made under Regulation 7(1A) were required to be disclosed under Regulation 7(3) of the Takeover Regulations, 1997, and if regulation 7(1A) is itself inapplicable, Regulation 7(3) can have no application. In the matter, it has been brought out in detail in the below mentioned paras of the Order as to how disclosures under Regulation 7(1A) were applicable to the sale transactions made by the promoters. Inote that the delayed compliance under Regulation 7(3) by the Company in respect of due date March 13, 2006 pertained to sale transaction of 1,00,000 shares on March 06,

2006 by the Promoter Noticee Subhkam Monetary. I note from Annexure I to Note on Submissions submitted vide letter dated February 17, 2014 that the Promoter Noticee Subhkam Monetary had duly intimated to the company on March 06, 2006. In which case, I find that it was incumbent upon the company to disclose to the stock exchange under Regulation 7(3) of the Takeover Regulations, 1997 within seven days of receipt of the information. However, I find that the company failed to disclose within the stipulated time and the disclosure under Regulation 7(3) was intimated to the stock exchange only on March 30, 2006 with a delay of 17 days.

30. In the matter, I note that the Company has stated that the two alleged violations are of alleged delay in compliance and not of non-compliance *per se*. However, I find that the ***Hon'ble Securities Appellate Tribunal (SAT) vide Order dated August 11, 2014 in the matter of M/s. Coimbatore Flavors & Fragrances Ltd.*** has observed as follows:

*"True and **timely disclosures** by a company or its promoters are very essential from two angles. Firstly; investors can take a more informed decision to invest or not to invest in particular scrip secondly; the Regulator can properly monitor the transactions in the capital market to effectively regulate the same."*

31. I further note that the ***Hon'ble SAT in Ashok Jain V. SEBI (Appeal no. 79 of 2014 decided on June 09, 2014)***has also observed that:

"..... *Under SAST Regulations, 1997 as also under SAST Regulations, 2011 disclosures are liable to be made **within specified days** irrespective of the scrip being traded on the Exchange or not. Similarly, disclosures have to be made irrespective of whether investors have suffered any loss or not on account of non-disclosure within the time stipulated under those regulations..."*

32. In view of the foregoing, I find that the allegation of violation of Regulations 7(3) and 8(3) of the Takeover Regulations, 1997 during the years 2006 and 2011 respectively stands established against the Company.

33. Next we will examine the allegations against the Promoter Noticees. I note that the SCN has alleged that the erstwhile promoters of the company viz. Mr. Rakesh S Kathotia,Ms. ArtiKathotia,Ms. KamladeviKathotia,Rakesh S. Kathotia-HUF,Subhkam Monetary,Subhkam

Properties, Subhkam Ventures and Subhkam Securitieshave failed to comply with Regulation 7(1) read with 7(2) and/ or Regulation 7(1A) read with 7(2) and/ or Regulations 3(3), 3(4) of the Takeover Regulations, 1997, as applicable. The details of the same are as given below:

Promoters	Year	Regulation	Transaction details		Total promoters shareholding (in %)		Due Date of compliance	Date of compliance	Non-compliance / Delay days
			No of shares acquired (%)	No of shares sold (%)	Pre-acquisition	Post-acquisition			
RakeshKathotia, ArtiKathotia, KamladeviKathotia, RakeshKathotia-HUF, Subhkam Monetary, Milton and Subhkam Properties	1999-00	7(1) r/w 7(2)	-	-	-	-	In the year 2000 *pursuant to Share Purchase Agreement (SPA) dated 25.10.1999 and the open offer	Not complied	Not complied
	2000-01				67.04	67.04			
	2001-02				67.04	65.55			
	2002-03				65.55	65.55			
	2003-04				65.55	65.49			
	2004-05				65.49	65.08			
KamladeviKathotia& others	2004-05	7(1A) r/w 7(2)	-	24000 (0.48%)	65.08	64.60	8.12.2004	Not complied	Not complied
	2004-05				64.60	63.12			
	2005-06				63.12	63.02			
RakeshKathotia	2005-06	7(1A) r/w 7(2)	-	24500 (0.49%)	63.02	62.53	23.10.2005	Not complied	Not complied
	2005-06				62.53	61.67			
Subhkam Monetary	2005-06	7(1A) r/w 7(2)	-	100000 (2.00%)	61.67	59.67	8.03.2006	30.03.2006	22
Subhkam Monetary	2005-06	7(1A) r/w 7(2)	-	124600 (2.49%)	59.67	57.18	25.03.2006	30.03.2006	5
	2005-06				57.18	51.67			
	2006-07				51.67	47.07			
RakeshKathotia	2006-07	7(1A) r/w 7(2)	-	125000 (2.50%)	47.07	44.57	29.04.2006	02.05.2006	3
	2006-07				44.57	42.77			
RakeshKathotia	2006-07	7(1A) r/w 7(2)	-	33500 (0.67%)	42.77	42.10	30.03.2007	02.04.2007	3
	2006-07				42.10	41.96			
	2007-08				41.96	38.14			

Promoters	Year	Regulation	Transaction details		Total promoters shareholding (in %)		Due Date of compliance	Date of compliance	Non-compliance / Delay days
			No of shares acquired (%)	No of shares sold (%)	Pre-acquisition	Post-acquisition			
	2007-08				37.84	36.92			
ArtiKathotia	2007-08	7(1A) r/w 7(2)	-	99990 (2.00%)	36.92	36.92	07.02.2008	12.02.2008	5
	2007-08				36.92	35.59			
	2008-09				35.59	35.59			
	2009-10				35.59	35.59			
	2010-11				35.59	34.63			
Subhkam Ventures	2010-11	7(1A) r/w 7(2)	-	263412 (5.27%)	34.63	34.63	25.03.2011	19.12.2011	269
Rakesh S Kathotia, ArtiKathotia, KamaladeviKathotia, RakeshKathotia HUF, Subhkam Properties , Subhkam Securities	2011-12	7(1A) r/w 7(2)	-	1730862 (34.62%)	34.63	34.62	22.10.2011	19.12.2011	58
Subhkam Securities		3(3) & 3(4)	-	-	-	-	23.03.2011	13.06.2012 & 22.06.2012	455, 436

**As per the Letter of Offer it is understood that the Promoters/Promoter Group of the Target Company had acquired the controlling stake and Management Control of the Target Company during the Financial Year 1999- 2000 pursuant to the Share Purchase Agreement (SPA) dated 25.10.1999.*

34. I note from the above table that it has been alleged that the Noticees viz. Mr. Rakesh S Kathotia,Ms. ArtiKathotia,Ms. KamladeviKathotia,Rakesh S. Kathotia- HUF,Subhkam Monetary,Milton and Subhkam Propertieshad failed to make the relevant disclosures under Regulation 7(1) read with 7(2) of the Takeover Regulations, 1997 in the year 2000 pursuant to the SPA Agreement and Open Offer. As per Regulation 7(1) of the Takeover Regulations, 1997, (as it stood in the year 2000) any acquirer, who acquires shares or voting rights which taken together with shares or voting rights, if any, held by him would entitle him to more than five per cent shares or voting rights in a company, was required to disclose the aggregate of his shareholding to the company. As per Regulation 7(2), such disclosures at the relevant point of time were required

to be made within four working days of the receipt of intimation of allotment of shares or the acquisition of shares or voting rights, as the case may be.

35. In the matter, I note thatthe Promoter Noticees viz. Mr. Rakesh S Kathotia,Ms. ArtiKathotia,Ms. KamladeviKathotia,Rakesh S. Kathotia- HUF,Subhkam Monetary and Subhkam Propertieshave *inter alia*submitted that an open offer to acquire the shares of the company was duly made and the promoters thereby came into control of the company under Regulation 10 and 12. It has been further stated that at every stage after the public announcement, the acquisition was disclosed by their Merchant Banker by filing the 45 days Report in respect of open offer and also through the quarterly filings filed with the stock exchange by the Company pursuant to Clause 35 of the Equity Listing Agreement entered with Stock exchange. The promoter Noticees have stated that, thus,the effect of the acquisition was always in the public domain. It has been stated that the disclosure regime for transactions that attract the obligation to make an open offer is distinct and separate from the disclosure regime for ongoing disclosures under Regulation 7 and Regulation 8. To substantiate the same, the promoter Noticees have highlighted that even the thresholds set out in Regulation 7 i.e. 5%, 10%, 14%, 54% or 74% explicitly stop short of the thresholds that would trigger an open offer under Regulation 10 and 11, thus consequently, the disclosure regime under Regulation 7 would not apply to acquisitions that are otherwise disclosed in the public domain under Regulations 10, 11 and 12.

36. I find it pertinent to mention here that disclosure under Regulation 7(1) were meant to protect the interests of the investors and the management of the target company. The reporting under Regulation 7(1) enabled the target company to know of any attempt by any person to corner shares of the company and to take measures to safe guard its interests. The requirement on the target company to report the matter to the stock exchange under regulation 7(2) was to provide information to the investors about the dominant holdings in the company, so as to enable them to decide on their investments. Thus, I find that the provisions of regulation 7 are substantive provisions and mandatory, hence, there is no escape, but, to comply with the same. The expression "shall" used in regulation 7(1) is indicative of the mandatory nature of the requirement.

37. Once an acquirer acquires the shares of the target companywhich breaches the threshold limit prescribedfor providing an exit route to the shareholders,the acquirers are also required to make

apublic announcement to acquire further shares of that companyat a specified price during a specified time. Thus, I note that the objective of the periodic disclosures under Regulation 7of the Takeover Regulations, 1997 is different from the public announcement required to be made under Regulation 10, 11 or 12. The periodic disclosure increasesthe transparency in the dealings of the acquirers apart from providing a warning system to the investors and the existing management of the target company. It also helps in monitoring compliance to the Takeover Regulations. Public announcement, on the other hand, is the announcement of the open offer by the acquirer, primarily disclosing an acquirer's intention to acquire shares of the target company from the existing shareholdersat a specified price during a specified time, thereby giving an opportunity of exit to the public shareholders. Thus, I note that the obligation to make disclosure under Regulation 7(1) of the Takeover Regulations, 1997 is independent of the obligation to make public announcement on breaching the threshold limit prescribed under Regulations 10, 11 or 12.

38. I, however, find that the promoter Noticees have contended that the disclosure regime under Regulation 7 would not apply to acquisitions that are otherwise disclosed in the public domain under Regulations 10, 11 and 12. In the matter, I find it necessary to draw attention to the May 2002 Report of the Reconvened Committee on Substantial Acquisition of Shares and Takeovers under the Chairmanship of Justice Mr. P.N. Bhagwatiwhich recommended that the obligation cast upon an acquirer to disclose his shareholding as and when it exceeds 5% is binding on every person, and there is no relaxation whatsoever from the reporting requirements, even if acquisition *per se* may be exempted.

39. In the extant case, I find that the promoter Noticees did not hold any shares in the company prior to the SPA dated October 25, 1999. Vide SPA dated October 25, 1999, the acquirers had agreed to acquire 59.57% of the equity share capital of the company from the erstwhile promoters of the company. Hence since the acquisition exceeded 5%, the concerned promoter Noticees who formed the acquirers at the relevant point of time were under an obligation to make disclosure under Regulation 7(1) of the Takeover Regulations, 1997, irrespective of the public announcement made under Regulation 10 and 12.

40. Besides, I also note that the concerned promoter Noticees cannot absolve themselves by making disclosures under the Listing Agreement *in lieu* of making necessary disclosures under Regulation 7(1) of the Takeover Regulations, 1997, as the purpose and intent of both the laws are different.

Further, I note that every company whose shares were listed on a stock Exchange was subject to disclosure requirements under Regulation 8(3) of the Takeover Regulations, 1997, irrespective of reporting made under clause 35 of the listing agreements with the stock Exchanges.

41. In the matter, I note that the ***Hon'ble Securities Appellate Tribunal (SAT) in Premchand Shah and Others V. SEBI (Appeal no. 108 of 2010 decided on February 21, 2011)***, has held as follows:

"..... *When law prescribes a manner in which a thing is to be done, it must be done only in that manner or not at all. Both sets of regulations prescribe formats in which the disclosures are to be made and those are then put out for the information of the general public through special window(s) of the stock exchange which did not happen in this case. The fact that non disclosure has been made penal makes it clear that the provisions of regulation 7(1A) of the takeover code and regulations 13(3) and 13(4) of the insider regulations are mandatory in nature. Non disclosure of the information in the prescribed manner deprived the investing public of the information which is required to be available with them when they take an informed decision while making investments."*

42. I also find that the ***Hon'ble Securities Appellate Tribunal (SAT) vide Order dated June 13, 2014 in the matter of M/s. Mafatlal Finance Company Limited (hereinafter referred to as 'MFCL')***hadfurther held that obligation to make disclosure under Regulation 8(1) and 8(2) of the Takeover Regulations, is independent of the obligation to make disclosure under clause 35 of the Listing Agreement, which is on the company.Here too, I find that the obligation to make disclosures under Regulation 7(1) of the Takeover Regulations, 1997 was on the promoter Noticees. Besides I find that at the relevant point of time, disclosure under regulation 7(1) was required to be made within four working days of the receipts of intimation of allotment of shares or the acquisition or sale of shares or voting rights, as the case may be, whereas disclosure under clause 35 of the listing agreement is done on a quarterly basis, within 21 days from the end of each quarter.

43. I further note that the Noticee Milton has submitted that it had not acquired any shares in the company pursuant to the SPA dated October 25, 1999 and that it was not a person acting in concert with the Acquirers with any common objective or purpose of acquisition. The Noticee Milton has also submitted that it was only a deemed PAC within the meaning of the Takeover

Regulation, 1997, and that deemed PACs including the companies which had common directors were listed out with an explicit assertion that they were being listed by reason of them falling in the category, although they were not in fact acting in concert with the acquirer with any common objective or purpose of acquisition. In the matter, I find that Noticees along with their submissions dated February 18, 2014 have provided a copy of the SPA agreement dated October 25, 1999. From a perusal of the same, I find that the Noticee Milton was not a part of the said Agreement entered by Noticees viz. Mr. Rakesh S Kathotia,Ms. ArtiKathotia,Ms. KamladeviKathotia,Rakesh S. Kathotia-HUF,Subhkam Monetary,Milton and Subhkam Properties (erstwhile M/s. Digdug Properties Pvt. Ltd.) with the sellers viz. M/s. Lakshya Trading & Agencies Pvt. Ltd., M/s. Next Credit &Mercantiles Pvt. Ltd., M/s. Vigil Credits &Mercantiles Pvt. Ltd. and M/s. Nexus Shares & Transfer Agents Pvt. Ltd. of the company (the erstwhile M/s. Principal Capital Markets Ltd.). A copy of the relevant pages of the open offer document made in 2000 were provided by the Noticee Milton vide its letter dated November 13, 2014. I find from the same that Noticee Milton had *inter alia*confirmed to the Manager to the Offer for the said open offer that it did not have any participation, concern or relation with the open offer made by the Acquirer and PACs therein to the shareholders of the company in accordance with the Takeover Regulations, 1997. I, thus, find that the allegation of Regulation 7(1) of the Takeover Regulations, 1997 against the Noticee Milton does not stand established in the matter.**Hence, the allegation of violation of Regulation 7(1) of Takeover Regulations, 1997 against the Noticee Milton is liable to be abated in the matter.However from all of the above,the violation of Regulation 7(1) of the Takeover Regulations, 1997against the other promoter Noticees, viz. Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Rakesh S. Kathotia- HUF, Subhkam Monetary and Subhkam Propertiesstands established.**

44. Now we move onto the next issue regarding allegation of Regulation 7(1A) read with 7(2) of the Takeover Regulations, 1997 by the promoter Noticees viz.Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia and Rakesh S. Kathotia- HUF,Subhkam Monetary, Subhkam Properties, Subham Ventures and Subhkam Securities. I note that the promoter Noticees have*inter alia*submitted that Regulation 7(1A) read with 7(2) of the Takeover Regulations, 1997 would not be applicable to the sale transactionas the pre-requisite for the application of Regulation 7(1A) is that an acquirer should have acquired shares or voting rights of the company either under sub-regulation (1) of Regulation 11 or the second proviso to the sub-regulation (2) of Regulation 11 of

the Takeover Regulations, 1997.The promoter Noticees have stated that any acquisition of *"additional shares or voting rights"* would not be governed by Regulation 11(1), since they had agreed to acquire approximately 60%vide a SPA dated October 25, 1999, thereby triggering Regulation 10 read with Regulation 12. An open offer to acquire the shares of the Company was, therefore, duly made and thereby they came into control of the Company under Regulations 10 and 12 way back in 1999. Pursuant to the open offer, theyhad held approximately sixty seven percent of the total share capital of the Target Company i.e. over fifty five percent *("Initial Acquisition").*And subsequent to the same, the promoter Noticees had only consistently sold their shares and had not made any acquisition of additional shares/creeping acquisition under Regulation 11 of the Takeover Regulations, 1997.

45. I note here that the Takeover Regulations, 1997 were framed on the basis of the recommendations of Justice Mr. P. N.Bhagwati Committee. However as early as June 1998, it was *inter alia* found that some provisions were open to diverse interpretations while some others were not sufficiently precise and could be used to achieve unintended results. In order to make the Regulations efficient and effective for achieving the object and purpose for which they were made, as also to meet the challenges resulting from economic reforms and liberalization, a review of the provisions of the Takeover Regulations, 1997 in light of the experience gained, so as to better subserve investor interest, consistent with fostering economic growthhad arisen. For addressing these concerns, SEBI reconstituted the same Committee, which was instrumental in drafting the Takeover Regulations, 1997 under the Chairmanship of Justice Mr. P.N.Bhagwati. One of the recommendation of the said reconvened Committee under the Chairmanship of Justice Mr. P.N. Bhagwatiin respect of "Disclosure Requirement" was that:

"For acquirers holding 15% and above, purchase orsales at every 2% level should be disclosed."

46. I find that the promoter Noticeesviz. Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Rakesh S. Kathotia-HUF, Subhkam Monetary, Subhkam Properties, Subham Ventures and Subhkam Securities,acting in concert, were holding 15% and above shares in the company and subsequently sold 2% or more shares. The promoter Noticees were, therefore, required to make disclosure after every sale transaction constituting 2% or more of the share capital of the company.

47. I note here that the promoter Noticees have repeatedly highlightedthe fact that their initial acquisition was under Regulation 10 and 12. In this context, I note that since the promoter Noticees did not hold any shares in the company prior to SPA dated October 25, 1999, their acquisition was covered under Regulation 10. Further, since they acquired a large percentage (67.02%) and control, they were also covered under Regulation 12. Furthermore on the basis of the holding reached through such acquisitions, they were covered under Regulation 11(1), as at the relevant point of time Regulation 11(1) covered acquirers holding 15% or more, but, less than 75% shares or voting rights in the company. This being the case, I find that the promoter Noticees cannot escape disclosure requirement under Regulation 7(1A) read with 7(2) on the technicality that the acquisition was made under Regulation 10 read with 12 of the Takeover Regulations, 1997.

48. In the matter, I note that the promoter Noticees have stated that the fact that thepromoter Noticees may subsequently have held less than 55% threshold at the time of the additional acquisitions, including at the time of the *inter-se* transfer, would not be relevant as Regulation 11(1) uses the words "an acquirer who has acquired". As per the promoter Noticees, for purposes of Regulation 11(1), if the acquirer together with persons acting in concert has through initial acquisition already acquired in excess of threshold of 55% of the shares or voting rights in the target company under Regulation 10 and 12, Regulation 11(1) would not govern any additional acquisitions regardless of whether at the time of the additional acquisition, there is a fall in the holdings of the acquirer below the threshold of 55%. Further that Regulation 11(2) would also have no application to the *inter-se* transfer, as Regulation 11(2) applies to an acquirer holding 55% or more but less than 75% of the shares or voting rights in the Company and at the time of instant *inter-se* transfer, the holding of the acquirer i.e. the Promoters and persons acting in concert with the Promoters was always less than 55%.

49. From a reading of Regulation 11, I find that thatRegulation 11covers the category of acquirers on the basis of their holding, and not on the basis under which regulation such a holding was reached as claimed by the Promoter Noticees. Further as brought out above, I note that even at the point of initial acquisition by the Promoter Noticees in the company i.e. in 2000, Regulation 11(1) covered within its scope any acquirer whose holding was more than 15% and less than 75%

percent shares or voting rights. Thus I note that on the basis of the holding, the Promoter Noticees initial acquisition too was covered by the scope of Regulation 11(1). Hence further acquisition or sale aggregating to two percent or more of the share capital of the company was required to be disclosed by the Promoter Noticees under Regulation 7(1A).In view of the above, I note that the Promoter Noticees have erred in presuming that their initial acquisition in 2000 was not covered by Regulation 11(1), by misconstruing the threshold for Regulation 11(1) to be *"less than 55%"* in 2000, instead of the applicable threshold of *"less than 75%"*at the relevant time. The threshold of "less than 75%" under Regulation 11(1) actually got reduced to "less than 55%" w.e.f. January 03, 2005 after amendment vide SEBI (Substantial Acquisition of Shares and Takeovers)(Amendment) Regulations, 2005.

50. I find further that the promoter Noticees have stated that Regulation 11(2) uses the words an *"an acquirer who holds"* unlike Regulation 11(1) which uses the words "an acquirer who has acquired", therefore for the purpose of Regulation 11(2),the holding of the acquirer at the time of the additional acquisition would need to be reckoned, unlike in the case of Regulation 11(1).

51. In the matter, I find that the language of Regulation 11 has undergone changes over a period of time. The same have been brought out below:

- ✓ *Prior to amendment dated May 26, 2006, Regulation 11(2) read as under:*

"11(2) An acquirer, who together with persons acting in concert with him **has acquired**, in accordance with the provision of law, fifty five per cent (55%) or more but less than seventy five per cent (75%) of the shares or voting rights in a target company, may acquire either by himself or through persons acting in concert with him any additional share or voting right, only if he makes a public announcement to acquire shares or voting rights in accordance with these regulations."

- ✓ *Regulation 11(2) vide SEBI (Substantial Acquisition of Shares and Takeovers)(Amendment) Regulations, 2006 w.e.f. May 26, 2006 was replaced by the following:*

*"11(2) No acquirer, who together with person acting in concert with him **holds**fifty-five percent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target*

company, shall acquire either by himself or through [4][or with] persons acting in concert with him any additional shares [5][entitling him to exercise voting rights] or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations.

Provided that ……"

- ✓ Regulation 11(1) at the relevant point of time read as follows:

*"11. (1) No acquirer who, together with persons acting in concert with him, **has acquired**, in accordance with the provisions of law, [6][15 per cent or more but less than [7][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 [8][5%] of the voting rights, [9][with post acquisition shareholding or voting rights not exceeding fifty five percent] [10][in any financial year ending on 31st March], unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations."*

52. I, thus, find that from the above that the words "acquired" and "holds" have been interchangeably used in Regulation 11(2). I find it necessary to emphasize here that the Takeover Regulations, 1997 were enacted to protect the interest of the retail investors in securities market, hencesuch interpretation as would serve the said objective and would best carry out its object and purpose should be preferred. SEBI's primary objective for enacting the Takeover Regulations, 1997 was to ensure that minority shareholders don't lose profitable exit opportunities in the event of a change in control through privately negotiated acquisitions. The disclosures under Regulation 7(1A), in particular, have been stipulated so that the shareholders are made aware of

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[4] *Inserted by SEBI (Substantial Acquisition of Shares and Takeovers)(Amendment) Regulations, 2009 w.e.f. 6-11-2009*

[5] *Inserted by SEBI (Substantial Acquisition of Shares and Takeovers)(Amendment) Regulations, 2008 w.e.f. 31-10-2008*

[6] Substituted for "not less than 10% but not more than 51%" by SEBI (*Substantial Acquisition of Shares and Takeovers)(Amendment) Regulations, 1998, w.e.f. 28-10-1998*

[7] Substituted for "75%" by SEBI (*Substantial Acquisition of Shares and Takeovers)(Amendment) Regulations, 2005, w.e.f. 03-01-2005*

[8] Substituted for "10%" by SEBI (*Substantial Acquisition of Shares and Takeovers)(Amendment) Regulations, 2001, w.e.f. 24-10-2001*

[9] *Inserted by SEBI (Substantial Acquisition of Shares and Takeovers)(Amendment) Regulations, 2009 w.e.f. 06-11-2009*

[10] Substituted for "in any period of 12 months" by the SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2002 w.e.f 9-9-2002

changes in holding of acquirers holding more than 15%, as changes in the holding of such acquirers has a bearing on the interests of the public shareholders. Hence in order to have transparency in the dealings of such acquirers holding more than 15% in the target company, disclosure obligations have been cast upon them under Regulation 7(1A) below the thresholds set for Public Announcement. However, if the argument made by the promoter Noticees is accepted, it would defeat the very purpose for which such disclosure requirements have been laid down.

53. I note here that the promoter Noticees have further stated that it is a settled law that if more than one view is possible in interpreting a penal provision, the interpretation that would not lead to penalty should be adopted. In the matter, I note that reference has been made to the judgment of the ***Hon'ble Supreme Court in TolaramRelumal v. State of Bombay 1955(1) SCR 158,*** wherein the Courthas held that *"if two possible and reasonable constructions can be put up on a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the legislation in order to carry out the intention of the legislation."*

54. In the matter, I note that both Regulation 11(1) and Regulation 11(2) deals with Consolidation of holdings through creeping acquisitions. Further the fact that has emerged from the above reading of the language of Regulation 11(1) and 11(2) is that the words "acquired" and "holds" have been interchangeably used. I, hence, do not agree with the contention of the Noticees that for the purpose of Regulation 11(2), the holding of the acquirer at the time of the additional acquisition would need to be reckoned, unlike in the case of Regulation 11(1). I find this to be an unduly narrow and restrictive interpretation of the Regulation 11 made by the promoter Noticees. The ordinary rule of construction when construing the Acts of Parliament and other documents is that if the language is ambiguous and admits of two views, one must not adopt that view which leads to manifest public mischief.

55. In the matter, I note that the ***Hon'ble Supreme Court in the matter of Bengal Immunity Co. Ltd vs. State Of Bihar &Ors1955 (2) SCR 603*** has observed that:
"It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case, 3 Co. Rep. 7a; 76 ElR. 637, was decided that-

..... for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:-

1st. What was the common law before the making of the Act., 2nd. What was the mischief and defect for which the common law did not provide., 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth., and 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.

……..

It appears to us that this rule is equally applicable to the construction of article 286 of our Constitution. In order to properly interpret the provisions of that article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief."

56. In the extant case, I find that the objective of disclosures of creeping acquisition or sale aggregating to two percent or more of the share capital of the target company under Regulation 7(1A) of the Takeover Regulations, 1997 is to make the shareholders aware of the changes in the shareholding of such acquirers who hold 15% or more shares or voting rights in the company. If such acquirers who have acquired shares under Regulation 10, 11and/ or 12 are allowed to purchase or sale shares without requiring disclosures of such creeping acquisitions or sale to be made under Regulation 7(1A), it is likely that promoters would increase their stakes upto the thresholds provided under Regulation 11 or even exit the target company without the knowledge of the shareholders.

57. I find further that the promoter Noticees have stated that the filings that the Promoters indeed made under Regulation 7(1A)fall in the nature of being voluntary compliance without there being a legal obligation to do so. And that any purported delay in such voluntary compliance can never be the basis of proceedings to impose penalty. However, it becomes clear from the discussions above and a reading of Regulation 7(1A) that purchases or sales aggregating two percent or more

of the paid-up capital of the company, by acquirers whose holding fell within the applicable limits specified under Regulation 11 at the relevant point of time, weremandatorily required to be disclosed to the company and the stock exchange. Further the same has no connection to the Regulation which had triggered the initial acquisition or whether additional shares or voting rights within the meaning of Regulation 11 of Takeover Regulations had been acquired or not.

58. I find that Regulation 7(1A) as incorporated required any acquirer whose holding fell within the scope of Regulation 11(1) at the relevant point of time, to disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company and the stock exchanges. Regulation 7(1A) was amended w.e.f. November 06, 2009, to include even those acquirers whose holding fell within the scope of Regulation 11(2) as at the relevant point of time, after proviso vide SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulation 2008 was inserted in Regulation 11(2) w.e.f. October 31, 2008 allowing additional acquisition of five percent shares or voting rights by acquirers falling within the scope of Regulation 11(2).

59. I also find that Regulation 11(1) too was subjected to amendments at various points of time. If we take into consideration the provisions of Regulation 11(1) as it stood at various points of time due to its amendment, Regulation 11(1) covered acquirers/PACs as follows:

(a) holding not less than 10% shares /voting rights but not more than 51% shares /voting rights from February 20, 1997 upto October 27, 1998;

(b) holding more than 15% shares /voting rights and less than 75% percent shares/ voting rights from October 28, 1998 upto January 02, 2005;

(c) holding more than 15% shares/voting rights and less than 55% shares/voting rights from January 03, 2005 onwards.

60. Thustaking all of the above into consideration, the applicability of Regulation 7(1A) to the sale of shares by the promoter Noticees in the extant case based on whether the holding of the promoter Noticees together with PACs was covered by the scope of applicable Regulation 11is given in tabular form below:

Name of the Promoter Noticee	Due date of compliance	Total Promoter shareholding (in %)		Applicable Regulation 11 at the relevant point of time	Scope of applicable Regulation 11 at the relevant time (Shares/ voting rights)	Applicability of Regulation 7(1A) at the relevant time
		Pre-acquisition	Post-acquisition			
KamladeviKathotia	08.12.2004	65.08	64.60	11(1)	> 15% <75%	Yes
RakeshKathotia	23.10.2005	63.02	62.53	11(2)	>55% <75%	NA as Reg 7(1A) was amended only w.e.f. 06-11-2009 to include acquirers holding falling under Reg 11(2)
Subhkam Monetary	08.03.2006	61.67%	59.67%	11(2)	>55% <75%	NA as Reg 7(1A) was amended only w.e.f. 06-11-2009 to include acquirers holding falling under Reg 11(2)
Subhkam Monetary	25.03.2006	59.67%	57.18%	11(2)	>55% <75%	NA as Reg 7(1A) was amended only w.e.f. 06-11-2009 to include acquirers holding falling under Reg 11(2)
RakeshKathotia	29.04.2006	47.70	44.57	11(1)	> 15% < 55%	Yes
RakeshKathotia	30.03.2007	42.77	42.10	11(1)	> 15% < 55%	Yes
RakeshKathotia	31.08.2007	38.14	37.84	11(1)	> 15% < 55%	Yes
ArtiKathotia	07.02.2008	36.92	36.92	11(1)	> 15% < 55%	Yes
Subhkam Ventures	25.03.2011	34.63	34.63	11(1)	> 15% < 55%	Yes

Name of the Promoter Noticee	Due date of compliance	Total Promoter shareholding (in %)		Applicable Regulation 11 at the relevant point of time	Scope of applicable Regulation 11 at the relevant time (Shares/ voting rights)	Applicability of Regulation 7(1A) at the relevant time
		Pre-acquisition	Post-acquisition			
RakeshKathotia, ArtiKathotia, KamaladeviKathotia, RakeshKathotia-HUF, Subhkam Properties, Subhkam Securities	22.10.2011	34.63	34.62	11(1)	> 15% < 55%	Yes

61. From the above table, I find that the transactions where the due dates of compliance was October 23, 2005, March 08, 2006 and March 25, 2006 are outside the purview of Regulation 7(1A) of the Takeover Regulations, 1997, as the total promoter holding was outside the scope of Regulation 11(1) and Regulation 7(1A) was amended to incorporate second proviso to sub-regulation (2) of Regulation 11 only w.e.f. November 06, 2009. Hence, the allegation of violation of Regulation 7(1A) of the Takeover Regulations, 1997against the Noticee Mr.RakeshKathotia for transaction for which due date of compliance were October 23, 2005 stands abated. Similarly, the allegation of violation of Regulation 7(1A) of the Takeover Regulations, 1997 against the Noticee Subhkam Monetary for the transactions for which due date of compliance wasMarch 08, 2006 and March 25, 2006 also stands abated.

62. Further, I note that the Manager to the Open Offer by M/s. S.R.Jute Traders Pvt. Ltd. had*inter alia*also stated in the letter of Offer that they had not been provided with any documentary evidence in respect of compliance required to be made to the stock Exchange under Regulation 7(1A) of Takeover Regulations, 1997 by the promoters of the company in respect of sale of 1,21,655 equity shares representing 2.43% of the equity and voting share capital of the company, in respect of due date December 08, 2004, hence they had presumed the same as not complied with. I note further that vide Annexure I to the Note on Submissions submitted vide letter dated

February 17, 2014, the Promoter Noticees have also indicated that for transaction dated December 06, 2004, while the intimation to the company was submitted on December 06, 2004, intimation to the stock Exchange is not traceable. In absence of evidence to the effect that the promoter Noticees had delayed filing to be made with the stock exchange under Regulation 7(1A) of the Takeover Regulations, 1997 for due date December 08, 2004, I am inclined to give the benefit of doubt to the promoter Noticees for due date December 08, 2004and conclude that violation of Regulation 7(1A) of the Takeover Regulations, 1997 for due date December 08, 2004 against the concerned promoter Noticees does not stand established.

63. However, the allegation of violation of Regulation 7(1A) of the Takeover Regulations, 1997 for due dates of compliance viz. April 29, 2006, March 30, 2007, August 31, 2007, February 07, 2008, March 25, 2011 and October 22, 2011 stands established against the Promoter Noticees viz. Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, RakeshS.Kathotia-HUF, Subhkam Ventures, Subhkam Properties and Subhkam Securities, as applicable.

64. I find further that the Promoter Noticees have referred to the ***Adjudicating Order in respect of Vibhu Agarwal in the matter of Technical Associates Infrapower Ltd.*** to statethat in the said Order it was held that the provisions of Regulation 7(1A) are applicable only where the acquisition is made under Regulation 11(1), and since Regulation 11(1) is not applicable in the extant case, necessarily the charge under Regulation 7(1A) and 7(2) would not be sustainable. I find that in the said Order it was observed that the Noticee Vibhu Agarwal along with the other promoters of the company was holding 92.95% before the alleged acquisition and post acquisition, the shareholding of the Noticee Vibhu Agarwal along with the other promoters had become 97.88%. Thus, since the promoter holding was outside the limit prescribed under Regulation 11(1) of Takeover Regulations, 1997, hence it was held in the said Order that the case cannot be covered by Regulation 7(1A) of the Takeover Regulation. In the extant case too, the allegation of violation of Regulation 7(1A) against the promoter Noticees for the transactions in respect of whichthe promoter holdings fell outside the scope of Regulation 11(1) have been abated.Thus, the stand taken in the extant case is in line with the stand taken in the case of Vibhu Agarwal referred to by the Promoter Noticees.

65. Next we move on to examine the allegation against the NoticeeSubhkam Securitiesof violation of Regulation 3(3) and 3(4) of the Takeover Regulations, 1997. I find that the Noticee Subhkam Securities has submitted there was no change at all to the total shareholding of the promoter group and the acquisition did not constitute "additional shares or voting rights" within the meaning of Regulation 11(1) of the Takeover Regulations, 1997. Further, it has been claimed that sincethe provisions of Regulation 10, 11 and 12 were not even attracted due to the acquisition of 2,63,412 shares of the company on March 23, 2011, there was no requirement to comply with the ingredients of regulation 3, as no exemption was necessary.It hasbeen further stated that the delayed filing under the provisionsof Regulation 3(3) and 3(4) of the Takeover Regulations, 1997 was made because the merchant banker for a subsequent open offer made pursuant to public announcement dated October 22, 2011 would not agree with the stance adopted by the Noticee, hence, the filings were made under protest.

66. In the matter vide letter dated June 25, 2015,it was clarified to the Noticee Subhkam Securities that the promoter shareholding prior to the *inter se* transfer of 2,63,412 shares on March 23, 2011between Subhkam Venturesand its group company Subhkam Securities was 34.63%. Therefore, acquisition of 2,63,412 shares (5.27%) by Subhkam Securities would have triggered Regulation 11(1) of the Takeover Regulations, 1997, but, for the exemption provided under Regulation 3(1)(e)(i) of the Takeover Regulations, 1997 relating to *inter se* transfer of shares within the definition of group as defined under the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as '**MRTP Act'),** where persons constituting such group have been shown as related parties in the Annual Report of the company Subhkam Capital Ltd. for the Financial Year 2009-10**.**Further, the said letter *inter alia*also clarified that even though the MRTP Act was repealed w.e.f. September 01, 2009, the exemption under Regulation 3(1)(e)(i) stands applicable, till such time that the Takeover Regulations, 1997 were in force i.e. till October 2011. The said letter also drew attention to the fact that the definition of *group* as given under MRTP Act was used under Regulation 3(1)(e)(i) of the Takeover Regulations, 1997 for reference purpose only, and since there was no amendment to the Takeover Regulations, 1997 upon revocation of the MRTP Act, exemption under Regulation 3(1)(e)(i) as available under the Takeover Regulations, 1997 continued to remain applicable.

67. I note here that Regulation 3 provides that nothing contained in Regulation 10, 11 and 12 would apply if the provisions of Regulation 3 and their ingredients are complied with. It has already been explained in detail in the preceding paragraphs of this Order as to how Regulation 11 of Takeover Regulations, 1997 covers the category of acquirers on the basis of their holding, and not on the basis under which regulation such a holding was reached as claimed by the Promoter Noticees. The fact that Regulation 11 of Takeover Regulations, 1997 covers the category of acquirers on the basis of their holding, and not on the basis under which regulation such a holding wasreached, is further strengthened by the fact that proviso to Regulation 11(2) incorporated vide SEBI (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2008 w.e.f. October 31, 2008 and further amended on November 06, 2009 reads as follows:

*" Provided further that such acquirer may [11][**notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation 11]** without making a public announcement under these Regulations acquire ..... additional shares or voting rights entitling him upto five per cent (5%) voting rights in the target company subject to the following ....."*

68. Thus from all of the above, I find that at the relevant point of time i.e. March 2011, Regulation 11(1) covered within its scope any acquirer whose holding was more than 15% and less than 55% shares/voting rights, irrespective of whether the acquirer's initial acquisition was under Regulation 10, 11 and/ or 12. I note that the holding of the Promoter Noticees with PACs at the time of *inter se* transfer of shares by Subhkam Ventures to its group company Subhkam Securities was 34.63%. Hence, the transaction fell within the scope of Regulation 11(1) of the Takeover Regulations, 1997 as explained in detail in the earlier part of the Order. Therefore, the contention of the Noticee Subhkam Securities that the provisions of Regulations 10, 11 or 12 are not even attracted in the first place, hence, there is no requirement to comply with the ingredients of Regulation 3, since no exemption would be necessary is not correct.

69. I further find that the Noticees have stated that the transaction is in the nature of an *'inter-se'* transaction where the promoter shareholding of persons acting in concert has remained unchanged post the acquisition. In the matter, I find that the Noticee Subhkam Securities was holding 'Nil' shares before the alleged transaction and acquired 5.27% shares from its group

[11] Inserted by the SEBI (Substantial Acquisition of Shares and Takeovers)(Third Amendment) Regulations, 2009, wef 6-11-2009

company Subhkam Ventures.I note that Regulation 11(1) of the Takeover Regulations, 1997 as at the relevant point of time i.e. March 2011 read as follows "*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. ".*

70. In the extant case, I find that the Noticee Subhkam Securities has "***by itself"*** acquired more than 5% (5.27%) of the paid-up capital of the company from Subhkam Ventures.Therefore the acquisition of 5.27% of shares by the Noticee Subhkam Securities would have triggered Regulation 11(1), but, for the exemption provided under Regulation 3(1)(e)(i) of the Takeover Regulations, 1997. I note here that Regulation 3(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as **'Takeover Regulations, 2011'**) has categorically highlighted the fact that individual shareholding of persons acquiring shares exceeding the stipulated thresholds shall also attract obligation to make an open offer for acquiring shares of the companyirrespective of whether there is a change in the aggregate shareholding with persons acting in concert. However, I find that even under the Takeover Regulations, 1997, the said concept was always in place as Regulation 11 too impliedthat individual shareholding of persons acquiring shares exceeding the stipulated thresholds shall also attract obligation to make an open offer, which becomes clear from reading of Regulation 11(1) which states that "*No acquirer who, together with persons acting in concert with him, has acquired, ….shall acquire,* ***either by himself*** *or through or with persons acting in concert with him*…."

71. I find that Annual Report of the company Subhkam Capital Ltd. for the Financial Year 2009-10 had shown both Subhkam Securities and Subhkam Ventures as related parties.Further, Noticee Subhkam Securities had "*by itself"* acquired 5.27% of the shares of the Company on March 23, 2011 from Subhkam Ventures, when with persons acting in concert it was holding shares within the scope of Regulation 11(1). Hence the Noticee Subhkam Securities had triggered Regulation 11(1) of the Takeover Regulations, 1997. Further since there was no amendment to the Takeover Regulations, 1997 upon revocation of the MRTP Act, exemption under Regulation 3(1)(e)(i) as

available under the Takeover Regulations, 1997 continued to remain applicable. However, I note that the Noticee Noticee Subhkam Securities had failed to make the appropriate filings within the due date under Regulation 3(3) and 3(4) of the Takeover Regulations, 1997.

72. I note further that the Noticee Subhkam Securities has argued that if the requirements of Regulation 3 were not met, the consequence should have been that an obligation to make an open offer should have been attracted. I note here that the ***Hon'ble Securities Appellate Tribunal (SAT) vide Order dated March 2001 in the matter of M/s. J M Financials & Investment Consultancy Services Ltd. Vs. SEBI*** had observed that *"Requirements of notifying stock exchange and reporting to SEBI in terms of sub regulations (3) and (4) are consequential to availing of exemption and not a requirement to avail exemption under regulation 3 as is made crystal clear in the Regulations."* Thus, it is not as brought out by the Noticee Subhkam Securities that if requirement under Regulation 3 of notifying the stock exchange and reporting to SEBI is not done, the consequence would be that an obligation to make an open offer would be attracted. These requirements are consequential to availing exemption under Regulation 3. In the extant case, I find that there is a delayed compliance to the requirement of notifying the stock exchange under Regulation 3(3) and reporting to SEBI in terms of Regulation 3(4).

73. I also note that the Noticee Subhkam Securitieshas stated that it can never be a consequence that a failure to comply with Regulation 3 would lead to imposition of penalty. I note that the extant case is of delayed compliance to Regulation 3(3) and 3(4) of Takeover Regulations, 1997, which required notifying the stock exchange in advance and reporting to SEBI respectively. In the matter, I note that the ***Hon'ble SATvide the aforesaid Orderin the matter of M/s. J M Financials & Investment Consultancy Services Ltd. Vs. SEBI***hadclarified that even failure to comply with the requirements of sub-regulation (3) i.e. notifying the details of the proposed transactions at least 4 working days in advance of the date of the proposed acquisition, in case acquisition exceeds 5 per cent of the voting share capital of the company, wouldattract penalty.

74. Further, filing of report with SEBI under Regulation 3(4) of the Takeover Regulations, 1997 is to enable SEBI to ensure that the particular acquisition did actually fall within the exempted category specified under Regulation 3(1)(e) or not. The objective is that if SEBI comes to the conclusion after perusing the report that the acquirer did not fulfill the conditions to avail exemption from

making public announcement as specified in the said Regulation, it can insist upon the acquirer to make public announcement for acquisition of such shares from others in accordance with the requirement of the Takeover Regulations, 1997.

75. I further find it noteworthy to mention here that Justice P.N. Bhagwati Committee Report on Takeovers had recommended that *"in order to ensure transparency in the transaction and assist in the monitoring, all exempted transactions should be subject to reporting requirements to the concerned stock exchange in advance of the proposed acquisition and to SEBI."*

76. I find from the submissions made by the promoter Noticee Subhkam Securities that the delayed compliance was made under protest. However, in view of all of the above, I conclude that the contention of Noticee Subhkam Securities that there was no requirement to comply with the ingredients of Regulation 3 at all including the requirement to file any report under Regulation 3(3) or Regulation 3(4) does not hold any merit.

77. I note further that the ***Hon'ble Securities Appellate Tribunal in HDFC Vs. SEBI***has held thatviolation of Regulation 3(4) attracts penalty under Section 15A(a) of the SEBI Act as the reporting requirement is towards the Board under Regulation 3(4) and Section 15 A(a) provides penalty for default in filing report to the Board. The ***Hon'ble Securities Appellate Tribunal*** *in* ***VLS Finance Ltd V P. Sri Sai Ram (2000) 28 SCL 205 (Sat)***has further observed that "*It is well settled that mere mention of wrong provision of law, when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power*". Also, the ***Hon'ble Supreme Court in Municipal Corporation of the City of Ahmedabad V. Ben HaribenManilal (1983) 2 SCC 422*** stated that "*It is well settled that the exercise of power, if there is indeed a power, will be referable to a jurisdiction, when the validity of the exercise of that power is in issue, which confers validity upon it and not to a jurisdiction under which it would be nugatory, though the section was not referred, and a different or a wrong section of different provision was mentioned....that a wrong reference to the power under which action was taken by the Government would not per se vitiate the action if it could be justified under some other power under which government could lawfully do that act*." Further, in ***State of Karnataka V Muniyalla (1985) 1 SCC 196 therein, the Hon'ble Supreme Court*** had reiterated the view held in Ahmedabad Municipal Corporation that ... *merely because an order is purported to be made under a wrong*

provision of law, it does not become invalid so long as there is some other provision of law under which the order could be validly made. Mere recital of a wrong provision of law does not have the effect of invalidating an order which is otherwise within the power of the authority making it."

78. Hence in view of the above, in the instant case I find that the Noticee Subhkam Securities is liable for penalty for delay in compliance of Regulation 3(4) of Takeover Regulations in terms of the provisions of Section 15A(a) of SEBI Act and for delay in compliance of Regulation 3(3) of Takeover Regulations in terms of the provisions of Section 15 A(b) of SEBI Act.

79. I further note that the NoticeeSubhkam Securities vide its submission dated July 22, 2015 has *inter alia*pointed out that issuing letter dated June 25, 2015 purportedly based on "additional material" sixteen months after the personal hearingis incorrect and impermissible in law. In this regard, reference has been drawn by the Noticee Subhkam Securities to the Order dated January 15, 2015 passed by the ***Hon'ble Securities Appellate Tribunal in the matter of PurshottamBudhwani v SEBI (Appeal No. 53 of 2013)***, wherein the Hon'ble Tribunal found fault with a similar procedure adopted by SEBI and set aside the Order of the Adjudicating Officer. I find it pertinent to mention here that the said case does not apply to the extant matter, as unlike in the said case, no '*supplementary material*' has been provided in the extant case vide letter dated June 25, 2015. The SCN had alleged violation of Regulation 3(3) and 3(4) of the Takeover Regulations, 1997 in respect of transaction dated March 23, 2011. The relevant pages of the letter of Offer made by M/s. S. R. Jute Traders Pvt. Ltd., whereby it was brought out that the Noticee Subhkam Securities had complied with Regulation 3(3) and 3(4) of the Takeover Regulations, 1997, but, with a delay of 455 and 436 days respectively in respect of 2,63,412 shares acquired by Subhkam Securities from Subhkam Ventures constituting 5.27% of total capital of the company, were also annexed to the SCN. Thus, the precise charges were leveled against the Noticee Subhkam Securities in the SCN issued to it along with the supporting documents. In view of the argument made by the NoticeeSubhkam Securities that nothing contained in Regulation 10, 11 or 12 of Takeover Regulations, 1997 was attracted in respect of the said acquisition, necessitated the issue of letter dated June 25, 2015 so as to clarify that the transaction would have triggered Regulation 11(1) of the Takeover Regulations, 1997, but, for the exemption provided under Regulation 3(1)(e)(i). The said letter was meant to provide the Noticee Subhkam Securities with a fair chance to defend itself.

80. Furtherunlike the case of *PurshottamBudhwani v SEBI,* where reply based on SCN and not on *'supplementary material letters'* was considered, in the extant case, all submissions made by the Noticee Subhkam Securitiesincluding vide letter dated July 22, 2015 has been taken on record. Also, another opportunity of personal hearing was given to Noticee Subhkam Securities pursuant to its reply dated July 22, 2015. Thus, the proceedings were conducted as per the principles of natural justice. Hence, the facts in the extant case are different from the said case referred by the Noticee. Besides, even in the said case of *PurshottamBudhwani v SEBI* referred by the Noticee,I note that the Hon'ble SAT has remanded back to SEBI for issue of fresh SCN by incorporating all the details.

81. Further with regards to the delayof sixteen months in conducting the proceedings as pointed out by the Promoter Noticees, the extant matter involves violation of certain provisions of the Takeover Regulations, 1997 by the company and the erstwhile promoter Noticees, who were acting in concert. In the matter, I find it pertinent to mention here that evolution of Takeover Regulations, 1997 was a product of intense discussion by the experts under the chairmanship of Justice Mr. P.N.Bhagwati. Also since its inception, the Takeover Regulations, 1997 had undergone changes from time to time to fine tune it to better serve investors interests. Hence, considering the complexity involved in Takeover related matters and some opportunistic interpretation of the Takeover Regulations made by the promoter Noticees completely insulating themselves from the requirement to make disclosures/ filing reports etc. as alleged under the applicable provisions, it became necessary to delve into the historical course of events leading to the evolution of the provisions, with a view to appropriately interpret the applicable provisions. Also in respect of certain alleged violations, further comments based on submissions made were required to be sought from the Manager to the Offer and certain promoter Noticees.Similarly, certain clarifications were required to be provided to certain promoter Noticees in view of submissions made. Though it is an unwritten rule of law that any proceedings initiated have to be concluded as expeditiously as possible, in complex matters such as the extant case, it is essential that each fact and allegation is examined in depth, with due consideration to submissions of the Noticees along with the evolution and the intent of the law. Such matters, hence, cannot simply be disposed of with undue speed and haste. In view of all of the above, I do not find that there was any unnatural

or undue delay in conducting the proceedings. Also, the Promoter Noticees have not pointed to any prejudice to their rights as a result.

82. 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*."

83. In view of all of the foregoing, I am convinced that it is a fit case to impose monetary penalty under Section 15 A(a) and/ or 15A(b) of the SEBI Act, as applicable, which reads as under:

Penalty for failure to furnish information, return, etc.
15 A(a) *Penalty for failure to furnish information, return, etc.- If any person, who is required under this Act or any rules or regulations made thereunder:*
to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of not exceeding one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

15 A(b) of the SEBI Act, 1992 prior to SEBI (Amendment) Act, 2002 (w.e.f. 29-10-2002)
If any person, who is required under this Act or any rules or regulations made thereunder,--
To file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues.

15 A(b) of the SEBI Act, 1992 afterSEBI (Amendment) Act, 2002 (w.e.f. 29-10-2002)
Penalty for failure to furnish information, return, etc.-
15.A(b)*If any person, who is required under this Act or any rules or regulations made thereunder,--*
To file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

84. While determining the quantum of monetary penalty under Section 15 A(a) and/ or15 A(b) of the SEBI Act, I have considered the factors stipulated in Section 15-J of SEBI Act, which reads as under:

"15J - Factors to be taken into account by the adjudicating officer

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."

85. 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 Noticees. 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 Noticees. However, the main objective of the Takeover Regulations is to afford fair treatment for shareholders who are affected by the change in control. The Regulation seeks to achieve fair treatment by *inter alia* mandating disclosure of timely and adequate information to enable shareholders to make an informed decision and ensuring that there is a fair and informed market in the shares of companies affected by such change in control. Correct and timely disclosures are also an essential part of the proper functioning of the securities market and failure to do so results in preventing investors from taking well-informed decision. Thus, the cornerstone of the Takeover regulations is investor protection.

86. As per Section 15 A(a) and 15 A(b) of the SEBI Act, as applicable, w.e.f. October 29, 2002, thePromoter Noticees are liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less. Prior to amendment dated October 29, 2002, the promoter Noticees are liable to a penalty not exceeding five thousand rupees for every day during which such failure continues.Further, under Section 15-I of the SEBI Act, the adjudicating officer has to give due regard to certain factors which have been stated as above while adjudging the quantum of penalty.I note that the Promoter Noticees and the company in their individual submissions made pursuant to SCN have confirmed that in the past there have been no instances where any regulatory action has been initiated against them.

87. I, however, note that the ***Hon'ble Securities Appellate Tribunal (SAT) in the matter of KomalNahata 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 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 Company and the Promoter Noticeesthat no loss was caused to any investor as a result of the alleged delayed disclosures is not relevant for the given case.

88. In the matter, I also 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 Company and the Promoter Noticees that there is no question of any gain or advantage that has accrued, let alone any disproportionate gain or unfair advantage and that the alleged failure to make disclosures in the prescribed form was bonafide, at best technical, inadvertent and no unfair benefit or advantage had been derived by the Promoter Noticees is also not relevant for the given case.

89. I, however, note here that the SCN has alleged that the Noticee Subhkam Securities had complied with Regulation 3(3) and 3(4) of the Takeover Regulations, 1997, but, with a delay of 455 and 436 days respectively in respect of 2,63,412 shares acquired by Subhkam Securities from Subhkam Ventures constituting 5.27% of total capital of the company. In the matter, I note that sub-regulation (3) of Regulation 3 of Takeover Regulations, 1997 requires the acquirer to notify the requirements atleast 4 days in advance of the date of acquisition. It is, thus, clear from the provision that notifying the stock exchange is a pre-acquisition requirement. Hence, failure under sub-regulation (3) of Regulation 3 of Takeover Regulations, 1997 is not of a continuing nature

after the acquisition, and therefore penalty for violation of Regulation 3(3) cannot be decided on the basis of per day default post the acquisition.

90. In addition to the aforesaid, I am also inclined to consider the following mitigating factors while adjudging the quantum of penalty: a) the paid-up capital/ market capitalization of the company at the relevant point of time; b) the trading volumes of the company's shares on BSE, where the shares were listed, during the relevant period; and c) the number of occasions in the instant proceeding that the Noticees have violated the relevant provisions of the Takeover Regulations, 1997.

91. I note from the BSE website that the paid up capital of the company was 50,00,000 shares of Rs. 10/- each aggregating to Rs. 5,00,00,000/- during the relevant period. I further note from the BSE website that the market capitalization of the company was approx. Rs. 200 crore and on an average approx. 9,000 shares were traded during the period 2006 to 2011.I note that the Company and the promoter Noticees have violated the provisions of the Takeover Regulations, 1997 as follows:

Sl. No	Name of the Noticee	Provisions of Takeover Regulations, 1997 violated	No. of times violated
1	Subhkam Capital Limited	Regulation 7(3)	1
		Regulation 8(3)	1
2	Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Rakesh S. Kathotia- HUF, Subhkam Monetary and Subhkam Properties as PACs	Regulation 7(1) read with 7(2)	1
3	Mr. Rakesh S Kathotia	Regulation 7 (1A) read with 7(2)	4
4	Ms. ArtiKathotia	Regulation 7 (1A) read with 7(2)	2
5	Subhkam Ventures	Regulation 7 (1A) read with 7(2)	1
6	Ms. KamladeviKathotia	Regulation 7 (1A) read with 7(2)	1
7	RakeshKathotia HUF	Regulation 7 (1A) read with 7(2)	1
8	Subhkam Properties	Regulation 7 (1A) read with 7(2)	1
9	M/s. Subhkam Securities	Regulation 3(3) and 3(4)	1
		Regulation 7 (1A) read with 7(2)	1

92. I also note from the letter of Offer that the company had earlier too not complied with the provision of Regulation 6 applicable as on February 20, 1997 & also Regulation 8(3) of Chapter II of the Takeover Regulations, 1997 for the period 1998 to 2002 and availed the benefit under SEBI (Regularization) Scheme, 2002 on March 28, 2003 to regularize the same by the paying penalty amount of Rs. 30,000/-.

93. I find that the Noticee Company and the Promoter Noticees have referred to the ***Order of the Hon'ble Supreme Court in VasudevRamchandraShelat v. PranlalJayanandThakar (AIR 1994 SC 1728),*** wherein the Court has observed that:

"There is nothing in Regulation 18 to indicate that without strict compliance with some rigidly prescribed form, the transaction must fail to achieve its purpose. The subservience of substance of a transaction to some rigidly prescribed form required to be meticulously observed, savors of archaic and outmoded jurisprudence."

94. From perusal of the said judgment relied upon by the Noticee Company, I note that the case referred above deals with respect to transfer of property rights in shares under the Companies Act and the Transfer of Property Act and not under the SEBI Act. Even otherwise, while making comparisons, I find that the context in which the above has been observed by the Court needs to be looked into. It has been brought out that in case of a gift, the more general provision of regulation which states as follows will apply–

the instrument of transfer of any share in the company shall be executed by or on behalf of both the transferor and transferee. The transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof. In the said case, I find that the Court noted that both the donor and the donee had signed the gift deed document under two headings respectively: *"giver of the gift"* and *"accepter of the gift".* Hence the Court observed that since the broadly indicated requirements of the regulation were also complied with by the contents of the gift deed, it is immaterial that the gift deed deals with a number of items so long as the requirements of regulation 18 are fulfilled.

95. Unlike the same in the extant case, I note that the disclosures to be made under the applicable provisions of the Takeover Regulations, 1997 by the company and the Promoter Noticees were in the form of mandatory disclosures. And disclosure of such information by the company and the

promoter Noticees on a timely basis, whether annually, currently or periodically, and in a form or manner prescribed by the regulations, is fundamental for investors. In the matter, I note that the ***Hon'ble Securities Appellate Tribunal (SAT) in the matter of GHCL Ltd (Appeal No. 6/2014)*** with regard to making regular/true disclosures has held as follows-

"..... *the purpose underlying the requirement of making regular and true disclosures by a company as regards the shares which the promoters may come to hold from time to time is to bring about greater transparency in the functioning of the companies. It is through such disclosures that the investors take an informed decision in a given situation to invest in the scrip of that company or even to exit. This is extremely important for the growth of a healthy capital market.*"

Thus, I note that the facts of the aforesaid case of *VasudevRamchandraShelatVs. PranlalJayanandThakar*referred by the Noticee Company and the Promoter Noticees are not comparable with the facts of the extant case.

96. I note here that the Noticee Company and the Promoter Noticees have also referred to the ***Hon'ble Supreme Court's decision in Hindustan Steel Ltd. Vs. State Of Orissa***wherein the Court has *inter alia* observed that even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose the penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. However, I find that any transaction which requires compliance to the provisions of the Takeover Regulations, if not complied within the timeline stipulated under the relevant provisions, is always a serious matter, and cannot be considered a mere "technical" violation, since other shareholders/ investors were deprived of the information. In fact, delayed disclosure with respect to the mandatory disclosures stipulated under the Takeover Regulationsundermines the investors interest relating to the effectiveness of the purpose of such disclosures.

97. In the given case, I find that the violation has been committed by the promoters Noticees and the Company. As a listed company, the promoters and the Company had a responsibility to comply with the disclosure requirements in accordance with their spirit, intention and purpose. Delayed compliance with disclosure requirements by promoters undermines the regulatory objectives and jeopardizes the achievement of the underlying policy goals.

ORDER

98. After taking into consideration all the facts and circumstances of the case, I impose the following penalties against the Company and the Promoter Noticees under Section 15 A(a) and 15 A(b) of the SEBI Act, as applicable, whichwill be commensurate with the violations committed by them:

Sl No.	Name of the Company/ Erstwhile Promoters	Provisions of Takeover Regulations, 1997 violated	Penalty under the SEBI Act	Penalty (in Rs.)
1	**M/s. Subhkam Capital Ltd.**	Regulation 7(3)	15A(b)	**2,00,000/- (Two lacs only)**
		Regulation 8(3)	15A(b)	**2,00,000/- (Two lacs only)**
2	**Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Rakesh S. Kathotia- HUF, M/s. Subhkam Monetary Services Pvt. Ltd. and M/s. Subhkam Properties Pvt Ltd.**	Regulation 7(1) read with 7(2)	15A(b)	**15,00,000/-(Fifteenlacs only) (payable jointly and severally)**
3	**Mr. Rakesh S Kathotia**	Regulation 7(1A) read with 7(2)	15A(b)	**3,00,000/- (Three lacs only)**
4	**Ms. ArtiKathotia**	Regulation 7(1A) read with 7(2)	15A(b)	**2,00,000/-(Twolacs only)**
5	**M/s. Subhkam Ventures (I) Pvt. Ltd.**	Regulation 7(1A) read with 7(2)	15A(b)	**6,00,000/- (Sixlacs only)**
6	**Mr. Rakesh S Kathotia, Ms. ArtiKathotia, Ms. KamladeviKathotia, Rakesh S. Kathotia- HUF, M/s. Subhkam Properties Pvt Ltd. and M/s. Subhkam Securities Pvt.Ltd.**	Regulation 7(1A) read with 7(2)	15A(b)	**8,00,000/- (Eight lacs only) (payable jointly and severally)**
7	**M/s. Subhkam Securities Pvt.Ltd.**	Regulation 3(3)	15A(b)	**2,00,000/- (Twolacs only)**
		Regulation 3(4)	15A(a)	**5,00,000/- (Fivelacs only)**

99. The charge of violation under Regulation 7(1) read with Regulation 7(2) of the Takeover Regulations, 1997 against the NoticeeM/s. Milton Securities Ltd. is dropped.

100. Also, the Promoter Noticee Ms. KamaladeviKathotia is given the benefit of doubt with respect to the allegation of non-compliance under Regulation 7(1A) read with 7(2) of the Takeover Regulation, 1997 for transaction in respect of which due date of compliance as per SCN was December 08, 2004.

101. Further,the allegation of violation of Regulation 7(1A) read with Regulation 7(2) of the Takeover Regulations, 1997 against the Noticees viz. Mr. Rakesh S Kathotiafor transaction in respect of which due date of compliance as per SCN was October 23, 2005 and against the Noticee viz. M/s. Subhkam Monetary Services Pvt Ltd. for transactions in respect of which due date of compliance as per SCN were March 08, 2006 and March 25, 2006 does not stand established in the matter.

102. The Noticees shall pay the said amount of penalty by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to -The Chief General Manager, Corporation Finance Department, SEBI Bhavan, Plot No. C – 4 A, "G" Block, BandraKurla Complex, Bandra (E), Mumbai – 400 051.

103. In terms of rule 6 of the Rules, copies of this order are sent to the Noticees and also to the Securities and Exchange Board of India.

Date: **October 29, 2015** **Anita Kenkare**
Place: **Mumbai** **Adjudicating Officer**