BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER No.: ORDER/SS/SK/2019-20/7232]

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

In respect of:

Akshya Infrastructure Private Limited
414, Bharathi Street,
Puducherry-605001.

In the matter of MARG Ltd.

1. M/s MARG Ltd., (hereinafter referred to as "Target Company") is a company having its securities listed on the Bombay Stock Exchange ('BSE') and National Stock Exchange (under permitted securities category). A voluntary open offer was made by Akshya Infrastructure Private Limited (hereinafter referred to as 'the Noticee' or 'the acquirer'), an entity forming part of the promoter group of the Target Company, vide public announcement dated October 20, 2011, to acquire 20% of the equity shares of the Target Company. A draft letter of offer (hereinafter referred to as 'LOO'), dated October 28, 2011, was filed with SEBI by the Merchant Banker M/s. Motilal Oswal Limited on behalf of the Noticee in terms of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'SAST Regulations').

2. Upon perusal of the aforesaid LOO, SEBI noted that certain acquisitions were made by the promoter group of the Target Company during the financial years 2006-07, 2007-08 and 2010-11. The details are mentioned in the table below:

Financial Year	Date of Acquisition	Mode of acquisition	No. of Shares acquired	%age of acquisition	Gross Acquisition for the financial year (%)
2006-07	**30-Mar-07**	Preferential allotment of convertible warrants made in favour of promoter group at Rs. 88.75 each	3,699,900	14.34	**14.34**
2007-08	7-Apr-07		779,100	0.03	0.03
	1-Aug-07		251,000	0.29	0.32
	11-Oct-07		1,900,000	4.62	4.94
	12-Oct-07		1,220,000	0.54	**5.64**
2010-11	15-Feb-11	Preferential allotment of convertible warrants made in	2,150,000	3.37	3.37
	19-Feb-11		2,750,000	3.74	**7.11**

Financial Year	Date of Acquisition	Mode of acquisition	No. of Shares acquired	%age of acquisition	Gross Acquisition for the financial year (%)
		favour of promoter group at Rs. 61 each			

3. SEBI noted that the above acquisitions resulted in a breach of 5% creeping acquisition limit under regulation 11(1) of the SAST Regulations in a financial year. In view of the same, the Noticee along with the promoter group were required to make public announcement on the respective dates as per regulation 11(1) read with regulation 14(2) of the SAST Regulations which the Noticee had failed to make.

4. In view of the above, SEBI issued the observation letter dated November 30, 2012 advising the Noticee to revise the offer price as a result of trigger of open offers on the aforementioned dates. In response, the Noticee had filed an appeal before Hon'ble Securities Appellate Tribunal ("SAT") against the aforesaid letter of SEBI. Hon'ble SAT, vide its order dated June 19, 2013 decided the following:-
   (a) Set aside SEBI's directions;
   (b) Allowed withdrawal of offer and escrow amount;
   (c) No observations were made on the merit of the issue regarding the three alleged triggers and the contentions of parties in this regard were kept open.

5. SEBI filed an appeal in Hon'ble Supreme Court ("SC") against the aforesaid SAT order. Hon'ble SC vide order dated April 25, 2014 set aside the SAT order and restored directions issued by SEBI in its letter dated November 30, 2012. The review petition filed by the Noticee was also dismissed by Hon'ble SC on October 30, 2014.

6. Subsequently, SEBI, vide letter dated March 05, 2015 advised the Noticee to comply with the observations issued by SEBI in its letter dated November 30, 2012. Further, vide letter dated April 10, 2015, the Noticee had requested SEBI to grant a month's time for its reply. In response, SEBI vide letter dated April 21, 2015, has informed the Noticee that SEBI has taken a note of its request and advised it to comply with the directions of Hon'ble SC. However, the Noticee had not complied with the directions.

7. It is, therefore, alleged that the Noticee did not carry out the changes in the LOO as specified by SEBI vide letter dated November 30, 2012, failed to send LOO to the shareholders and to make public announcement for revision of the offer price in compliance with SEBI observation letter

dated November 30, 2012 thereby violating the provisions of regulation 18(2) read with regulation 26 of the SAST Regulations. The said provisions of SAST Regulations read as under:

SAST Regulations

18. Submission of letter of offer to the Board.

(1) …..

(2) The letter of offer shall be despatched to the shareholders not earlier than 21 days from its submission to the Board under sub-regulation (1):

Provided that if, within 21 days from the date of submission of the letter of offer, the Board specifies changes, if any, in the letter of offer (without being under any obligation to do so), the merchant banker and the acquirer shall carry out such changes before the letter of offer is despatched to the shareholders :

Provided further that if the disclosures in the draft letter of offer are inadequate or the Board has received any complaint or has initiated any enquiry or investigation in respect of the public offer, the Board may call for revised letter of offer with or without rescheduling the date of opening or closing of the offer and may offer its comments to the revised letter of offer within seven working days of filing of such revised letter of offer.

26. Upward revision of offer.

Irrespective of whether or not there is a competitive bid, the acquirer who has made the public announcement of offer may make upward revisions in his offer in respect of the price and the number of shares to be acquired, at any time up to seven working days prior to the date of the closure of the offer :

Provided that any such upward revision of offer shall be made only upon the acquirer—

(a) making a public announcement in respect of such changes or amendments in all the newspapers in which the original public announcement was made;

(b) simultaneously with the issue of such public announcement, informing the Board, all the stock exchanges on which the shares of the company are listed, and the target company at its registered office;

(c) increasing the value of the escrow account as provided under sub-regulation (9) of regulation 28.

8. Vide a *communication-order* dated May 11, 2018, the competent authority in SEBI appointed the undersigned as Adjudicating Officer under Section 19 read with Section 15I (1) of the SEBI Act, 1992 ((hereinafter referred to as 'SEBI Act') and Rule 3 of SEBI (Procedure for Holding Inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as 'Adjudication Rules') to inquire into and adjudge the alleged violation of the provisions of regulation 18(2) read with Regulation 26 of the 1997 Regulations under Section 15H (iii) of the SEBI Act. Section 15H (iii) of the SEBI Act reads as under:

Section 15H (iii) of the SEBI Act

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

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

(iii) make a public offer by sending letter of offer to the shareholders of the concerned company;

he shall be liable to a penalty [1] [which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher].

9. Accordingly, after receipt of records of the proceedings on June 12, 2018, a notice to show cause no. EAD/SS-SKS/OW/17438/2018 dated June 18, 2018 (hereinafter referred to as 'the SCN') was issued to the Noticee, calling upon it to show cause as to why an inquiry should not be held against it in terms of rule 4 of the Adjudication Rules and penalty be not imposed under Section 15H (iii) of the SEBI Act for the aforesaid alleged violations. The SCN sent to the Noticee was duly served.

10. Mr. G R K Reddy who is a Noticee in other matter pertaining to Marg Ltd. sought three weeks extension of time vide email dated July 05, 2018 to file the reply on behalf of the Noticee in this matter. However, no reply was submitted by the Noticee even after additional time sought by it had elapsed. Vide notice of hearing dated August 06, 2018, the Noticee was granted an opportunity of hearing on August 20, 2018. The said notice of hearing was duly served. On the scheduled date of hearing, Mr. KRCV Seshachalam, Advocate, appeared on behalf of the Noticee and informed that the Noticee is in the process of filing application for settlement under SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 and reply on behalf of the Noticee will be filed within four weeks. The submissions of the learned advocate was taken on record.

11. In the meantime, on January 31, 2019, Settlement Division of Enforcement Department in SEBI informed that the settlement application received from the Noticee was placed before Internal Committee on December 28, 2018 and was deferred after deliberation. Further, the Settlement Division advised that as the matter is under process, the adjudication proceedings be kept in abeyance till further communication in this regard. In view of the same, the instant proceedings against the Noticee was kept in abeyance till further communication from the Settlement Division.

12. On June 21, 2019, Settlement Division informed that the applications received from the Noticee was rejected by the panel of WTMs and requested the undersigned to proceed with the pending proceedings. However, considering the pendency of section 11B proceedings for the same charges

[1] Substituted for the words "twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher" by the Securities Laws (Amendment) Act, 2014, w.e.f. 08-09-2014.Prior to substitution, as substituted by the SEBI (Amendment) Act, 2002, w.e.f. 29-10-2002 it read as under: "not exceeding five lakh rupees".

the instant proceedings was kept in abeyance till the conclusion of the section 11B procedings.in peculiar facts and circumstances of this case.

13. In the interest of principles of natural justice, a fresh opportunity of hearing was granted to the Noticee on October 18, 2019 and another opportunity was also provided to the Noticee to file its submissions on merits. Subsequently, the Noticee who is also a Noticee in a separate matter pertaining to Marg Ltd. along with 8 other Noticees in that separate matter filed a common reply vide e-mail dated October 17, 2019. The Noticee then availed the opportunity of hearing granted to it on October 18, 2019 when Mr. KRCV Seshachalam, Advocate, Authorised Representative ('AR') appeared on behalf of the Noticee and made oral submissions on the lines of the said common written reply. The AR also tender a copy of the following documents at the time of hearing:

    a) Order of Hon'ble SC in the matter of *Akshya Infrastructure Pvt. Ltd Vs. SEBI* (Civil Appeal No. 6041 of 2013) decided on April 25, 2014.
    b) Order of Hon'ble SC in the matter of *Akshya Infrastructure Pvt. Ltd Vs. SEBI* (Review Petition (C) No. 1414 of 2014 in Civil Appeal No. 6041 of 2013) decided on October 30, 2014.
    c) Order of Hon'ble SAT in the matter of *Akshya Infrastructure Pvt. Ltd Vs. SEBI* (Appeal No. 3 of 2013) decided on June 19, 2013.

14. The AR further requested 10 days' time to submit additional documents *viz.* conditions stipulated in FCCB and QIP issue before acquisition by the Noticee, copy of reply dated February 26, 2019 enclosing the net-worth / Income Tax returns of the Noticee as well as additional written submissions, if any. The request of the AR was allowed. Vide letter dated October 30, 2019, copy of extract of QIP and Income tax returns were submitted by the AR on behalf of the Noticee.

15. On November 15, 2019, SEBI has passed order (No. WTM/MPB/EFD-1-DRA-III/74-75/2019) under section 11, 11 (4), 11B (1) of the SEBI Act read with SAST Regulations in respect of Noticee and 22 others in the prior acquisitions by the promoter group of Marg Ltd. I, therefore, deem it appropriate to proceed to conclude the instant proceedings.

16. I note that the Noticee has *inter-alia* made the following submissions in its replies:

    a) Mr. GRK Reddy and Mrs. V P Rajini Reddy are the Promoters of Marg ltd. and rest of the Noticees are promoter group and are alleged persons acting in concert ('PAC'). The Noticee being one of the PAC made a voluntary public announcement of an open offer through Motilal Oswal Investment Advisors Pvt Ltd ('Merchant Banker') on October 20, 2011, to acquire

76,51,572 (20%) of equity shares of the target company. The offer price was ₹ 91 per equity share and the total consideration was ₹ 69.62 Crore. The open offer which was made for consolidation of the promoters holding in the target company was purely a voluntary open offer and not on account of any trigger.

b) Prior to public announcement, an Escrow Account was opened and ₹ 17.45 Crore was deposited with the Axis Bank, Virugambakkam, Chennai Branch in relation to the open offer. The said amount is still lying in Escrow Account since the year 2011. The acquirer considering the delay in giving approval by SEBI and change in circumstances submitted a letter dated March 29, 2012, to SEBI for withdrawal of voluntary open offer.

c) SEBI communicated to the Merchant Banker vide letter dated November 30, 2012, that the acquisition of shares by the promoter group on March 30, 2007, October 12, 2007 and February 19, 2011, was in violation of Regulation 11(1) of the 1997 Regulations. The Merchant Banker was advised to make appropriate disclosures in the offer document regarding the violation of regulation 11(1) of the 1997 Regulations and revise the offer price. However, the offer price was not mentioned in the said communication.

d) The Noticee filed an appeal before SAT. Vide order dated June 19, 2013, the SAT allowed the appeal without making any observation on the merit of the issue regarding the three alleged triggers dated March 30, 2007, October 12, 2007 and February 19, 2011. Subsequently, SEBI filed an appeal before the Hon'ble SC which was allowed vide order dated February 25, 2014.

e) With regard to the allegation of acquisition of shares by the promoters on March 30, 2007, the Noticee submitted that:

(i) The promoters/ promoter group as on March 31, 2006, were holding 46% of the total equity capital of the target company.
(ii) On May 8, 2006, 190,000 shares were issued on preferential basis to public and hence, the shareholding of promoter/promoter group got reduced.
(iii) In order to have a buffer, the promoters were allotted 81,00,000 warrants and 97,00,000 warrants on February 22, 2006 and March 05, 2008, respectively, for converting the warrants into shares to offset the dilution of shareholding.
(iv) On February 28, 2007, the GDR holders exercised their options to convert GDRs into 2,703,000 equity shares which diluted the promoters shareholding.

(v) On March 30, 2007, promoters converted 36,99,900 warrants into equity shares so that their holding get consolidated at 50.021%.

(vi) The closing balance of the promoters/promoter group shareholding as on March 31, 2006, was 46% and the closing balance as of March 30, 2007 was 50.021%. The same constitutes an increase of only 4.021%.

f) With reference to the alleged acquisitions during the year 2007-2008, the Noticee submitted that:

(i) On April 07, 2007, the promoters converted warrants into 7,79,100 shares thus, increasing the shareholding from 50.021% to 50.05%. At the same time FCCB issued earlier were also converted into 7,68,276 shares.

(ii) On August 01, 2007, the promoters converted warrants into 2,51,000 shares thus, increasing the shareholding from 50.05% to 50.34%. At the same time, FCCB issued earlier were also converted into 141,292 shares.

(iii) On October 11, 2007, the promoter group converted warrants issued earlier into 190,000 shares thus, increasing the shareholding to 54.96%.

(iv) On October 12, 2007, the shareholding of the promoters group increased from 54.96% to 54.99% on account of preferential allotment of 200,000 shares to non-promoter entities, conversion of FCCB issued by the target company into 261,390 shares, conversion of warrants leading to allotment of shares to the tune of 12,20,000 shares to the promoters and to the tune of 250,000 shares to the non-promoters and sale of 150,000 shares by one of the promoter entities in the open market.

(v) On December 01, 2007 and January 5, 2008, FCCB issued by the target company earlier were converted into 21,19,384 shares and 11,25,039 shares respectively, thus reducing the promoters stake in the target company from 54.99% to 48.03% and the same continued till March 31, 2008.

(vi) Thus, compared to the total holding of 50.02 % as on March 31, 2007, all the transactions during the year 2007-08 had resulted in a decrease in promoters holding to 48.03% as at March 31, 2008.

g) With regard to acquisition on March 31, 2010, the Noticee submitted that:

(i) The promoters and promoters group were holding 1,41,00,000 equity shares out of the total 2,72,08,369 equity shares representing 51.822% of the total paid up equity share capital of the target company.

(ii) The promoters and promoters group were also holding 49,00,000 warrants to be converted into equity shares.

(iii) In the meanwhile, there was a Qualified Institutional Placement on May 03, 2010. There was conversion of employees Stock Options on October 12, 2010 and November 13, 2010.

(iv) Promoters and promoters group converted warrants into equity shares on February 15, 2011 and February 19, 2011. Thereafter, the consolidated equity shareholding of promoters and promoters group stood at 1,90,00,000 equity shares out of the total 3,81,18,926 equity shares of the target company representing 49.844% of total equity share capital of the target company.

(v) Thus, as such, there was no increase in the percentage of equity shareholding of promoters and promoters group as on March 31, 2011 as compared to the 51.822% holding as on March 31, 2010.

h) There were instances of invocation of pledged shares of promoter which were pledged for the benefit of the Company. This reduced the Promoters holding. Further, conversion of FCCB by the non-promoters had led to drastic fall in promoters holding. The act to convert the warrant was only to protect the interest of promoters in the company and mainly to protect the shareholders from third party acquisitions.

i) The promoters have not speculated for their personal gain. No fresh allotment was done to the promoters rather it was entirely conversion of warrants which was predetermined. Like all shareholders, promoters too have lost heavily on their investment

j) In the light of the above, there was no market purchase by the Promoters. All the acquisition of shares by the PAC was on account of corporate action and conversion of pre-allotted options. The Consideration paid by the acquirers was in fact paid to the Company which was benefited out of it. Further, the breaching of limits, if any, is only technical and there was no net effect on the holding annually.

k) The Company had defaulted in the servicing its debts and under serious consideration of the lenders for restructuring. The shares of the target company as on today is quoted at ₹ 13.00 and is very thinly traded. None of the Noticees had any substantial income in the span of last 5 years. Hence, the financial viability of making open offer is practically not possible. All the assets of the Promoters stood mortgaged to the lenders of the target company as collaterals which can be collaborated with the net-worth /IT Returns provided.

l) The Noticee including other 8 Noticees in the separate matter are facing number of cases before National Company Law Tribunal, Chennai by its creditors including Edelweiss, Voltas Ltd., J R Mittal, ICICI Bank Ltd., Blue Stone Infrastructure India Ltd., R Kumar, Saravana Building Products, Jyoti Industries Ltd., Dena Bank etc. The Noticees are also facing cases before High Court Chennai, Consumer Court, RERA and Arbitration Tribunals at various places. The Creditors have initiated the proceedings to recover their outstanding amounts.

m) The properties of the Noticee including other 8 Noticees in the separate matter are under attachment of various lenders i.e. Banks/financial institution. The Applicants have also received eviction notices from the lenders. The financial status of the promoters bears negative net worth as on date. Further, none of the promoters had any substantial income in span of last 5 years. Hence, making open offer is practically not possible.

n) Without prejudice to the above, it is submitted that the Noticee including other 8 Noticees in the separate matter are not solvent enough to give an open offer. ARC had taken over the loans of the target company from the Banks and financial institutions as a part of restructuring upon loans becoming NPAs and consequently assets of PAC's including the shares and investments stood mortgaged. There are no assets of the PACs without any lien on the ARC and there is no income to the PACs.

o) The amount of ₹17.45 Crore lying in Escrow Account with Axis Bank has been under attachment of Income Tax department. The Applicants have filed an Appeal which is pending before Income Tax Appellate Tribunal, Chennai for setting aside the said attachment.

p) Axis Bank had transferred the Escrow account as margin account and hence the amount of ₹17.45 Crore is not earning any interest as of now. Civil suit has been against the Axis Bank for recovery of interest amount upon the said amount of ₹ 17.45 Crore.

q) The Noticee including other 8 Noticees in the separate matter are ready to give an open offer for acquisition for amount of ₹ 17.45 Crore subject to the above attachment and the proceedings thereon.

r) The PACs including the Noticee had proposed before the Hon'ble WTM, SEBI, in the proceedings under section 11 and 11B that they would give an open offer to all the shareholders who were on records as on date of decision of the Hon'ble SC i.e. 30th October, 2014 using the amount available. Since one open offer is proposed to be given, all the other triggers

mentioned in the SCN could be subsumed into the said open offer in the peculiar facts and circumstances of the case. The Hon'ble WTM is yet to take a decision in the matter.

s) It is the case that direction as foreseen in the SCN is incapable of being complied with, the performance of obligations contained therein, would stand excused in the eyes of law. The law excuses the performance of obligations that are incapable of being performed. The Noticee placed reliance on the judgement dated September 20, 2016, of Hon'ble SC in the matter of *Gyani Chand V s State of AP in CA No. 5728/ 2005* wherein it was held as under:

" In the instant case, from the facts stated hereinabove, it is crystal clear that the appellant had no intention of committing breach of the undertaking given to the court. It was physically impossible for the appellant to produce the documents as the documents had already been given by him to his mother, on whose behalf he had collected the same from the court and the said documents had been subsequently destroyed because of a natural calamity. In our opinion, after knowing the above stated facts, the court should not have directed the appellant to produce the documents because it was impossible for the appellant to produce the documents. It would not be fair on the part of a court to give a direction to do something which is impossible and if a person has been asked to do something which is impossible and if he fails to do so, he cannot be held guilty of contempt."

t) Any direction to give an open offer or any other direction as foreseen in the SCN would be an order impossible to be implemented and the said directions are not in the interests of the target company or its shareholders.

17. I have carefully considered the allegations levelled against the Noticee, the reply/submissions of the Noticee and the relevant material available on record. It is admitted position that the Noticee has not complied with the directions of SEBI made vide letter dated November 30, 2012 as restored by Hon'ble SC vide order dated April 25, 2014, which include not carrying out the changes in the LOO, failure to send LOO to the shareholders and failure to make public announcement for revision of the offer price. It is pertinent to mention here that the violation of the provisions of regulation 11 (1) read with regulation 14(2) of 1997 Regulations by the Noticee along with the promoter group is not the charge in this case. I note that SEBI vide its Order dated November 15, 2019, has independently concluded that the Noticee who is also a Noticee in a separate matter pertaining to Marg Ltd. along with 22 other Noticees have triggered / violated the provisions of regulation 11 (1) read with regulation 14(2) of 1997 Regulations.

18. The instant case is with regard not implementing the directions of SEBI and not sending send LOO to the shareholders and failure to make public announcement for revision of the offer price

in relation to the voluntary offer made by the Noticee on October 20, 2011. SEBI had taken note of the three triggers for Open Offer during the financial years 2006-2007, 2007-2008 and 2010-2011 and vide letter dated November 30, 2012, advised the Noticee to carry out the changes in the LOO, send LOO to the shareholders and make public announcement for revision of the offer price. Admittedly, the Noticee has not complied with the directions of SEBI made vide its letter dated November 30, 2012, till date. Therefore, the charges and allegation against the Noticee stands established.

19. The Noticee has submitted difficulty in implementing those directions and completing its obligations in respect of said voluntary offer and has claimed impossibility of performance of its obligations. It has submitted that it is facing numerous cases before NCLT Chennai, Hon'ble High Court, Chennai, Consumer Court, RERA and Arbitration Tribunals at various places. It is noted that the Noticee has not submitted any documentary proof substantiating its claim in this regard. Further, the Noticee has not made any submissions with respect to the entity against whom the proceedings as stated by it has been initiated. The difficulty, if any faced by the Noticee as claimed cannot be a ground to exonerate it completely form compliance of directions as confirmed by Hon'ble SC way back in April 2014. No allowance can be given for such lethargic approach to not comply with directions after making voluntary offer even after the directions were confirmed by Hon'ble SC.

20. The case of *Gyani Chand* vs. *State of AP* as relied upon by the Noticee is distinguishable from the present matter. In the said case, the Hon'ble SC held that the appellant in question had no intention of committing breach of the undertaking given to the Court. It was physically impossible for the appellant to produce the documents as the documents had already been given by him to his mother, on whose behalf he had collected the same from the Court and the said documents had been subsequently destroyed because of a natural calamity. In the present matter, the facts of the case brings out that it is not a case of *force majeure.* I further note that while analyzing the maxim *"lex non cogit ad impossibilia",* Hon'ble Supreme Court, in then matter of *State of Rajasthan & Anr. Vs. Shamsher Singh 1985(Supp) Supreme Court Cases 416,* held that in situations involving time imperative, no allowance can be made for lethargic indifference. No allowances can be made for needless procrastination. But, allowances must surely be made for necessary efforts where intricacies and factual ramifications are involved. Thus, in my view, the *impotentia* excuses where there is a necessary or invincible disability to perform the mandatory part of the law. In the instant case, I do not find any invincible disability on the part of the Noticee to perform its obligations under regulation 18 (2) read with regulation 26 of the SAST Regulations.

21. The Noticee has submitted that it is ready to give an Open Offer for acquisition for an amount of ₹17.45 crore subject to the outcome of Income Tax Department's attachment proceedings. Noticee has not submitted any documentary proof in support of its submission with regard to any such attachment proceedings. Even if any such attachment proceedings are going on against the Noticee, the same cannot be a ground not to comply with the directions of SEBI as both the proceedings are independent of each other. Further, the obligations under the SAST Regulations are mandatory are not subservient to any such attachment proceedings. In this regard, I also rely upon the following findings in the SEBI Order dated November 15, 2019:

"…Noticees have not submitted any documentary proof in support of their submission of attachment. Even if the said attachment proceedings are going on against the Noticees, the same cannot be a ground not to comply with the directions of SEBI as both the proceedings are independent of each other. Mandatory obligations under Takeover Regulations have to be complied with by the Noticees irrespective of their obligations under other laws of the land. Noticees cannot fail to pay the consideration to the shares offered in the Open Offer on this ground. Further, Noticees and AIPL shall comply with the obligations relating to the escrow account as per Takeover Regulations irrespective of the attachment proceedings, if any, by the Income Tax Department as the same is an independent and a mandatory obligation under Takeover Regulations."

22. The Noticee has further submitted that SEBI's directions are not in the interests of the target company or its shareholders. In this regard, I note that the 52 week high price of the scrip of the Target Company as on November 8, 2019, is ₹ 22.9 and its 52 week low price is ₹ 7.6. Currently the price of the scrip is within the range of ₹ 8 - ₹ 9. Thus, the data on the movement in price of the scrip of the Target Company leaves no room for doubt that even if the offer price is calculated based on the voluntary offer price which was ₹ 91, it is still more than the present quoted price of the scrip at BSE. Therefore, the shareholders will benefit by the Open Offer, if the Noticees make the same today.

23. With regard to the Noticee's submission that it did not have any substantial income in the span of last 5 years and hence, the financial viability of making open offer is practically not possible, it is relevant to refer to the observations of Hon'ble SC in the matter of *Nirma Industries Ltd.* vs. *SEBI* decided on May 9, 2013, wherein it was held that:

"*…we are unable to stretch the meaning of terms such circumstances from the realm of impossibility to the realm of economic undesirability. In essence, the submission made by Mr. Divan is that unless they are allowed to walk away from the public offer they would have to bear losses which would otherwise have been shared by the erstwhile*

shareholders of the target company. Accepting such a proposition would be contrary to the aims and objectives of the Takeover Code which is to ensure transparency in acquisition of a large percentage of shares in the target company. It would also encourage undesirable and speculative practices in the stock market. Therefore, we are unable to accept the submission of Mr. Shyam Divan. Regulation 27(1) (d) would empower the SEBI to permit withdrawal of an offer merely because it has become uneconomical to perform the public offer."

24. Further, the Hon'ble SC in the matter of *SEBI* vs. *Akshya Infrastructure Pvt. Ltd.* decided on April 25, 2014, has inter-alia made the following observation:

"*We are also not impressed by the submission of Mr. Nariman that it has now become economically impossible to give effect to the public offer. This very submission has been rejected in Nirma Industries Ltd. (supra). We reiterate our opinion in Nirma Industries Ltd. (supra) that under Clause 27(1)(b)(c) and (d), a Public Offer, once made, can only be permitted to be withdrawn in circumstances which make it virtually impossible to perform the Public Offer. In fact, the very purpose for deleting Regulation 27(1)(a) was to remove any misapprehension that an offer once made can be withdrawn if it becomes economically not viable.*"

25. The principle laid down for withdrawal of Open Offer as referred in the aforesaid two observations of the Hon'ble SC will also be applicable to situations where Open Offer was due by the acquirer but the same was not made and later on the Acquirer claims economic / financial hardship for not making an Open Offer. The changed condition, if any, of the Noticee is not a valid reason for absolving it from its liability arising out of breach of the relevant provisions of SAST Regulations.

26. I, therefore, conclude that by disobeying the directions of SEBI as specified in the letter dated November 30, 2012 and failing to send LOO to the shareholders and in making public announcement for revision of the offer price in compliance with SEBI observation letter dated November 30, 2012, the Noticee contravened the provisions of regulation 18(2) read with regulation 26 of the SAST Regulations. The consequence of this breach in the facts and circumstances as found hereinabove, deserve imposition of monetary penalty under section 15H (iii) of the SEBI Act. The penalty under section 15H (ii) of the SEBI Act on the relevant date was *"twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher"*.

27. For the purpose of adjudication of quantum of penalty it is relevant to mention that under section 15I of the SEBI Act imposition of penalty is linked to the subjective satisfaction of the Adjudicating Officer. While adjudging the quantum of penalty the adjudicating officer has discretion and such discretion should be exercised having due regard to the factors specified in section 15J. The factors stipulated in Section 15J of the SEBI Act, which reads as follows:-

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

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

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

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

(c) the repetitive nature of the default.

Explanation-

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

28. Having regard to the factors listed in section 15J and the guidelines issued by Hon'ble Supreme Court of India in *SEBI Vs Bhavesh Pabari Civil Appeal No(S).11311 of 2013* vide judgement dated February 28, 2019, it is noted that evading the mandatory obligations by such deliberate defiance as found in this case would definitely be profitable to the Noticee as it has avoided incurring costs of compliance of open offer obligations which entail appointment of a SEBI registered merchant banker, making public announcement, payment of consideration to the public shareholders who opt to exit in open offer at the price determined in terms of SAST Regulations. To this extent, it can be said that the Noticee has earned unfair advantage. Such avoidance in compliance of mandatory provisions is against the interests of investors in the facts and circumstances of this case.

29. Apart from the above, despite dismissal of its review application by Hon'ble SC, the Noticee has wilfully disregarded the directions of SEBI made vide letter dated November 30, 2012. I have further noted that vide an Order dated November 15, 2019, *inter-alia* the promoter group of the Target Company have been directed to make an Open Offer revising the offer price which shall be the highest offer price calculated in terms of the SAST Regulations for all the subject Mandatory Open Offers i.e. for all the other triggers mentioned in the SCN and Voluntary Open Offer made by the Noticee on October 20, 2011 and in terms of SEBI letter dated November 30, 2012, within a period of 45 days from the date of service of the said Order. Further, from the SEBI Order dated November 15, 2019, it is noted that SEBI had received complaints from investors as the promoter group of the Target Company have not made an Open Offer during the relevant period and thus, the interests of investors have been affected in the absence of Open Offer from the Noticee.

30. It is relevant to mention that with regard to a separate proceedings for failure to make open offer with regard to previous violation of regulation 11 (1) read with regulation 14 (2) of the SAST

Regulations by certain entities including the Noticee, by a separate order, the penalty under section 15H (ii) of the SEBI Act has been imposed. Since the voluntary offer of Noticee has been merged in the open offer obligations covered in the said other order, the quantum of penalty would mitigate with regard to the violations by the Noticee in the instant proceedings. In addition, it is also a mitigating factor that the enforcement proceedings have been initiated belatedly after the review petition of the Noticee was dismissed by the Hon'ble SC on October 30, 2014. However, the brazen failure as found in this case, had clearly defeated the purposes of the SAST Regulations i.e. investor protection. Considering the objective and purpose of SAST Regulations, in my view, the default is grave and the gravity of this matter cannot be ignored. Therefore, no lenient view should be taken in this matter merely on the grounds of delay in enforcement actions and the case deserves imposition of monetary penalty proportionate to the default as found in this case.

31. Considering the peculiar facts and circumstances of the case including the mitigating facts as brought out above and exercising the powers conferred upon me under section 15I of the SEBI Act read with rule 5 of the Adjudication Rules, I, hereby impose a monetary penalty of ₹ 25,00,000/- (Rupees Twenty Five Lakh Only) on the Noticee under section 15H (iii) of SEBI Act. In my view, the said penalty is commensurate with the specific violation of regulation 18 (2) read with regulation 26 of the SAST Regulations as committed by the Noticee in this case.

32. The Noticee shall remit / pay the said total amount of penalty within 45 days of receipt of this order in either of the way of demand draft in favour of *"SEBI - Penalties Remittable to Government of India"*, payable at Mumbai, or by following the path at SEBI website www.sebi.gov.in, ENFORCEMENT > Orders > Orders of AO > PAY NOW; OR by using the web link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html. In case of any difficulties in payment of penalties, the Noticee may contact the support at portalhelp@sebi.gov.in.

33. The Demand Draft or details and confirmation of e-payment made in the format as given in table below shall be sent to *"The Division Chief, EFD-DRA-II, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C- 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051"* and also to e-mail id :- tad@sebi.gov.in.

1	Case Name	
2	Name of the 'Payer/Noticee'	
3	Date of Payment	
4	Amount Paid	
5	Transaction No.	
6	Bank Details in which payment is made	
7	Payment is made for - (like penalties along with order details)	

34. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated under section 28A of the SEBI Act, 1992 for realization of the said amount of penalty along with interest thereon, *inter alia,* by attachment and sale of movable and immovable properties.

35. In terms of Rule 6 of the Adjudication Rules, copies of this order are sent to the Noticee and also to SEBI.

Date: March 16, 2020
Place: Mumbai

Santosh Shukla
Adjudicating Officer