BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No.139 of 2011

Date of Decision: 1.6.2012

Rajesh Toshniwal
Taher Mansion, 2nd Floor,
8, Bentinck Street, Kolkata – 700 001. …Appellant

Versus

1. Securities and Exchange Board of India
SEBI Bhavan, Plot No.C4A, G Block,
Bandra Kurla Complex,
Bandra (East), Mumbai – 400 051.

2. Mr. G.R. Surana
No.2, Vimala Street, Ayyavoo Colony,
Aminjikarai, Chennai – 600 029.

3. Mr. Shantilal Surana
New Door No.23, Old Door No. 13A,
Mandapam Road, Kilpauk, Chennai – 600 010.

4. Mr. Vijayraj Surana
Flat No.2D, IInd Floor, 'Orchid Villa',
15 Harrington Road, 6th Avenue Corner,
Chetpet, Chennai – 600 031.

5. Mr. Dineshchand Surana
New No.49, Old No.A-34,
"A" Block, 6th Street, Anna Nagar East,
Chennai – 600 102.

6. Mrs. Chandanbala Surana
No.2, Vimala Street, Ayyavoo Colony,
Aminjikarai, Chennai – 600 029.

7. Mrs. Saraladevi Surana
New Door No.23, Old Door No. 13A,
Mandapam Road, Kilpauk, Chennai – 600 010.

8. Mrs. Alka Surana
Flat No.2D, IInd Floor, 'Orchid Villa',
15 Harrington Road, 6th Avenue Corner,
Chetpet, Chennai – 600 031.

9. Mrs. Vasantha Surana
New No.49, Old No.A-34,
"A" Block, 6th Street, Anna Nagar East,
Chennai – 600 102. …Respondents

Mr. Zal Andhyarujina, Advocate with Mr. Deepak Dhane, Advocate for the Appellant.

Mr. Kumar Desai, Advocate with Ms. Harshada Nagare, Advocate for Respondent no.1.
Mr. P.N. Modi, Advocate with Mr. Ajai Achuthan, Advocate for Respondents no.2 to 9.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg*.)
S.S.N. Moorthy, Member

Per : S.S.N. Moorthy

The appellant was a shareholder in M/s. Surana Industries Ltd. (for short the company) which is listed on the Bombay Stock Exchange (BSE), National Stock Exchange of India Limited (NSE) and Madras Stock Exchange Limited (MSE). The appeal is directed against a decision of the Securities and Exchange Board of India (for short the Board) conveyed by Assistant General Manager, Corporate Finance Department, Division of Corporate Restructuring. The decision which is impugned in this appeal relates to a petition filed by the appellant for payment of enhanced offer price in the case of open offer of the shares of the company.

2. When the appeal was taken up for hearing the learned counsel for the Board raised a preliminary objection regarding maintainability of the appeal. According to him, the impugned order does not qualify to be an 'order' falling within section 15T of the Securities and Exchange Board of India, 1992 (for short the Act) and is, therefore, not appealable. It is submitted that the decision which is challenged is in the form of a communication, by which a prayer made by the appellant has been disposed of. The Board receives several complaints/requests on a day to day basis and they are disposed of by the concerned departments by way of appropriate replies in the form of communication and such replies do not constitute 'order' qualifying to be appealed against as laid down under section 15T of the Act. It is also argued that similar orders do not adversely affect the rights of the parties and, therefore, they do not fall within the category of appealable orders. According to the learned counsel for the Board, the person whose complaint/request is disposed of by way of suitable replies cannot be regarded as a 'person aggrieved'.

3. Learned counsel for the appellant submitted that the impugned communication cannot be regarded as the disposal of a routine complaint/request in as much as it raises major questions of law and that rights of the appellant have been adversely affected.

4. We have considered this issue. It has been held by this Tribunal in several cases that a communication/decision conveyed to a person is in the nature of an 'order' if it affects the

rights of the party. The decision conveyed after due consideration of the issue raised by a person may not be couched in the form of a quasi judicial order. Nevertheless, it has to be regarded as an 'order' falling within the provisions of section 15T of the Act if it affects the rights of the parties. In the present case, we are of the view that a prima facie case affecting the rights of the appellant has been made out. The impugned decision is a communication by which the request of the appellant for enhanced offer price in the open offer of the company has been denied. At the threshold, this affects the rights of the appellant to obtain higher price for the shares. In this view of the matter, the impugned decision falls within the ambit of section 15T of the Act. Therefore, it is taken as an 'appealable order' and the objection raised by the learned counsel for the Board is over ruled.

5. The principal issue in this appeal relates to interpretation of a few provisions of Securities and Exchange Board (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover regulations). The brief facts of the case are the following. The appellant was a shareholder of the company. Respondents no.2 to 9 are part of the promoter group of the company. On March 3, 2007 the acquirers were allotted 30 lac share warrants of ` 150 each which were optionally convertible to an equal number of shares at a premium of ` 140 per share. They paid a sum of ` 33,09,45,000 between August 21, 2008 and September 1, 2008 towards the balance amount payable by them for conversion of the said share warrants and informed the company about the intention to exercise the option to convert the share warrants into equity shares. As a result, the acquirers were allotted 30 lac equity shares of the company on September 1, 2008. The shareholding of the acquirers went up from 43.15 per cent to 51.62 per cent. The increase of 8.74 per cent triggered regulation 11(1) read with 14(2) of the takeover regulations and the acquirers were obliged to make a public announcement. There was delay in making the statutory public announcement. The public announcement was made on March 25, 2009 on which the Board issued an observation letter. The offer opened on December 31, 2009 and closed on February 1, 2010. The acquirers bought 7,14,370 shares in the open offer and they were transferred to the their account on March 4, 2010. Completion report was filed by the merchant bankers on March 10, 2010. The offer price was ` 150 per share with interest of ` 17.70 per share. The acquirers were also allotted 70 lac share warrants on August 29, 2008 which were optionally convertible into equity shares of ` 10 at a premium of ` 290

per share. The acquirers exercised the option for conversion of the above warrants by paying the consideration between February 17, 2010 and February 26, 2010. The company allotted equity shares to the acquirers on February 28, 2010. In this process also the shareholding of the acquirers increased from 51.61 per cent to 64.09 per cent and according to the appellant the requirements of regulation 11(1) read with 14(2) of the takeover regulations got triggered. There was no public announcement as contemplated in the aforesaid regulations. The appellant informed the Board by way of several communications the failure of the acquirers to comply with the provisions of takeover regulations. As a result of protracted correspondence by the appellant with the Board, a show cause notice was issued to the acquirers. At this juncture, the company came out with a public announcement on June 14, 2010. This was, admittedly, delayed. On this occasion, the appellant addressed a communication to the Board claiming that he should be given the benefit of the higher offer price of ` 300 per share since the second acquisition had taken place within 6 months from February 1, 2010 i.e. the date of closure of the first open offer. The appellant also requested the Board to keep the second open offer in abeyance pending decision on enhanced payment to the appellant and to undertake investigation into the matters. In reply, the Board started adjudication proceedings against the acquirers, but no directions were issued under the takeover regulations as requested by the appellant. The appellant further proceeded with a series of correspondence with the Board mainly asking for enhanced payment of ` 300 per share with interest to the shareholders who tendered their shares in the first open offer. On April 20, 2011 the impugned communication was issued by the Assistant General Manager of the Board turning down the request of the appellant for enhanced payment for the shares tendered in the first open offer. This decision of the Board is under challenge in the present appeal.

6. Since the issues raised in this appeal revolve around interpretation of a few provisions of the takeover regulations it is necessary to examine the impugned order of the Board in detail. For the convenience of reference, the impugned order is extracted below:

> "This has reference to the correspondences resting with your letter dated March 17, 2011 in the captioned matter. In this regard, the various submissions made by you have been examined and we accordingly advise as under.
>
> - Regarding the applicability of regulation 20(7) and 20A(1) of the Takeover Regulations, please note that the provisions of regulation 20(7) are

applicable only up to 7 working days prior to closure of an offer. In the instant case, since the First Offer had closed on February 2, 2010 itself while the allotment of shares upon conversion of warrants happened only on February 28, 2010, the provisions of regulation 20(7) are not attracted.

- Also, the provisions of regulation 20A(1) are applicable to acquisitions made under regulation 11(1) whereas the second offer has been made under regulation 11(2). Hence, the provisions of regulation 20A(1) do not apply to the same.

- As regards the second offer being made under regulation 11(2) and not under regulation 11(1), you may kindly note that while computing the relevant shareholding percentages, the total shareholding of the entire promoter group (and not that of the acquirer alone) is normally considered, unless claimed and proved otherwise by such acquirer. The burden of proof lies on the acquirer in these cases. In the second open offer, the acquirer(s) (who are part of the promoter group) have themselves considered the shareholding of the entire promoter group for the purpose of the offer, and the promoters' shareholding (including that of the acquirers) has increased from 64.85% to 71.28%. Accordingly, the offer has been made under regulation 11(2).

- Regarding the statement in the letter of offer that there are no PACs, it may be noted that the said offer has been triggered on account of an increase in the entire promoter shareholding of the target company (and not that of the acquirers alone). In view of the same, the other persons in the promoter group would also be jointly and severally responsible for fulfillment of the open offer obligations in terms of regulation 22(19). It would have been worthwhile to clarify the same in the letter of offer. However, the offer has already closed and the aforesaid provisions of regulation 22(19) would nevertheless continue to apply to the instant case."

7. It is argued by the appellant that the second open offer by which the acquirers converted 70 lac equity shares at ` 300 per share falls under regulation 11(1) of the takeover regulations. On this ground, it is argued that the prohibition under regulation 20A(1) on acquisition of shares during the period of 6 months from the date of closure of a public offer at a price higher than the offer price stands attracted and as per regulation 20(7) the shareholders who tendered their shares on the earlier occasion should be compensated on the basis of the second open offer. It is emphasised by the appellant's learned counsel that the prohibition in regulation 20(7) applies to all acquisitions irrespective of whether the offer is made under regulation 11(1) or 11(2). According to the appellant, the prohibition of 6 months as laid down in regulation 20A(1) applies with reference to the 'offer period' and completion of formalities. With reference to the public announcement it is argued that there was no other member of the promoter group except the acquirers in the conversion of 70 lac share warrants and so other members of the promoter group were not 'persons acting in

concert'. The argument of the appellant is that the shareholding of the entire promoter group of the company should not have been clubbed in arriving at the increase in percentage of holding and this has resulted in a wrong interpretation being given to the provisions of regulation 11(2) in the impugned order. It is contended that acquirers have already acquired 70 lac shares of the company on February 28, 2010 itself, prior to completion of all formalities relating to the first offer and so the enhanced amount of ` 300 should be legitimately given to the shareholders who tendered their shares in the first open offer. A reference is made to the decision of the Supreme Court in the case of Daiichi Sankyo Company Limited vs. Jayaram Chigurupati and others (2010) 7 SCC 449 and the decision of the Bombay High Court in the case of K.K. Modi vs. Securities and Exchange Board of India 2001 LawSuit (Bom) 863 in support of the appellant's argument that the promoters cannot be invariably treated as a homogenous class of persons acting in concert. The appellant questions the stand taken by the Board that the second offer has been made under regulation 11(2) of the takeover regulations and so the provisions of section 20A(1) do not come into play. It is contended that the entire promoter group of the company cannot be taken as a group acting together in the acquisition of shares in the present case. Further, according to the appellant, the acquirers have breached regulations 20(7) and 20A of the takeover regulations.

8. The learned counsel appearing for the Board defended the impugned order and submitted that the second open offer is covered under regulation 11(2) of the takeover regulations and there is no breach of regulations 20(7) and 20A as alleged by the appellant. It is submitted that regulation 20A deals with a situation where an acquirer who has made an open offer seeks to acquire further shares within the creeping acquisition limit provided under regulation 11(1) of the regulations. So the provisions of regulation 20A deal with a totally different scenario in as much as the present case does not relate to one of creeping acquisition. It is submitted that the provisions of regulation 20(7) also do not apply to the facts of the case since the second acquisition did not take place within the prohibited period laid down in regulation 20(7). The acquisition of 70 lac shares during the second open offer took place on February 28, 2010 i.e. after January 25, 2010 which is the cut off date with reference to the first open offer. According to the learned counsel for the Board, regulation 20(7) applies to purchases made before closure of the open offer while regulation

20A applies to purchases made after closure of the open offer. Therefore, the two provisions are represented to be applicable to different situations and they cannot be integrated as contended by the appellant. The second open offer was made under regulation 11(2) of the regulations taking into account the entire promoter group and the object of the acquisition was consolidation of holdings. In view of the factual position and legal matrix as set out above, the learned counsel contended that the provisions of regulations 20(7) and 20A do not apply to the facts of the case and the offer has been made under regulation 11(2) of the regulations.

9. The learned counsel appearing for respondents no. 2 to 9 earnestly supported the stand taken by the Board. He would also contend that regulations 20(7) and 20A of the regulations do not have any application to the facts of the present case. With reference to the closure of the first open offer which took place on January 25, 2010 it is observed that the conversion of the second tranche of warrants on February 28, 2010 clearly falls outside the period of prohibition. It is submitted that as a result of the acquisition which took place consequent on the first open offer, the threshold limit had crossed over to regulation 11(2) and in that scenario the provisions of regulation 11(1) do not come into operation. So the second open offer was considered as falling under the provisions of regulation 11(2) of the regulations.

10. We have considered the rival submissions. It is necessary to examine a few provisions of the takeover regulations for proper appreciation of the case. The provisions relevant to the issues under consideration are extracted below for ease of reference:-

> **"Consolidation of holdings.**
>
> **11.** (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5 per cent of the voting rights, 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.
>
> (2) No acquirer, who together with persons acting in concert with him holds, 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, shall acquire either by himself or through or with persons acting in concert with him any additional shares 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 in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent (10%) of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures 'seventy-five per cent (75%)', the words and figures 'ninety per cent (90%)' were substituted.

Provided further that such acquirer may, notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation 11, without making a public announcement under these Regulations, acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him up to five per cent (5%) voting rights in the target company subject to the following:-

(i) the acquisition is made through open market purchase in normal segment on the stock exchange but not through bulk deal /block deal/ negotiated deal/ preferential allotment; or the increase in the shareholding or voting rights of the acquirer is pursuant to a buy-back of shares by the target company;

(ii) the post acquisition shareholding of the acquirer together with persons acting in concert with him shall not increase beyond seventy five per cent (75%).

.....
.....

20.(7) Notwithstanding anything contained in the provisions of sub-regulations (2), (4), (5) and (6), where the acquirer has acquired shares in the open market or through negotiation or otherwise, after the date of public announcement at a price higher than the offer price stated in the letter of offer, then, the highest price paid for such acquisition shall be payable for all acceptances received under the offer:

Provided that no such acquisition shall be made by the acquirer during the last seven working days prior to the closure of the offer:

Provided further that nothing contained in sub-regulation (7) shall be construed to authorise an acquirer who makes a public announcement in terms of sub-regulation (2A) of regulation 11 to acquire any shares during the offer period in the open market or through negotiation or in any other manner otherwise than under the public offer.

.....

Acquisition price under creeping acquisition.

20A. (1) An acquirer who has made a public offer and seeks to acquire further shares under sub-regulation (1) of regulation 11 shall not acquire such shares during the period of 6 months from the date of closure of the public offer at a price higher than the offer price.

(2) Sub-regulation (1) shall not apply where the acquisition is made through the stock exchanges."

11. The facts of the case as discussed in paragraph 5 above remain undisputed.

12. The argument of the appellant with regard to regulation 11(1) read with regulation 20A is that the open offer in this case which opened on March 25, 2009 related to the acquisition of shares at ` 150 per share with interest and it, having closed on February 1, 2010, the acquirers could not have acquired another tranche of 7 lac shares at ` 300 per share on February 28, 2010 i.e. within 6 months from the closure date. Regulation 20A deals with 'acquisition price under creeping acquisition' and imposes a prohibition of 6 months for further acquisition from the date of closure of the first public offer. It is necessary to examine the provisions of regulation 20A(1) in the background of the facts available in the present case. Regulation 20A(1) admittedly deals with a scenario where "further shares" are acquired under regulation 11(1) of the regulations. Acquisition of further shares under regulation 11(1) relates to creeping acquisition. Creeping acquisition takes place only in situations governed by regulation 11(1) and not under regulation 11(2) of the regulations. In other words, creeping acquisition is permissible only under regulation 11(1) of the regulations. The facts of the case show that the impugned acquisition has been held to be falling under regulation 11(2) since it is not in the nature of creeping acquisition. Considering the shareholding after the conversion of the first tranche of warrants the entire promoter group held 64.85 per cent and with the acquisition of the second tranche of warrants the threshold limit crossed over from regulation 11(1) to 11(2). In short, this is not a case of creeping acquisition. Regulation 20A deals with acquisition price under creeping acquisition route provided under regulation 11(1) and it has no application to regulation 11(2) where the acquisition relates to limits more than the parameters laid down for creeping acquisition. The increase in shareholding in this case is beyond the five per cent limit laid down for creeping acquisition and so regulation 11(2) comes into operation. Having regard to the substantial acquisition of shares and voting rights in the present case, it has to be concluded that the provisions of regulation 20A do not apply to the facts of the case and so the prohibition period of 6 months has no relevance. The appellant's learned counsel stated that 'marginal heading' to a section cannot be taken as the sole guiding factor in interpreting the language of the section. According to him, the 'marginal heading' to Regulation 20A may not mean that it is confined only to creeping acquisition. We agree with the general proposition of law made by the appellant's learned counsel. However, the 'marginal heading' to a section invariably throws some light on the content and implication of the

section. In the present case, as discussed above, the content of the regulation relates to creeping acquisition and it is integrally connected with regulation 11(1). A reference was also made to the recommendations of the Bhagwati Committee report which resulted in the introduction of regulation 20 A(1). The committee proceeded on the assumption that acquisitions during the offer period irrespective of the price of acquisition is a price sensitive information and should be disclosed. It also recommended a prohibition period of 6 months. The recommendations may not be of any special assistance to the appellant. The actual implications of creeping acquisitions, closure of public offer etc have to be considered from the language of the regulation and connected provisions and not from the wording contained in the recommendations of the committee. At any rate, acquisition during the 'offer period' highlighted by the appellant's learned counsel has to be taken in its general sense so as to avoid any misuse of acquisitions during the offer period. It cannot be imported to interpret the language of the regulation which is clear and unambiguous.

13. The next issue to be considered is whether the entire promoter group has to be considered as a homogenous unit and, therefore, acting in concert in the acquisition of shares. It is the basic principle of corporate law that promoter group is a homogenous class. It is the normal practice to club the entire promoter group into one class unless otherwise proved by the acquirer. The acquirers have always filed their shareholding as belonging to the promoter group. In the disclosures made to the stock exchanges and the Board, the promoters' shareholding consisted of the group as a whole. Even though there is a mention in the offer document that the acquirers by themselves are responsible to the offer to the exclusion of other promoter group the conduct of the promoters as a whole suggests that their behaviour was always united. The appellant's learned counsel made a pointed reference to para 1.2 of the second public announcement (Page 49 of the appeal paper book) and stated that there is an unequivocal mention therein that there is no person acting in concert with the acquirers and all purchase in the public offer will be made by the acquirers. He also referred to a few other conditions laid down in the public announcement to highlight his contention and support his view. It is interesting to note that an identical statement is made in the same terminology in the first public announcement also. Merely because a statement is made in the public announcement document the statutory position cannot be altered. The statement contained in the public announcement relates to only the formalities

connected with the purchase of shares in the instant case. It cannot govern the general statutory position of the promoters. The promoters, as a rule, belong to a homogenous group unless otherwise proved by attendant circumstances to be otherwise. In the present case, except the statement contained in the public announcement no circumstance is pointed out which would prove that a set of promoters are a class apart. It is a matter of record that the shareholding of the entire promoter group was always disclosed as a group holding to the regulators. In the public announcement document also the shareholding of the entire promoters group is specifically grouped together. The objective of the open offer was consolidation of shareholding and this could be achieved only by grouping the acquirers and other promoters together. When the shares got pledged with the merchant banker towards escrow obligation in the open offer all the promoters had given their consent. The other promoters also participated by giving their shares as pledge or security. The decision of the Supreme Court in Daiichi case relied on by the appellant may not be of any assistance to him since it deals with a different set of facts relating to common object underlying the acquisition of shares. In the case of K.K. Modi, again relied upon by the appellant, the shareholders were admittedly a divided house. In the present case the various statements furnished by the promoter group and the conduct of the parties show that they acted together. Perhaps the appellant has introduced the above argument with a view to diluting the percentage of shareholding which is reckoned in the acquisition of shares and consideration for public announcement. We cannot appreciate the stand taken by the appellant in this regard.

14. The appellant's learned counsel strenuously argued that there is a breach of regulation 20(7) of the regulations. According to him, the acquirer is bound to pay the higher price he has paid for the shares acquired in the open market or through negotiations after the date of public announcement as per regulation 20(7) but there is no mention about the period up to which it would apply. It is submitted that according to the first proviso to regulation 20(7) there is a prohibition on acquisition during the last seven working days prior to the closure of the offer. There is no prohibition for acquisitions after the closure of the open offer. It is very strenuously argued that the second proviso to regulation 11(2A) covers the offer period and this extends to the period of completion of offer formalities. On

this ground, it is contended that the second acquisition took place before the completion of offer formalities on March 10, 2010.

15. We have considered this argument. There is no dispute with respect to the proposal of the appellant in so far as it relates to regulation 20(7) and the first proviso thereto. However, the second proviso which deals with regulation 11(2A) is not relevant to the facts of the present case. We have already held that the provisions of regulation 11(1) do not apply to the facts of the case. Similarly, the provisions of section 11(2A) also do not apply to the facts of the case. Consequently, it follows that second proviso to regulation 20(7) does not have any relevance to the facts of the case. It is in the second proviso that the acquisition of shares during 'offer period' is referred to. We agree that 'offer period' is a larger concept and it extends to the period till offer formalities are completed. The appellant would like to take shelter under this proviso and bring the acquisition as one falling within the 'offer period'. We cannot appreciate this plea when examined in the background of the facts of the present case.

16. While considering regulation 20(7) and the proviso thereto we have to examine whether there is any violation of the provisions laid down therein. The following dates are relevant to the consideration of this issue.

First Public Offer

Public announcement	-	March 25, 2009
Opened on	-	December 31, 2009
7 days prior to closure of first Offer	-	January 25, 2010
Closed on	-	February 1, 2010
Completion of offer formalities	-	March 10, 2010

In the instant case, acquisition of 70 lac shares in the second open offer took place on account of conversion of share warrants on February 28, 2010. If the acquirers had acquired any shares between the date of first public announcement (March 25, 2009) and seven days prior to closure of the first offer (January 25, 2010) at a price higher than ` 150 plus interest that higher price would have to be disclosed and an opportunity given to all shareholders during the interregnum of seven days prior to closure of the offer to tender at a higher price.

In the present case, such an eventuality does not arise since acquisition of shares has taken place only after the period of prohibition which expired on January 25, 2010. The contention of the appellant could have been tenable if the acquisition had taken place during the period of prohibition. The proviso deals with the last seven working days prior to 'closure of the offer'. Regulation 23 (6) of the regulations deals with the closure of public offer and transfer of securities to the name of the acquirers. It is distinct from completion of offer formalities dealt with in regulation 24 (7) of the regulations. The appellant's argument that the acquisition has taken place during the offer period and so falls within the period of prohibition is not correct when we take into account the meaning of 'closure of offer' dealt with in regulation 23(6) of the regulations. The above discussions would show that the acquirers have complied with the provisions of regulation 20(7) and the first proviso thereto. No violation of the above provision can be imputed in the facts of the case.

17. The appellants were in full knowledge of the first offer and the allotment of 7 lac warrants which could be subsequently converted into shares. Being party to the first offer the details regarding the share warrants, possibility of conversion and other relevant factors were known to the appellant. While tendering his shares in the first public offer the appellant had reasonable knowledge of the outstanding share warrants and their possible conversion. It cannot now be pleaded that the second offer has taken place to the total shock and inconvenience of the appellant.

18. Another argument raised by the appellant is that respondent nos. 2 to 9 formally received the shares tendered in the first open offer only on March 4, 2010 on transfer from the escrow account of the merchant banker. This argument is not tenable in view of the normal procedural requirements which require compliance during open offer. The report of the merchant banker received by the Board on February 25, 2010 makes it clear that all the offer formalities were completed, full consideration paid and bank guarantees released. It is well known that once the payment is made the merchant banker holds the shares in the escrow account only as an agent on behalf of the shareholders and the title and interest thereon vest with the shareholders. The merchant banker cannot be the beneficial owner of the shares. This would show that the appellant's contention that the acquirers were not owners of the shares prior to March 4, 2010 is not correct. The appellant's attempt to stretch

the period of prohibition beyond the statutory date and consequent dilution in the shareholding of the acquirers and of the appellant does not fit in with the provisions of the regulations.

In view of the discussions above, we hold that the acquisition in the instant case is one covered under regulation 11(2) and not 11(1) of the takeover regulations. In this view of the matter, the order passed by the Board is upheld. Appeal stands dismissed with no order as to costs.

Sd/-
P.K. Malhotra
Member &
Presiding Officer (*Offg*.)

Sd/-
S.S.N. Moorthy
Member

1.6.2012
Prepared and compared by
RHN