

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA  
CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER**

**ORDER**

**UNDER SECTIONS 15-I (3) OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 IN THE MATTER OF GOENKA DIAMONDS LIMITED**

**IN RE SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011 AND SEBI (PROHIBITION OF INSIDER TRADING) REGULATIONS, 1992**

**IN RESPECT OF**

<b>S. No.</b>	<b>NAME</b>	<b>PAN</b>
1	Ms. Nirmala Goenka	ACUPG6554H

- 1) Securities and Exchange Board of India ('SEBI') during the examination in the scrip of Goenka Diamond and Jewels Ltd ('GDJL/Company') observed that Ms. Nirmala Goenka ('Ms.Nirmala/Noticee'), Promoter of GDJL, through an off-market transaction had received 4,09,76,250 shares (12.93% of the share capital of GDJL) from Mr. Nitin Goenka who is the Noticee's son, and was the promoter and Managing Director of GDJL at the relevant point of time. As a result of the said transaction, the shareholding of the Noticee changed from 1,03,50,000 shares (3.26%) to 5,13,26,250 shares (16.19% of the Share Capital of GDJL). In this regard, it was noted that the Noticee did not disclose the change in her shareholding to the Company/Stock Exchanges as was required under Regulation 29(1) read with Regulation 29(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Takeover Regulations') and Regulation 13(1) and Regulation 13(4A) read with Regulation 13(5) of SEBI (Prohibition of Insider Trading) Regulations, 1992 ('PIT Regulations').

- 2) In view of the above, SEBI initiated adjudication proceedings against the Noticee under section 15A(b) of Securities and Exchange board of India Act, 1992 ('SEBI Act') for the alleged non-disclosure of change in her shareholding. The Adjudicating Officer ("AO") appointed under the said adjudication proceedings issued a show cause notice dated September 11, 2017 to the Noticee and thereafter an opportunity of inspection of documents, filing reply and to appear for personal hearing was provided to the Noticee. The said opportunities were availed by the Noticee.
- 3) After considering the reply / submissions filed by the Noticee and the material on record, the AO in his order dated March 27, 2018 ("AO Order") recorded the following:

" ...

***Issue a) Whether, Noticee have violated the respective provisions as alleged in the SCN?***

*12. Ms. Nirmala, Promoter of Goenka, held 1,03,50,000 shares (3.19% of the share capital of Goenka). On November 11, 2013, Ms. Nirmala received 4,09,76,250 shares (12.93% of the share capital of Goenka), which resulted in change in holdings of Ms. Nirmala in Goenka to 16.19% (5,13,26,250 shares).*

*13. It is pertinent to take note of the submissions made by Nitin, the other noticee in the matter, in which he had contested that the disclosure would arise only in case of change in the shareholding. It has been contested that the very transfer of the shares out of his account itself is being agitated in the court of law as the same has been alleged to have been fraudulently done. Given the same, it has been mentioned that the competent authority has applied a freeze on the holding and thus neither Mr. Nitin nor Ms. Nirmala are able to exercise any rights arising out the disputed holding.*

*14. Before proceeding further, the conduct of the Noticee to be placed on record. The Noticee in her reply has failed to submit the correct and complete facts of the matter. It is pertinent to mention that the Ld. Session Court of Greater Mumbai vide order (dt: January 10, 2014) has rejected the application of the Noticee for anticipatory bail on the ground that:*

- a. The evidence collected by the investigating agency as pointed out above clear in terms prima facto pointing out that the gift deed and release deed are forged and fabricated. So also, on the basis of the forged signature of the informant on TIFD*

*slip the shares are transferred from the demat account to the account of the applicant.*

- b. The papers of investigation further indicates that the accused and the co accused Navneet Goenka signed the documents and the forged and fabricated documents are tendered by the co-accused Navneet Goenka and managed to get transferred huge shares of the informant to the account of the applicant. She is beneficiary of the crime. In absence of the informant all these acts are committed therefore she is part of conspiracy.*
- c. The offence charged against the applicant (Nirmala) is certainly serious in nature. She has direct nexus with the alleged crime. In order to unearth the conspiracy her custodial interrogation is essential. She has not come before the Court with clean hands. Therefore, according to me, the applicant failed to make out the case for grant of anticipatory bail.*

*15. Also, during the pendency of the anticipatory bail proceedings of others, in the mediation proceedings before an Additional Sessional Judge, a Settlement Agreement dated March 18, 2014 in mediation proceedings was arrived. Such facts were not before the Adjudicating Officer, which are pertinent to come to arrive a conclusion on the matter pending before the Adjudicating Officer. It is observed that the conduct of the Noticee as observed by the honorable Court continues even in these proceedings, as full facts were not brought out.*

*16. Given the specific observations of the competent authority on the veracity as well as the legality of the transaction leading to the change in the holding of Ms. Nirmala, it would not be appropriate to adjudge this matter at this stage until the Competent Authority decides the matter.*

***Issue b) If yes, does the violation, on the part of Ms. Nirmala attract monetary penalty under section 15A(b) of SEBI Act?***

***Issue c) If yes, what quantum of monetary penalty should be imposed on the Ms. Nirmala taking into consideration the factors mentioned in Section 15J of the SEBI Act?***

*17. As the violations are not established against Ms. Nirmala, consequent issues b and c require no further examination.”*

- 4) For the above reasons, the AO disposed of the show cause notice dated September 11, 2017 without imposition of any penalty on the Noticee.

## **PROCEEDINGS IN RESPECT OF REVIEW OF THE AO ORDER UNDER SECTION 15-I(3) OF THE SEBI ACT**

- 5) SEBI, after examining the order passed by the AO and material relied upon by him, was of the opinion that the above mentioned AO order, in as much as not holding the Noticee liable for imposition of penalty, under section 15A (b) of the SEBI Act was erroneous and not in the interests of the securities market for the reason that the matter has not been decided on merit.
- 6) In view of above, SEBI issued a show cause notice dated June 26, 2018 under section 15-I(3) of SEBI Act to the Noticee advising her to show cause as to why appropriate penalty should not be imposed upon her in terms of section 15A (b) of the SEBI Act for the violation as alleged in SCN dated September 11, 2017 issued by AO. It was also mentioned therein that the contents of this show cause notice dated June 26, 2018 shall be read along with the previous SCN dated September 11, 2017 issued by the AO.

### **Hearing and written submissions**

- 7) An opportunity of personal hearing was provided to the Noticee on October 25, 2018 but no communication was received from the Noticee in that regard. Subsequently, another opportunity of hearing was provided to the Noticee on November 28, 2018, when Noticee's authorized representatives appeared and made their submissions. The representatives also sought one week's time for filing written submissions in the matter including the response to the queries raised during the course of hearing. Then the Noticee sought extension for filing the written submissions and filed the same vide letter dated December 13, 2018.
- 8) The submissions filed by the Noticee are, *inter alia*, as under:
  1. ... *These Written Submissions are filed as directed by the learned Whole Time Member to provide summary of the arguments advanced during the personal hearing.*
  2. ...
  - Brief Background of the Case:***
  3. ...

*a. The matter pertains to the transfer of shares of Goenka Diamonds Limited of which I am one of the promoters with my husband and two sons.*

*b. There has been a dispute going on between our family and my younger son, Nitin Goenka since 2011. There were various settlement talks and discussions which took place and finally after an incident in Mauritius, where Nitin was being detained and my husband got him released that things were looking to be settled. Nitin transferred the shares which he held in Goenka Diamonds to me by way of gift as it was decided that he part ways with our family and the Company.*

*c. After the shares were transferred, all required compliances were being requested to be done by our then Company Secretary. Immediately, before this could happen and part compliances were done as I understand, Nitin got an order from the Police that there will be freeze on the shares which he had transferred. My elder son was arrested and the Complaint was registered against me, my husband (Nandlal Goenka) and my elder son (Navneet Goenka).*

*d. The Company Secretary was threatened to not act on the deed of transfer and was called by the Police for investigation. At this stage, there was no reason for anybody to act on the shares.*

*e. The matter was later on settled and Consent Terms were filed in the Court with the help of a Court appointed Mediator. The mediation went on for more than 5 months.*

*f. As per the Settlement, the shares were to be with me as per the Gift Deed and there was no issues on the same. Yet again, there were disputes and ultimately the matter was again settled by the High Court of Rajasthan at Jaipur and now as settlement, Nitin is being given Rs. 4 Crores.*

*g. Company is in bad shape and none of us have money. Banks have initiated proceedings for recovery and still we are trying to pay Nitin as per the Settlement which was done under the guidance and help of the Hon'ble High Court Judge. So the shares will be unfrozen once the payment is done and there is no clarity still on the issue.*

*h. The Voting rights are frozen till date and there is nothing happening in the Company in this regard.*

*4. I submitted these submissions and therefore the learned Adjudicating Officer decided the matter as contained in the Adjudicating Order. With these, the matter was closed as the outcome of the Criminal Proceedings was underway as explained.*

***Preliminary Objection to the maintainability of the present proceedings:***

*5. The Notice is issued under Section 15 I (3) which reads as under:*

*"SEBI, after examining the order passed by the AO and material relied upon by him, is of the opinion that the AO's order, in as much as not holding the noticee liable for imposition of penalty, under section 15 A (b) of the SEBI Act is erroneous and not in the interest of the securities market for the following reasons because the matter has not been decided on merit. "*

6. Although reasons are to be provided, there is no reason given in the paragraph extracted above. Further, the provision Section 15 I(3) is extracted below:

***"Power to Adjudicate:***

*The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interest of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty if the circumstance of the case to justify"*

7. The provision which is being swung in action in the Notice is self explanatory. The provision only provides for the enhancement of the penalty if the order is erroneous. However, if the Adjudicating Officer decides to dispose of the proceedings without any penalty on the ground that the matter in another Court is pending and therefore sub-judice, Section 15 I (3) cannot be used to impose any penalty. Further, the language is clear that Section 15 I(3) can be used only to enhance the penalty but not change the decision per se of the Adjudicating Officer. This is against the spirit of law where SEBI was also a party before the Adjudicating Officer.

8. I submit that, in any adjudication proceedings after the AO is appointed, there are three stages which are explained below, the third one being relevant in the present matter:

(a) **First Stage:** The Adjudicating Officer issues Notice under Rule 4(1) of the Adjudication Rules whereby the Noticee is asked to show cause as to why an inquiry should not be held in the matter. The Notice would contain the allegations provided by SEBI and the material relied upon by SEBI.

(b) **Second Stage:** After the reply is filed, if the AO is of the view that an inquiry is required in the matter, then a Notice of Hearing which is an inquiry is sent to the Noticee. This will be followed by the personal hearing in the matter.

(c) **Third Stage:** During the personal hearing the issues and allegations are explained to the Noticee and the arguments are advanced as per the issues framed. The AO then decides the matter based on the two issues which are framed as under:

- (i) Whether the alleged violation against the Noticee is established in the matter to warrant a monetary penalty;

*(ii) If the answer is affirmative in the first place, then the quantum of penalty is decided considering various parameters contained in Section 15 J of the SEBI Act, 1992.*

*9. As is clear from the above, which also can be verified from any adjudication orders passed by the AO, the core issue is establishing the fault and violation on the part of the Noticee. Then comes the question of quantum. Section 15 I(3) would therefore not be applicable to the present case as the issue of quantum was not decided in the matter considering the absence of establishing the violation as per issue (i) mentioned above. Had there been a penalty after holding the Noticee guilty, Section 15I(3) would have become operative.*

*10. Considering these submissions, if SEBI wishes to still pursue the matter, the I request SEBI to inform me of such decision as I would then challenge the decision of SEBI to invoke Section 15 I (3) of the SEBI Act. Section 15 T of the SEBI Act clearly states that any person aggrieved by the Order of the Board or the Adjudicating Officer may file an Appeal before the Hon'ble Securities Appellate Tribunal which is the remedy available with SEBI. In my respectful submission, SEBI having given the matter to Adjudicating Officer to decide the issue, being a party to such proceedings, cannot now exert influence over the entire proceedings. This will amount to diluting the very concept of having an independent person as Adjudicating Officer.*

*11. As submitted during the personal hearing, the preliminary issue be decided at the preliminary stage to decide whether at all the proceedings can be re-agitated by SEBI after having an order passed by the Adjudicating Officer.*

*12. It is a settled position of law that judicial discipline requires a uniform approach by co-ordinate benches and any difference in approach would not be considered in the right spirit. Proceeding with the present proceedings and imposing any penalty would mean that the SEBI which was a party to the Adjudication Proceedings, overruling the findings of the Adjudicating Officer and also exercise the power of the Appellate Tribunal.*

*13. It is also a settled position of law which SEBI is aware, the issue of preliminary objection which goes to the root of the controversy and the present proceedings be decided as a primary / preliminary issue before proceeding in the matter. As regards the concerns of the learned Member during the personal hearing about second hearing on merits if the preliminary issue is decided against the Noticee, I hereby state that I would not be requesting for another hearing on merits as I would like to challenge such a decision. Such decision being an appealable order under Section 15 T of the SEBI Act as well as an issue which the Hon'ble High Court in writ jurisdiction could exercise.*

14. Without prejudice to the foregoing and submitting that I would not be arguing the matter on merits till the preliminary issue is decided by the learned Member or the Hon'ble Appellate Court or Hon'ble High Court, as a matter of respect, I hereby submit the details which were required by the learned Member. I state that this is without prejudice to my rights and contentions and preliminary objections on the maintainability of the present proceedings and my submissions on the merits would not mean my acceptance of the maintainability or jurisdiction of the learned Member in the present case.

15. Following are the key questions which were raised during the personal hearing to determine the compliance with the disclosure requirements of the two say period:

(a) Date of the acquisition of shares by me;

(b) Date of the Police Complaint and the action taken by the Police;

16. Please note that the shares by way of a gift deed was sent by my son, Nitin Goenka to my residence address. This was part of the settlement which my husband and elder son on one side and Nitin on the other side had agreed in lieu of withdrawal of the complaint filed by our Company against Nitin Goenka which was filed in Bandra Police station for stealing and misappropriation of diamonds belonging to the Company store.

17. As the documents had arrived, my husband and my elder Son Navneet sent it to our office to the Company Secretary Mr. ShyamKasera who was also handling the accounts and compliance. Mr. Kasera, the same day in the evening sent some forms to me through our office boy for my signature. I signed the documents and the same were taken back to the office. I am not aware of any of the forms which were signed by me. On the same day I was told that the signatures were for disclosures on the stock exchange. On the next day, some more forms were sent saying that wrong forms were signed by me. I was informed that instead of Disclosures under 29(1) by mistake disclosures under 29 (2) were sent by the office. The next day our Depository Participant informed my husband that the shares which were gifted were frozen by the Police based on the complaint of Nitin.

18. I signed the forms and sent it back to Mr. Kasera. Kasera informed me that Nitin threatened him to send all the documents to Police as Kasera would also be impleaded in the Complaint. I am not aware of what happened after that. The same day in the evening, Mr. Vijay Waghmare (Mobile: 9870209966) came to our house to arrest my husband and my elder son saying that Nitin has filed a complaint against me, my husband and Navneet. After this, I am not aware of any documents as the next day Navneet was arrested and we had to approach the court for bail for him and anticipatory bail for us.



19. The learned AO has in the Order accepted the contention of Nitin Goenka and commented on the gift deed and the share transfer form and held that the very basic document which effects transfer is questionable and is pending before the Hon'ble Court. Therefore the AO held that till the Criminal trial is completed, the issue cannot be adjudicated by the AO. Please see Para 16 of the Order passed by the AO whereby the legality of the share transfer was questioned. Therefore, if SEBI states that the disclosure was required to be made based it would mean that the share transfer is valid and is contrary to what has been stated by the AO as well as the observations of the Criminal Court.

20. Further, I am not aware of the order passed against Nitin or any Notice like in the instant case being issued to Nitin. The liability of both the Noticees stands on similar footing and therefore I request you to inform me the status of the proceedings against Nitin Goenka. These findings would also have to be placed before the Criminal Court as the findings of SEBI would be material. I believe that the shares were validly transferred and there was no fraud whatsoever in the entire matter. Because of the arrests and Police complaints, there was a lapse on the disclosure requirement as wrong disclosure was made. The circumstances were not conducive at the time to correct the mistake by which time the shares and the voting rights were already frozen.

***Circumstances underlying the date of compliance***

21. For about one week, we were all in the court proceedings for the release of Navneet. Every employee of our Company left the company. The board members resigned and also Mr. Kasera who had access to all the information.

22. I wish to place this on record and also depose on affidavit if required that the Police took away all the documents including the gift deed and the forms which was intended to transfer the shares in my name. Other than the documents which were presented to the AO, I do not have any records in the matter. This can be validated if Mr. Waghmare is contacted. Mr. Waghmare is transferred and my husband is still trying to get copies of the entire file and records which are in possession of the Police. SEBI can as well make an enquiry into this or ask for the records. All the records pertaining to the transfer and the statements are with the MRA Marg Police Station. Kindly let me know copy of the Complaint filed by Nitin Goenka is required. If yes I will be furnishing a copy to enable SEBI to appreciate what we were undergoing at the time of such crisis.

23. The transfer in question could have been done for not more than two days as the same were frozen immediately based on the complaint. I am informed that the disclosure was a onetime disclosure and therefore I was not advised to file the same at a later stage when

*things started settling down. The shares are still frozen with no voting rights with me. Please appreciate the pains and the underlying circumstances when the disclosure was to be made. Without prejudice, it is an undisputed fact that I have never gained any advantage over the alleged defaults. I don't even have the voting rights nor even interested in such shares. My entire family is devastated and we are still enlarged on bail in the criminal proceedings. What could be the benefit of such shares and how could even any person think of disclosure when the family is undergoing crisis and the son and husband were getting arrested.*

***Plea of the Noticee;***

*24. Without prejudice to the foregoing, there are two submissions which I would like to make before the learned Member as the same were not made by the learned representative. (a) The alleged violation being a one time disclosure was a bonafide mistake by Mr. Kasera. I am not aware of any disclosure requirements and relied on Mr. Kasera who by mistake sent me the wrong forms which I was not aware of.*

*(b) There is no gain made by me or any loss avoided. I have till date not used those shares in any manner and there is no complaint whatsoever by any shareholder on the alleged failure to disclose.*

*(c) Even while considering the issues raised, the humble submissions be considered in the matter. I undertake to inform the learned Member on the outcome of the Criminal proceedings.*

*25 I earnestly request you to consider the submissions and dispose of the proceedings should the learned Member decide to not form any view on the merits of the matter.*

**Consideration of issues**

9) I have perused the order passed by the AO, the show cause notice issued by SEBI dated June 26, 2018, the oral and written submissions made by the Noticee and other material on record. In the facts and circumstances of the case and in light of the above material, I find that the first issue that arises for consideration is *whether the facts and circumstances of the case require the invocation of powers under section 15-I(3) of the SEBI Act.*

10) In this context, it is relevant to note the Noticee's submission that Section 15- I (3) would not be applicable to the present case as the issue of quantum was not decided by the AO in the

matter considering the absence of establishing the violation. It has been further submitted that Section 151(3) would have become operative if there had been a penalty after holding the Noticee guilty. According to the Noticee, section 15-I (3) is self-explanatory and only provides for the enhancement of the penalty if the order is erroneous. Further, it has been submitted that the language is clear that Section 15 I(3) can be used only to *enhance the penalty* but not change the decision *per se* of the AO. As per the Noticee, changing the decision of the AO is against the spirit of law where SEBI was also a party before the Adjudicating Officer. In connection with the above submissions, the Noticee has raised a preliminary objection that the issue regarding the applicability of section 15-I (3) of the SEBI Act should be decided first and if SEBI is of the view that section 15-I(3) is applicable, then the Noticee should be allowed to go in appeal against the said decision before Hon'ble SAT.

11) I have perused section 15-I (3) which reads as under:

*“The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify:*

*Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter:*

*... ”*

12) It is noted that section 15-I (3) was inserted in the SEBI Act vide the Securities Laws (Amendment) Act, 2014. Under this section, the Board has been conferred with the power to call for and examine the records of any Adjudication Proceedings taken up under section 15 I, which essentially pertains to Adjudication Proceedings under the SEBI Act. Further, the Board has the power to make an inquiry or it can cause an inquiry to be made if it considers that the order passed by the AO is erroneous to the extent that it is not in the interest of securities market.

In my view, the object of section 15-I (3) is in effect revision of the orders passed by AO which are erroneous to the extent that they are not in the interest of securities market.

- 13) I find it relevant to point out that the show cause notice dated June 26, 2018 has been issued on the ground that the AO order is erroneous and not in the interest of securities market because it has not been decided on merits.
- 14) On perusal of the AO order dated March 27, 2018, I find that the said order has been disposed of without rendering any finding on merits, for instance (a) whether the Noticee had acquired the shares of GDJL or (b) whether the requirement of disclosure was triggered even though the acquisition itself was disputed subsequently, or (c) whether disclosure requirement was triggered before the alleged dispute on the holding of shares arose, thereby violating the provisions of Regulation 29(1) read with Regulation 29(3) of Takeover Regulations and Regulation 13(1) and Regulation 13(4A) read with Regulation 13(5) of PIT Regulations, etc. Paragraph 16 of the AO order dated March 27, 2018 states *“Given the specific observations of the competent authority on the veracity as well as the legality of the transaction leading to the change in the holding of Ms. Nirmala, it would not be appropriate to adjudge this matter at this stage until the Competent Authority decides the matter”*.
- 15) Therefore, it is clear that the Adjudication Proceedings have been disposed of without a decision on merits. I note that the power under section 15-I(3) of SEBI Act can be invoked on the ground that the order of AO which is not on merits is per se erroneous to the extent that it is not in the interests of the securities market. However, I find that since AO is a statutory authority (for holding inquiry, and in cases of a violation of securities laws, for imposing penalty), the statutory mandate is better fulfilled by the AO himself/herself by passing a reasoned order on merits. Therefore, the question that arises for consideration before invocation of section 15-I(3) of SEBI Act is whether there is any legal bar on SEBI from initiating fresh adjudication proceedings on the same cause of action on which AO proceedings were disposed of without adjudging the issue on merits. In other words, the question that arises for consideration is whether the earlier AO order, which is not on merits, stands as *res judicata* for fresh

adjudication proceedings for the same cause of action. In this context, it is relevant to quote the following case law on “*res judicata*” laid down by the Courts:

- a) In a judgment dated October 27, 2015 rendered by the Hon’ble High court of Gujarat in *Vipulbhai Mansinhbhai Chaudhary vs State of Gujarat* on the subject of “*res judicata*” the following was observed, which is relevant for the present proceedings:.

*“On the aspect of res-judicata, it is required to note that such principles would have application only when in earlier round of litigation between the same parties, there is a final decision on merits and the decision on the issue shall remain binding to such parties.*

*However, if the action of the authority is found in breach of legal procedure or in breach of the principles of natural justice to be followed, nothing could be said to have been decided on merits concerning the rights of the parties and therefore, it is always open to the concerned authority to initiate fresh action by following legal procedure or the principles of natural justice before taking action under the provisions of concerned Statute”*

- b) Hon’ble Supreme court in *Mathura Prasad Bajoo Jaiswal and Ors. vs. Dossibai N.B. Jeejeebhoy*, 1970 SCR (3) 830 observed as under:

*“A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties : the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. **An issue of fact or an issue of mixed law and fact decided by a competent court is finally determined between the parties and cannot be re-opened between them in another proceeding.** The previous decision on a matter in issue alone is res judicata : the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue.*

*When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the foundation of the right and the relevant law applicable to the determination of the transactions which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision of law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.(emphasis supplied)*

- c) Later in another judgment in *Superintendent (Tech. I) Central Excise vs Pratap Rai*; 1978 SCR (3) 729 the Hon'ble Supreme Court was dealing with a situation where an order of adjudication proceedings of the Assistant Collector under the Customs Act was appealed before Appellate Collector. In appeal, the Appellate Collector by his order vacated "without prejudice" the order of the Assistant Collector mainly on the ground that the Assistant Collector had not complied with the rules of natural justice. It was held by Hon'ble Supreme Court that where an order passed in appeal vacates the order of the first Tribunal on purely technical grounds and expressly states that it is being passed without prejudice, which means an order not on the merits of the case, such an order does not debar fresh Adjudicatory Proceedings which may be justified under the law.

- 16) The law laid down by the Hon'ble Supreme court clearly states that when it is said that a previous decision is *res judicata*, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties and fact decided by a competent court is finally determined between the parties and cannot be re-opened between them in another proceeding. Similar is the case law cited above which makes it clear that fresh proceedings can be initiated on the same cause of action if the earlier proceedings have resulted into a decision not on merits. In view of the above, there is no legal bar on SEBI in initiating fresh adjudication proceedings on the same cause of action on which AO proceedings were disposed of without adjudging on the issue on merits. In view of AO order dated March 27, 2018 disposing of the show cause notice dated September 11, 2017 without deciding on the allegations of fact and law covered in the said show cause notice, there is no bar on SEBI to initiate fresh adjudication proceedings on the same cause of action. Accordingly, SEBI is at liberty to initiate fresh Adjudication Proceedings in the matter. Therefore, in the facts and circumstances of the present case, the invocation of section 15-I(3) for the purpose of exercise of powers conferred thereunder, is not required.
- 17) I find that having answered the issue relating to invocation of section 15-I (3) (as observed above), the matter does not require any further consideration.
- 18) The revision proceedings under section 15-I (3) of the SEBI Act stand disposed of accordingly.

**DATE: April 18, 2019**

**PLACE: Mumbai**

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