WTM/RKA/CFD/DCR/28 /2013

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: RAJEEV KUMAR AGARWAL, WHOLE TIME MEMBER

ORDER

Under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (SEBI Act) read with regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations, 2011).

In respect of G.P. Shah Investment Private Limited, B.G. Jain Investment Private Limited, P.B. Jain Investment Private Limited, Varju Investment Private Limited, Nakoda Syntex Pvt. Ltd, Mr. Babulal G. Jain, B.G. Jain HUF, Ms. Pushpadevi B. Jain, Mr. Devendra B. Jain, Mr. Kartik B. Jain, Ms. Shilpa B. Jain and Ms. Neetu D. Jain

In the matter of acquisition of shares of M/s Nakoda Limited.

Appearances

For the noticees:

1. Mr.Keyoor Bakshi, practicing Company Secretary, KBNT & Associates, Company Secretaries, Mumbai

For SEBI:

1. Mr. Santosh Shukla, Joint Legal Advisor
2. Mr. Anindya Das, Deputy General Manager
3. Mr. Susanta Kumar Das, Assistant General Manager

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1. M/s. Nakoda Limited ('the target company') is a company incorporated under the Companies Act, 1956, having its registered office at Block No 1 & 12 to 16, Village Karanj, Taluka-Mandvi, District- Surat, Gujarat – 394110. The shares of the target company are listed on the Bombay Stock Exchange Limited ('BSE'). G.P. Shah Investment Private Limited, B.G. Jain Investment Private Limited, P.B. Jain Investment Private Limited, Varju Investment Private Limited, Nakoda Syntex Pvt. Ltd, Mr. Babulal G. Jain, B.G. Jain HUF, Ms. Pushpadevi B. Jain, Mr. Devendra B. Jain, Mr. Kartik B. Jain, Ms. Shilpa B. Jain and Ms. Neetu D. Jain, comprise the promoter group of the target company.
2. SEBI noticed that -

(a) Pursuant to a resolution passed by its shareholders in the Annual General Meeting ("AGM") held on June 10, 2010, the target company issued warrants and GDRs as follows :-

(i) On June 23, 2010, the target company allotted 2,70,00,000 warrants to two promoters *viz*; P. B. Jain Investments Private Limited and Nakoda Syntex Private Limited, and 90,00,000 warrants to non- promoters.

(ii) On November 26, 2011, the target company allotted 20,00,000 GDRs with 6,00,00,000 underlying shares to non -promoters.

(b) The warrants allotted as above, were to be converted into equity shares upon receipt of the balance 75% consideration payable on them.

(c) Prior to issuance of GDRs, individual shareholding and voting rights of P. B. Jain Investments Private Limited and Nakoda Syntex Private Limited in the target company was 11.57% and 1.92%, respectively and the shareholdings /voting rights of the promoter group was at the level of 50.23% of the paid up share capital and voting rights of target company.

(d) Upon issuance of GDRs on November 26, 2010 and equity shares underlying the GDRs, the individual shareholding of P. B. Jain Investments Private Limited reduced from 11.57% to 6.08% and that of Nakoda Syntex Private Limited reduced from 1.92% to 1.01%. Since the shares underlying GDRs did not carry any voting rights, the percentage of voting rights held by P. B. Jain Investments Private Limited and Nakoda Syntex Private Limited, individually, and that of the promoter group, collectively, did not change.

(e) On December 19, 2011, the target company allotted 5,40,00,000 equity shares to P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited pursuant to conversion of the 2,70,00,000 warrants allotted to them on June 23,2010. Consequent to this allotment of equity shares, the voting rights of P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited individually increased from 11.57% to 24.98% and from 1.92% to 20.36% and the voting rights of the promoter group collectively increased from 50.23% to 62.92%.

(f) Change in the shareholding /voting rights of these two allottees and that of the entire promoter group in the target company consequent to this allotment, is given in the

following Table:-

Table- Shareholding of promoters prior to and after allotment of equity shares

Name of the acquirer	**Pre-allotment shareholding (%)**	**Post-allotment shareholding (%)**	**Pre-allotment voting rights (%)**	**Post-allotment voting rights (%)**
M/s P B Jain Investments Private Limited	6.08%	17.48%	11.57%	24.98%
M/s Nakoda Syntex Private Limited	1.01%	14.25%	1.92%	20.36%
Promoter Group	**26.38%**	**44.03%**	**50.23%**	**62.92%**

3. It was observed that consequent to the aforesaid allotment of equity shares on December 19, 2011, the collective shareholding of the promoters increased from 26.38% to 44.03% and their collective voting rights in the target company increased from 50.23% to 62.92%. Since such increase in shareholding/voting rights was more than the permissible creeping limit of 5% in a financial year, the promoters were under obligation to make public announcement in accordance with provisions of regulation 3(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011(hereinafter referred to as the "Takeover Regulations, 2011") on the date of exercise of option to convert the warrants into equity shares i.e. the date of payment of balance money.

4. In view of the same, SEBI issued a show cause notice ("SCN") dated September 27, 2012 to the promoter group (hereinafter collectively referred to as "the noticees") of the target company alleging that they failed to make the public announcement on the date of exercise of option to convert the warrants into equity shares and thereby violated provisions of regulation 3(2) of the Takeover Regulations, 2011. The SCN called upon the noticees to show cause as to why suitable directions under sections 11, 11B and 11D of the Securities and Exchange Board of India Act, 1992 read with regulation 32 of the Takeover Regulations, 2011 should not be issued against them for the alleged violations. The SCN charged P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited as acquirers and other persons belonging to promoter group {*as 'deemed persons acting in concert' under regulation 2(1) (q) (2)(iv) of the Takeover Regulations, 2011*}.

5. The noticees filed their reply vide letter dated November 21, 2012. They were also given a

personal hearing before me on March 26, 2013 when Mr. Keyoor Bakshi, Company Secretary and authorised representative of the noticees appeared and made submissions on their behalf. The authorised representative of the noticees also filed written submissions dated April 5, 2013 on their behalf. The submissions of the noticees are as follows:

a) Pursuant to the resolution dated June 10, 2010, the target company made preferential allotment of 3,60,00,000 warrants on June 23, 2010 out which 2,70,00,000 warrants were allotted to P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited. While as per the applicable SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997(Takeover Regulations, 1997) which were in force at the time of allotment of the warrants, the warrants were required to be allotted within fifteen days from the date of the AGM. The Qualified Institutional Placement (QIP) or issue of GDRs was subject to necessary compliance and marketing the issue overseas. Accordingly, it was felt that the QIP/GDR issue will take considerable time and the target company would not receive the subscription to the QIP/GDR during the financial year 2010-11.

b) Vide its letter dated June 2, 2010, the target company had made an application to the Bombay Stock Exchange (BSE) seeking *"in-principle"* approval for allotment of warrants on preferential basis. On receipt of the *"in-principle"* approval from BSE, vide their letter dated June 16, 2010, the target company allotted the said warrants on June 23, 2010 in terms of the "in-principle" approval. BSE had asked the target company to furnish an undertaking that it would make the QIP/GDR issue before conversion of warrants, or otherwise it would comply with the Takeover Regulations. The target company had given such undertaking to BSE vide its letter dated June 14, 2010. Thus, it may be appreciated that even BSE insisted that the QIP/GDR issue should be made before conversion of warrants into equity shares of the target company.

c) While the warrants were allotted on June 23, 2010, in compliance of stipulation of BSE the target company had simultaneously initiated the procedure for issue of QIPs/GDRs. The process of issue and allotment of GDRs was much faster than expected and it was completed on November 26, 2010 i.e. in the same financial year –2010-11 during which the warrants were issued. However, the available time for conversion of warrants issued on preferential basis into equity shares was extending upto 18 months ending during the next financial year. Accordingly, the warrants were converted into shares in the next financial year 2011-12 by way of allotment made on December 19, 2011.

d) The above issues of securities were simultaneous and the proposal was composite. The

promoters were holding 50.23% of the shares and voting rights of the target company at the time of making this simultaneous offer, and their holding, after implementing the said composite proposal, had on the contrary, reduced to 44.03%, as exhibited in the following Table:

		Promoters (Noticees)				**Total(shares)**
Date	**Event**	**No. of shares**	**% of paid up capital**	**Voting rights**	**% of voting rights**	
25.11.10	Pre issue Holding	3,33,49,600	**50.23**	3,33,49,600	**50.23**	6,64,00,000
26.11.10	Issue of underlying GDR shares	-	-	-	-	6,00,00,000
26.11.10	Sub Total	3,33,49,600	26.38	3,33,49,600	50.23	12,64,00,000
19.12.11	Conversion of Warrants into equity shares	5,40,00,000	-	5,40,00,000	-	7,20,00,000
19.12.11	**Total**	8,73,49,600	**44.03**	8,73,49,600	**62.92**	19,84,00,000

e) The shareholding of the noticees in the target company got reduced from 50.23% to 26.28% during the financial year 2010-11 due to issuance of underlying GDR shares which did not have voting rights. The shareholding had subsequently increased from 26.38% to 44.03% during the financial year 2011-12 and the increase in the voting rights from 50.23% to 62.92% during the financial year 2011-12 was due to the fact that the GDR shares did not have voting rights, and the GDR holders did not convert their GDRs into equity shares on which the noticees had no control. The noticees should not be charged for the same as there was no action or omission on their part, and the increase in the voting rights was solely due to the action or omission on the part of the GDR holders.

f) The warrants were to be automatically converted (without any further application) into equity shares upon receipt of the balance 75% money due on them and this fact has been acknowledged by SEBI in para 4(ii) of the SCN. Accordingly, the warrants had inbuilt features of the shares and voting rights attached to them upon payment of 75% balance money, and in effect, the warrants were as good as partly paid-up shares. They were to be converted into shares within eighteen months from the date of their allotment as per the

terms of their issue and as prescribed in the then prevailing Takeover Regulations, 1997. Warrants were liable to be lapsed and 25% money already paid on the same at the time of their allotment was to be forfeited in the event of failure to pay 75% money within 18 months. This is exactly the same that would have happened to the partly paid up shares, as the shares would have been forfeited in the event of failure to pay the balance call money amount of 75% within the stipulated time. Since the warrants were to be automatically converted on payment of balance 75% money payable on them, the noticees had agreed to acquire equity shares at the time of allotment of warrant on June 23, 2010 i.e. during the financial year 2010-11 though the actual allotment of equity shares happened in the next financial year 2011-12. Accordingly, the shareholding of the noticees (i.e. shares held and agreed to be acquired) during the financial year 2010-11 had fallen from 50.23% to 44.03% and their voting rights remained intact at 50.23% during the financial year. The increase in the voting rights from 50.23% to 62.92% in the financial year happened on account of act or omission of the GDR holders and this was not in control of the noticees.

g) By agreeing to acquire the shares and voting rights in the target company, the noticees had become acquirers when they subscribed to the warrants on June 23, 2010. The noticees had deemed to acquire the shares and voting rights in the target company on June 23, 2010 and not on December 19, 2011. The equity shares were allotted only on conversion of the warrants acquired during the financial year 2010-11 and in terms of the prevailing Takeover Regulations, 1997 as also under the authority of the shareholders of the target company. Accordingly, the noticees had not acquired the shares during the subsequent financial year to the one during which the GDRs were issued by the target company. They had agreed to acquire and thereby effectively acquired the shares during the same financial year in which the GDRs were issued, and therefore there was no question of their shareholding going down from 50.23% to 26.38% during that financial year. It has been submitted that the shareholding of the noticees in the target company had deemed to have gone down from 50.23% to 44.03% during the financial year 2010-11 itself, and there was no question of considering the date of conversion of warrants into equity shares for the trigger of Takeover Regulations, 2011.

h) Since the noticees had agreed to acquire equity shares on June 23, 2010, the Takeover Regulations, 1997 will apply. In terms of regulation 2(1)(b) of the Takeover Regulations, 1997 which was in force on June 23, 2010 the term 'acquirer' includes a person who 'agrees to acquire' the shares or voting rights of the target company. In terms of regulation 2(1)(a) of the Takeover Regulations, 2011 also which was in force at the time of allotment of equity shares on December 19, 2011, the term 'acquirer' includes a person who 'agrees to

acquire' shares or voting rights of the target company.

i) Relying upon the observation of the Hon'ble Securities Appellate Tribunal(SAT) in the matter of *Shri Sharad Doshi Vs. The Adjudicating Officer & Ors. (Appeal No. 1/98 decided in April, 1998)* that *"the time limit prescribed for public announcement to acquire shares is relatable to the finalization of the negotiations or entering into the agreement or memorandum of understanding to acquire shares. Date of registration of shares acquired in the Company's register is not the starting point."* authorized representative of the noticees submitted that the noticees by actually paying 25% money while subscribing to the warrants that were to be automatically converted into the equity shares on payment of 75% balance amount, the noticees manifested their agreement to acquire equity shares on June 23, 2010. Accordingly, date of subscription to the warrants should be the date of trigger or acquisition, and not the date of their conversion into equity shares.

j) Relying upon the observation of the Hon'ble SAT in the above mentioned *Sharad Doshi's* case, that - *"…. The appellant's contention that the purchase of shares of ATL was conditional one subject to compliance of the SEBI regulations and approval, that in the event of non compliance or SEBI rejecting the deal, the shares would revert back to the sellers, and that the shares will carry voting rights only on entering the transfer of shares in the company's record, in my view, is devoid of any legal support….."* the authorized representative of the noticees further contended that the noticees had subscribed to the warrants that were to be automatically converted on payment of 75% balance money and thereby firmly agreed to acquire the equity shares on the date of subscription of warrants. Accordingly, there would not be any legal support to a view that shares could not have been allotted if balance 75% moneys were not paid, and therefore only the date of allotment of shares converted out of the warrants should be a date of trigger of Takeover Regulations. All actions of the noticees, except payment of balance 75% money happened prior to commencement of Takeover Regulations, 2011. Hence, the Takeover Regulations, 2011 will not apply in this case.

k) The authorized representative of the noticees further submitted that if one takes a narrow view by strictly interpreting only the letters of regulations, any of the following scenario could emerge :-

    i. In order to ensure no fall in the shareholding of the noticees during the financial year 2010-11 from 50.23% to 26.38%, the target company could have been required to defer the GDR issue by atleast four months so as to make it happen in the financial year 2011-12 during which the warrants were converted by the

noticees. This would have been quite risky as one cannot predict the future market and it was very important in the interest of the target company and its shareholders to receive the required moneys for the business and growth as soon as the same was available.

ii. The noticees could have paid the balance 75% money on warrants before March 31, 2011 and converted their warrants into equity shares. However, they did not have the arrangement to put in an amount of ₹60.75 crores at that time. They had agreed to invest ₹81 crore besides significantly contributing to the management of the target company and cannot be accepted to forgo the conversion of warrants and get the 25% money (₹20.25 crore) forfeited just because the target company concluded GDR issue much faster than expected and one financial year passed between the GDR issue and conversion of warrants into shares.

l) The authorised representative of the noticees further submitted that the Hon'ble SAT in the above mentioned Sharad Doshi's case, had emphasized on two crucial elements *viz;* transparency and benefit of the shareholders at large for interpreting the Takeover Regulations. In this case, the entire process was carried out with total transparency and the shareholders of the target company were fully aware that the shareholding of the noticees would go on from 50.23% to 44.03% upon implementation of the simultaneous proposal of preferential issue of warrants and issue of GDRs. The same shareholders who were sought to be protected under the Takeover Regulations had duly approved the proposal. Merely the conversion of warrants into equity shares during the next financial year than the financial year during which issue of GDRs was completed did not violate the spirit of Takeover Regulations. Further, the target company had raised a sum of ₹ 216 crore through the simultaneous offer of GDRs and warrants out of which a sum of ₹ 81 crore is contributed by the noticees. The said funds have been deployed by the target company for the purpose of its business and growth. Accordingly, their subscription which was duly approved by the shareholders of the target company has been to the benefit of all the shareholders at large of the target company. It would be improper and unfair to take a narrow view with rigid interpretation that the Takeover Regulations would not trigger if the warrants were converted into shares on March 31, 2011 but it would trigger if they were converted on the next day – i.e. on 1st April 2011. Such narrow view would neither benefit the shareholders at large, nor would the contrary practical view harm the interest of any shareholders.

m) Therefore, the noticees have not violated Takeover Regulations, 1997 that was applicable at the time of issue of warrants. Takeover Regulations, 2011 were not applicable in the case of

the noticees and the SCN issued thereunder was bad in law and has no effect at all. Therefore, the SCN should be quashed and all charges against the noticees be dropped.

6. From the Annual Report of 2010-11 of the target company it was noted that Shri B. G. Jain, Shri D. B. Jain, Smt. P. B. Jain were amongst the directors of the target company. In the explanatory statement to the notice of AGM dated June 10, 2010 it was stated that they were interested in the resolution proposing preferential allotment to promoters. SEBI sought clarification from the target company whether any of its directors were also directors/persons in control / immediate relative of the noticees. The target company vide its email dated June 18, 2013 informed that the target company and some of the noticees had common directors as indicated in the following Table-

Sr. no.	**Common directors**	**Entities**
1.	Shir B. G. Jain	*Chairman and Managing Director of the target company and also a director in B. G. Jain Investment Pvt. Ltd.*
2.	Shri D. B. Jain	*Joint Managing Director of the target company and also a director in G.P. Shah Inv. Pvt. Ltd., Varju Inv. Pvt. Ltd. and Nakoda Syntex Pvt. Ltd.*
3.	Smt. P. B. Jain	*A director in the target company and also a director in Nakoda Syntex Pvt. Ltd.*

7. I have considered the SCN, the aforesaid submissions of the noticees, copy of the resolution passed by the shareholders of the target company in its AGM held on June 10, 2010 as mentioned in its Annual Report for the year 2009-10 and the material available on record. I note that there is no dispute as to the fact that P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited are part of the promoter group of the target company and all the promoters forming part of the promoter group, being a homogenous class, are persons acting in concert under regulation 2(1) (q) (2) (iv) of the Takeover Regulations, 2011 and nothing contrary has been submitted or established. There is also no dispute as to the fact that just prior to allotment of 2,70,00,000 warrants to the said two entities of the promoter group, the collective shareholding and voting rights of the noticees in the target company was 3,33,49,600 shares (50.23% voting rights).

8. It is also admitted fact that on account of issuance of underlying equity shares with respect to GDRs on November 26, 2010, the noticees' voting rights in the target company did not change as, according to the noticees and also confirmed by target company vide its letter dated

January 3, 2013, the shares underlying the GDRs did not have voting rights and the depository, that was holding those share, was not entitled to exercise voting rights with respect to them.

9. It is noted that as on March 31,2011 and just prior to allotment of 5,40,00,000 equity shares consequent to conversion of 2,70,00,000 warrants of said two entities of the promoter group of the target company, the noticees were holding 3,33,49,600 shares and this shareholding increased to 8,73,49,600 shares on December 19, 2011 pursuant to the conversion of the said warrants. Consequent to conversion of those warrants during the financial year 2011-12 their voting rights in the target company increased from 50.23% (*as on March 31, 2011 and just prior to conversion of warrants on December 19,2011)* to 62.92% during the financial year 2011-12.

10. The dispute is with regard to the breach of regulation 3(2) of the Takeover Regulations, 2011 by the noticees on account of the above alleged increase in their shareholding during the financial year 2011-12. Therefore, the question that requires to be addressed in this case, in light of the facts of this case and submissions of the noticees, is as to whether the noticees acquired shares and voting rights beyond the threshold limits stipulated under regulation 3(2) of the Takeover Regulations, 2011 during the financial year 2011-12 and whether they failed to make the requisite public offer under regulation 3(2). In order deal with this issue it is necessary to refer to relevant provisions of the Takeover Regulations, 1997 and Takeover Regulations, 2011 that are reproduced hereunder:-

Takeover Regulations, 1997.

"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 55 per cent 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, in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations."

"Timing of the public announcement of offer.

14. (1) The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein:

(2)In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in regulation 10 or regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than

four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be:

Provided that in case of American Depository Receipts or Global Depository Receipts entitling the holder thereof to exercise voting rights in excess of percentage specified in regulation 10 or regulation 11, on the shares underlying such depository receipts, public announcement shall be made within four working days of acquisition of such depository receipts."

Takeover Regulations, 2011

Substantial acquisition of shares or voting rights.

3.(1)…….

(2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Explanation. For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.

(3) For the purposes of sub-regulation (1) and sub-regulation (2), acquisition of shares by any person, such that the individual shareholding of such person acquiring shares exceeds the stipulated thresholds, shall also be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of whether there is a change in the aggregate shareholding with persons acting in concert."

Timing.

13.(1) The public announcement referred to in regulation 3 and regulation 4 shall be made in accordance with regulation 14 and regulation 15, on the date of agreeing to acquire shares or voting rights in, or control over the target company.

(2) Such public announcement,—

(b) pursuant to an acquirer acquiring shares or voting rights in, or control over the target company upon converting convertible securities without a fixed date of conversion or upon conversion of depository receipts

for the underlying shares of the target company shall be made on the same day as the date of exercise of the option to convert such securities into shares of the target company;

……

……"

11. The noticees have disputed the applicability of Takeover Regulations, 2011 with regard to the above increase of voting rights of the noticees. According to the noticees, the acquisition in question attracted the provisions of Takeover Regulation, 1997 and not the provisions of the Takeover Regulations, 2011 as charged. In this regard, the first argument of the noticees is that the allotment of warrants to them on June 23, 2010 and issuance of GDRs were simultaneous and proposal to issue them was composite in view of resolution dated June 10, 2010 passed by the shareholders of the target company in its AGM. In this regard, from the resolution dated June 10, 2010, I note that by this resolution the shareholders of the target company had authorised its Board of Directors to issue, offer and allot through public or private offerings in domestic and/or one or more international markets, equity shares and/or other securities convertible into equity shares at the option of the target company and/or holders of such securities. By this resolution the discretion was given to the Board of Directors of the target company to decide on time and mode of issuance of such securities. I, therefore, note that the resolution dated June 10, 2010 did not specifically contain simultaneous and composite proposal for issuance of warrants and GDRs as sought to be argued by the noticees.

12. The other argument of the noticees is that warrants had to be allotted within 15 days of the resolution dated June 10, 2010 as required under Takeover Regulations 1997. However, GDR issuance took time. In this regard, I note that neither the Takeover Regulations of 1997 nor the Takeover Regulations, 2011 prescribe the time for completion of allotment of warrants after passing of the special resolution. The timeline of 15 days in this regard has been prescribed in regulation 74(1) of the ICDR Regulations. In the instant case, the target company allotted 2,70,00,000 warrants to P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited, the entities belonging to the promoter group of the target company on June 23,2010 i.e. within the timeline prescribed in said regulation 74(1).

13. The noticees have further contended that due to condition imposed by BSE the GDR issue had to precede the conversion of warrants and the available time for conversion was available upto 18 months ending during the financial year 2011-12. According to the noticees since the GDR holders did not convert their GDRs into equity shares on which the noticees did not have control, the increase in their voting rights on conversion of their warrants on December 19, 2011 can not be attributed to any act or omission on their part. It was solely due to the act or omission on the part of the GDR holders. I note that on allotment of warrants on June 23, 2010, there was no change in the shareholding or voting rights of the noticees in the target company and it remained at the level of 50.23% because the warrants neither carry voting rights nor do they entitle their holders to exercise voting rights in the target company.

14. Further, as per the resolution dated June 10, 2010, the warrants issued by the target company to the noticees had option exercisable by them to subscribe for equity shares in the target company. If the noticees were to convert their entire 2,70,00,000 warrants in the financial year 2010-11 into equity shares their shareholding and voting rights would have increased beyond the eligible creeping limit of 5% stipulated in regulation 11(1) of the Takeover Regulations, 1997. This would have triggered their obligation to make the mandatory open offer under the said regulation 11(1).I do not find anything, in the condition stipulated by BSE, which mandated the noticees to refrain from converting their warrants, partly, so as to avail the benefit of creeping acquisition under regulation 11(1) or to convert them fully and comply with requirements of regulation 11(1) during the financial year 2010-11. I, therefore, do not agree with contentions of the noticees in this regard.

15. When the target company issued GDRs on November 26, 2010, their voting rights in the target company admittedly remained at the level of 50.23% since neither the GDR holders nor did the depository that held the underlying GDR shares had voting rights. It also needs to be mentioned that while calculating the minimum public shareholding for the purposes of Rule 19A of the Securities Contracts (Regulation) Rules, 1957(SCRR), the capital issued outside India is neither included in public shareholding nor in the total shareholding of a company. Legally, the GDR holders have option to exchange the GDRs with equity shares of the issuer but they do not have any obligation to do so. Same is the case with the warrant holders. In this case, the warrants were convertible into equity shares at the option of holders thereof. Conversion of warrants was not contingent upon exchange of GDRs with equity shares. I find that even after issuance of GDRs on November 26, 2010, the noticees had sufficient time in the financial year 2010-11 i.e. till March 31, 2011 to convert such number of warrants into equity shares of the target company so that the increase in their shareholding or voting rights in the target company did not breach the permissible creeping limit of 5% prescribed in regulation 11(1) of the Takeover Regulations, 1997. Alternatively, the noticees also had liberty to convert their entire 2,70,00,000 warrants without depending on decision of GDR holders to exchange their GDRs with equity shares in the financial year 2010-11 and make the mandatory public announcement under regulation 11(1) of the Takeover Regulations. In view of these findings, I do not find merit in the arguments of the noticees and reject the same.

16. Another argument of the noticees is that the issue of GDRs and warrants was a simultaneous and composite issue and the conversion of warrant on December 19, 2011 was merely a consequence of decision already taken on the date of the AGM authorising the allotment of GDRs and Warrants. The noticees have further contended that as acknowledged in the SCN, the warrants were to be automatically converted, without any further application by them, on payment of 75% balance subscription money. According to the noticees, in terms of regulation 2(1)(b) of the Takeover Regulations, 1997 the term *'acquirer'* includes a person who *'agrees to acquire'* shares or voting rights of the target company. Since the warrants allotted to them had in-built features of the equity shares, and in effect, they were as good as partly paid-up shares, the noticees had agreed to acquire equity shares in the target company at the time of allotment of

warrant on June 23, 2010 though the actual allotment of equity shares happened in the financial year 2010-11 i.e. on December 19, 2011. Accordingly, it was the Takeover Regulations, 1997 that was applicable on the acquisition of the two entities of the promoter group.

17. On examination of the terms *'acquirer'* in regulation 2(1)(b), *'target company'* in regulation 2(1)(o) and the provisions of regulation 11(1) of the Takeover Regulations, 1997, I note that the obligation under regulation 11(1) is triggered when any person, directly or indirectly, acquires or agrees to acquire-

    (a) shares or voting rights in the target company entitling him to exercise voting rights more than the specified threshold limit; or
    (b) control over the target company.

18. The words *'shares or voting rights entitling him to exercise'* used in the regulation 11(1) clearly suggest that its provisions apply when a person acquires or agrees to acquire shares which entitle him to exercise voting rights or he acquires or agrees to acquire voting rights in or control over the target company. The equity shares by its very nature carry voting rights and the voting rights are built in when the equity shares are issued. I note that in this regard the legal position had been settled by Hon'ble Securities Appellate Tribunal (SAT) in many cases. For instance, in the matter of *Sharad Doshi v. AO, SEBI [1998] 16 SCL(269)* Hon'ble SAT held that -

    "The argument that the shares will carry voting rights only after registration of the transfer in the company's register of members is not legally tenable. ……The equity shares by its very nature carry voting rights……. Voting rights is attached to equity shares or say, it is built in the moment the share is issued..…… ……..While the voting right is attached to equity shares, registration of holding the share enables the holder to exercise the voting rights attached thereto….."

19. Further, in the matter of *Ch. Kiron Margdarshi v. SEBI - [2001] 33 SCL 349,* Hon'ble SAT held that :-

    "What attracts the regulation is the acquisition of shares / voting rights which will entitle the person acquiring the shares to exercise voting rights beyond certain limits is specifically provided in the regulations, ……

    If the acquisition entitles an acquirer to exercise ten percent or more of the voting rights in a company, then only the regulation would be attracted. <u>It is not the manner in which the shares are acquired. It is the effect that triggers action. If the acquisition has no impact on the voting rights, regulation is not attracted."</u>

20. It is commonly known that the warrants, by their very nature, do not entitle its holders to exercise voting rights in a company nor do they *per se* confer any power or authority of control over a target company. The warrants contain an option in favour of the holder to get the shares of the issuer company. Such option by itself does not entitle voting rights or control in favour of the holder. When the warrant holder exercises option to subscribe to equity shares he agrees to acquire shares that entitle him to voting rights in the target company. Therefore, it is not correct

to say that the warrant holders agree to acquire equity shares in the target company at the time of their allotment as sought to be argued by the noticees.

21. In this case, as seen from the resolution dated June 10,2010, the issuance of warrants and GDRs was not a composite or simultaneous issue. At the time of allotment of warrants, the noticees had option to acquire equity shares in the target company on a future date. I note that in terms of regulation 77 of the ICDR Regulations, it is mandatory that 25% of the consideration payable on each warrant should be paid by the allottees on the date of allotment itself and the balance 75% should be paid at the time of allotment of equity shares pursuant to exercise of option against each such warrant by the warrant holder. If the warrant holder does not exercise the option to take equity shares against any of the warrants held by him, the 25% consideration paid by him in respect of such warrant should be forfeited by the issuer. The mode of exercising option is immaterial. In my view, the option could be exercised by the warrant holders expressing the intention orally or in writing or manifesting the same by conduct or actions such as by tendering the 75% balance consideration payable on the warrants. The mandatory requirements of ICDR Regulations apply in each case of preferential allotment of warrants and the position in the instant case is in no way different. In this case, I note from the resolution dated June 10, 2010, that the convertible securities including warrants were convertible into equity shares at the option of the target company and/holders thereof. Thus, the two entities of the promoter group to whom the target company had allotted warrants on preferential basis on June 23, 2010 had the option to either exercise the option to take the equity shares by paying balance 75% consideration within the 18 months duration of the warrants or to let the 25% advance consideration paid by them be forfeited by the issuer. In the facts and circumstance of this case, I do not find anything suggesting automatic conversion of warrants into equity shares. Even if it is assumed so, the position would not change since the warrant holders acquire or agree to acquire equity shares when they exercise the option to subscribe to equity shares in the company. Thus, it is incorrect to contend that the noticees agreed to acquire equity shares entitling them voting rights in the target company on June 23, 2010.

22. I note that in view of the provisions of the Companies Act, particularly those of sections 87, 92, 93 and 181 thereof, the partly paid-up shares are equity shares on which the value is not paid in full and the remaining value is to be called up by the company. I further note that the holder of partly paid-up shares is also a member of the company but holder of only warrant is not. In terms of section 87(1) of the Companies Act, a member holding partly paid-up shares is entitled to exercise voting rights in the company in proportion to his share of the paid up equity capital of the company. A member who has failed to pay the calls or the funds payable by him, his voting rights may be restricted if the articles of the company provide so in terms of section 181 of the Companies Act. The warrants do not entitle the holders thereof to exercise any voting rights in the company. Further, whereas in case of warrants the consequence of failure to pay the balance consideration is compulsory forfeiture of the advance consideration already paid, in case of partly paid-up shares, forfeiture of part payment is not the compulsory consequence. In my view, therefore, the warrants cannot be treated as or equated with partly paid-up shares.

23. I have perused the order of Hon'ble SAT in the above mentioned *Sharad Doshi's* case relied upon by the noticees in support of their arguments. I note that in *Sharad Doshi's* case, the appellant had acquired equity shares but the transfer thereof was yet to be registered in the register of the members of the target company. In that case, the Hon'ble SAT was dealing with the applicability of regulation 9 of the Takeover Regulations of 1994 and the argument of the appellant that the equity shares in question were to carry voting rights only on entering transfer of shares in the records of the target company. Hon'ble SAT rejected the contention and held that the time limit prescribed for public announcement is relatable to the finalization of the negotiations or entering into agreement or MoU to acquire 'equity shares'. SAT held that the date of registration was not the starting point. From interpretation given by Hon'ble SAT in *Sharad Doshi's* case as quoted hereinabove, it is clear that it is the acquisition or negotiation/agreement / MoU to acquire equity shares that entitle voting rights is the starting point for the obligation to make public announcement and not the acquisition of warrants with option to subscribe to equity shares in future. Therefore, in my view this order of Hon'ble SAT does not support the arguments of the noticees.

24. If the arguments of the noticees are accepted, the acquirer of warrants beyond specified threshold, in all cases, would be under obligation to make public announcement under regulation 11(1) of the Takeover Regulations on the date of allotment of warrants although he may not exercise his option to acquire equity shares. If the arguments of the noticees that they had agreed to and deemed to acquire shares and voting rights on June 23, 2010, itself is accepted, the noticees would be obligated to make the public announcement under regulation 11(1) of the Takeover Regulations, 1997 since they would be deemed to or agreed to have acquired voting rights beyond the 5% permissible limit (on account of assumed increase in voting rights from 50.23% to 62.92%) under said regulation 11(1) on June 23 2010 itself. In my view, such argument would give undesirable and unintended result. I note that for this reason, regulation 14(2) of the Takeover Regulations, 1997 and regulation 13(2)(b) of the Takeover Regulations, 2011 provide timing of making public announcement, in such cases, relatable to the date of exercise of option to subscribe to the equity shares. I, therefore, do not agree with the contention of the noticees that they had agreed to acquire equity shares in the target company on June 23, 2010 when the 2,70,00,000 warrants were allotted to the two entities of the promoter group and the provisions of Takeover Regulations, 1997 was applicable to their acquisition.

25. I note that the above views also find support from various judgments of Hon'ble SAT including the one in the matter of *Sohel Malik Vs. Securities and Exchange Board of India* wherein Hon'ble SAT vide its order dated October 15, 2008 held that:

> *"…it is the acquisition of voting rights that triggers the provisions regarding public announcements and public offers contained in the Regulations. Acquisition of securities without voting rights, including convertible warrants as in the present appeal, will not, by itself, necessitate any public announcement or public offer."*

26. In the above case, the Hon'ble Tribunal further held that:

> *"…It is true that information about issue of warrants became public with the holding of the BoD meeting of 16.12.2006 but that cannot be taken as information about issue of shares. The issue of shares was contingent on the warrant holder exercising the option to convert the warrants and cannot be taken as a mere formality. It was, in fact, an event quite distinct from the issue of warrants. Therefore, the reference date for computing the offer price should be 28.6.2008, the date of the BoD meeting when the shares were allotted and not 16.12.2006…."*

27. Similarly, in the matter of *Eight Capital Master Fund Ltd and others Vs. Securities and Exchange Board of India* in Appeal No. 111 of 2008, wherein the issue was similar to this case Hon'ble SAT, in its order dated July 22, 2009 held that:

> *"Undoubtedly, the compulsorily convertible debentures were allotted to the appellants by the BoD in their meeting on July 21, 2006 and even though these debentures were shares for the purposes of the takeover code, they did not carry any voting rights on that date. The BoD meeting of July 21, 2006 did not, therefore, authorise the preferential allotment of shares carrying voting rights. The voting rights which triggered the takeover code were acquired by the appellants only on January 26, 2008 when the period of 18 months expired and the compulsorily convertible debentures got converted automatically and the BoD in their meeting on that day allotted equity shares to the appellants. It is on this date the BoD authorised the preferential allotment to the appellants …."*

28. In this case, I find that when the warrants were allotted on June 23, 2010, there was no acquisition of shares or voting rights by the noticees and their shareholding and voting rights remained at the level of 50.23%. When GDRs were issued by the target company on November 26, 2010, the voting rights of the noticees in the target company remained at 50.23%. For the purposes of Rule 19A of the SCRR, there was no change in their shareholding as shares underlying GDRs are neither included in the public shareholding nor in total shareholding in the target company. On these dates, the noticees had not triggered the obligation under regulation 11(1) of the Takeover Regulations, 1997. The Takeover Regulations, 1997 were repealed by the Takeover Regulations, 2011 with effect from October 22, 2011. I further find that till the Takeover Regulations, 1997 were in force, the noticees had not triggered the obligations of public announcement thereunder as they had not acquired shares or voting rights during that period. I further find that as on March 31, 2011 the noticees held 3,33,49,600 shares and 50.23% voting rights in the target company. There was no increase or reduction in their shareholding and voting rights in the financial year 2011-12 till the noticees decided to convert their 2,70,00,000 warrants into 5,40,00,000 equity shares of the target company on December 19, 2011. Pursuant to this acquisition of shares and voting rights their voting rights in the target company had increased from 50.23% to 62.92% during the financial year 2011-12. By virtue of this acquisition of equity shares, noticee's shareholding in the target company had also increased from 50.23% to 62.92% for the purposes of Rule 19A of the SCRR. In this case, even if the shareholding underlying GDRs is also included in the total shareholding of the target company, then also the shareholding of noticees increased from 26.38% to 44.03% pursuant to conversion of warrants on December 19 2011. At the time of this acquisition of shares and voting right, the Takeover

Regulations, 2011 had come into force and are applicable as they are enacted. I note that in terms of regulation 3(2) of the Takeover Regulations, 2011 no acquirer, who has acquired and holds shares or voting rights in the target company entitling him to exercise 25% voting rights in the target company but less than permissible non public shareholding, shall acquire within any financial year additional shares or voting rights in the target company entitling him to exercise more than 5% voting rights unless he makes a public announcement required therein. As per regulation 3(2) the noticees could further consolidate their shareholding and voting rights in the target company by acquiring upto 5% shares/voting rights in a financial year without making a public announcement. I find that the consolidation in shareholding and voting rights of the noticees during the financial year 2011-12 was beyond the 5% creeping limit permitted under regulation 3(2) of the Takeover Regulations, 2011 and they were under mandatory obligation to make the public announcement under regulation 3(2) which they have failed to make.

29. I further find that regulation 3(2) provides exception from obligation to make public announcement only if the acquisition is within permissible creeping limit of 5% in any financial year. In case of breach of the creeping limit, public announcement is the consequence obligated under regulation 3(2). I note that regulation 3(2) has clothed its command in negative form which insists on compliance with its provisions as they are enacted. Further, its provisions require a particular act, (i.e. consolidation of holdings/voting rights by specified acquirers), to be done in a particular manner and also lay down that failure to comply with the requirements leads to a specific consequence. Therefore, provisions of regulation 3(2) are mandatory.

30. Regulation 32 of the Takeover Regulations, 2011 gives flexibility to SEBI to issue directions in the interests of the investors and the securities market which are the statutory guiding principles. I note that while examining the consequence of breach of regulation 11(1) of the Takeover Regulations, 1997, the Hon'ble SAT vide order dated September 08, 2011 in the matter of *Nirvana Holdings Private Limited vs. SEBI (Appeal no. 31/2011)* observed as follows:

> "*It must be remembered that whenever an acquirer violates Regulation 10, 11 or 12 of the takeover code by not making a public announcement, he should be directed to comply with the provision by making a public offer. The words "unless such acquirer makes a public announcement" appearing in Regulations 10 and 11(1) make these provisions mandatory and a public announcement has to be made. Similar words appear in Regulation 12 as well. These provisions make the acquisition conditional upon a public announcement being made. The primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation.*"

31. I note that the provisions of regulation 3(2) of the Takeover Regulations, 2011 are *pari materia* the provisions of regulation 11(1) of the Takeover Regulations, 1997 with regard to acquisition of shares or voting rights on conversion of warrants, creeping limit and obligation in case of breach of threshold. I note that under section 11 of the SEBI Act, regulating *'substantial acquisition of shares and takeover of companies'* is one of the functions assigned to SEBI for protecting the interest of investors. The Takeover Regulations, 1997 and the Takeover Regulations, 2011 both are aimed at achieving the said objective. They both operate principally to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and control and to ensure that such acquisitions and processes involved therein do not take place in a clandestine manner. The cardinal principles for administering and applying them *inter alia* include transparency in the transactions, equality of treatment and opportunity to all shareholders and protection of interests of shareholders at large. I also note that the Takeover Regulations, 2011 have retained and continued the inherent and basic objectives and spirit of the Takeover Regulations, 1997(*since repealed*) and the policy as regards the mode of acquisition of shares or voting rights, the obligation of open offer, etc. In my view, therefore, the legal position discussed hereinabove with regard to interpretation and application of Takeover Regulations, 1997 will hold good for interpretation and application of the Takeover Regulations, 2011 also.

32. In view of the above, the consequence of breach provided in regulation 3(2) should follow unless in the facts and circumstance of the case any other direction could be found in the interest of investors and the securities market. In this case, I have already rejected the contention that conversion of warrant in the financial year 2011-12 was beyond the control of notcees and it was due to the act or omission of the GDR holders. The noticees have further argued that the shareholders who are sought to be protected under the Takeover Regulation, 2011 had duly approved the proposal of issuance of warrants to the noticees. It is to be kept in mind that, by the special resolution, the shareholders of a company approve every proposal of preferential allotment. I note that the Takeover Regulations do not exempt acquisition through preferential allotment from obligation of public announcement and in case of acquisition of shares or voting rights or control through preferential allotment also the consequence is the same as in case of acquisition through any other mode. I find that the facts and circumstances of this case do not suggest any reason to deviate from the normal rule of requirement of making public announcement in terms of regulation 3(2) of the Takeover Regulations, 2011. I, therefore, find that the noticees should make open offer to the public shareholders in accordance with the Takeover Regulations, 2011.

33. I note that had the noticees made the public announcement in accordance with the Takeover Regulations, 2011 and complied with all related activities within the timelines specified under therein, all formalities with respect to their public announcement and the open offer would have been completed on March 12, 2012. Since the noticees have failed to make the public announcement within the stipulated time and the public announcement in compliance with this order would be after delay, the noticees shall pay interest on consideration amount to the

shareholders who tender their shares in the open offer and who are eligible for interest as per law.

34. I, therefore, in exercise of powers conferred upon me under sections 19, 11 and 11B of the SEBI Act and regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereby issue the following directions:

    (a) The noticees, G.P. Shah Investment Private Limited, B.G. Jain Investment Private Limited, P.B. Jain Investment Private Limited, Varju Investment Private Limited, Nakoda Syntex Pvt. Ltd, Mr. Babulal G. Jain, B.G. Jain HUF, Ms. Pushpadevi B. Jain, Mr. Devendra B. Jain, Mr. Kartik B. Jain, Ms. Shilpa B. Jain and Ms. Neetu D. Jain shall make a combined public announcement to acquire shares of the target company, M/s Nakoda Limited, in terms of regulation 3(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, within a period of 45 days from the date of this order;

    (b) The noticees shall, alongwith consideration amount, pay interest at the rate of 10% per annum from March 13, 2012 to the date of payment of consideration, to the shareholders who were holding shares in the target company on the date of violation and whose shares have been accepted in the open offer, after adjustment of dividend paid, if any.

35. This order shall come into force with immediate effect.

RAJEEV KUMAR AGARWAL

DATE: July 8th , 2013 **WHOLE TIME MEMBER**

PLACE: MUMBAI **SECURITIES AND EXCHANGE BOARD OF INDIA**