WTM/MPB/EFD-1-DRA-III/66/2019

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

Under Sections 11, 11(4) and 11B of the Securities and Exchange Board of India Act, 1992

In Re: Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

In the matter of Electrosteel Castings Limited

In respect of:

1	**Uma Kejriwal 13, Gurusaday Road, Kolkata, 700019**	**2**	**Ghanshyam Kejriwal 13, Gurusaday Road, Kolkata, 700019**	**3**	**Mayank Kejriwal HUF 13, Gurusaday Road, Kolkata, 700019**
4	**Mayank Kejriwal, Trustee, Priya Manjari Trust 13, Gurusaday Road, Kolkata, 700019**	**5**	**Uddhav Kejriwa 13, Gurusaday Road, Kolkata, 700019**	**6**	**Uddhav Kejriwal HUF 13, Gurusaday Road, Kolkata, 700019**
7	**Shaswat Kejriwal 13, Gurusaday Road, Kolkata, 700019**	**8**	**Pallavi Kejriwal (Noticee 8) 13, Gurusaday Road, Kolkata, 700019**	**9**	**Samriddhi Kejriwal (Noticee 9) 13, Gurusaday Road, Kolkata, 700019**
10	**Uddhav Kejriwal, Trustee, Samriddhi Trust 13, Gurusaday Road, Kolkata, 700019**	**11**	**Malay Commercial Enterprises Ltd. 19, Camac Street, Kolkata, 700017**	**12**	**G. K. & Sons Pvt. Ltd. 13, Gurusaday Road, Kolkata, 700019**

13	**Uttam Commercial Co. Ltd. 19, Camac Street, Kolkata, 700017**	**14**	**Electrocast Sales India Ltd. 13, Gurusaday Road, Kolkata, 700019**	**15**	**Escal Finance Services Ltd. 19, Camac Street, Kolkata, 700017**
16	**Global Exports Ltd. 19, Camac Street, Kolkata, 700017**	**17**	**Cubbon Marketing Pvt. Ltd. 19, Camac Street, Kolkata, 700017**	**18**	**Sri Gopal Investments Ventures Ltd. 14A, Rowland Road, Kolkata – 700020**
19	**Quinline Dealcomm Pvt. Ltd. 19, Camac Street, Kolkata, 700017**	**20**	**Ellenbarrie Developers Pvt. Ltd. 19, Camac Street, Kolkata, 700017**	**21**	**Greenchip Trexim Pvt. Ltd. 19, Camac Street, Kolkata, 700017**
22	**Calcutta Diagnostics Centre Pvt. Ltd. 19, Camac Street, Kolkata, 700017**	**23**	**Umang Kejriwal - Trustee of Sreeji Family Benefit Trust 19, Camac Street, Kolkata, 700017**	**24**	**Mayank Kejriwal - Trustee of Sreeji Family Benefit Trust 19, Camac Street, Kolkata, 700017**
25	**Asha Kejriwal - Trustee of Sreeji Family Benefit Trust 19, Camac Street, Kolkata, 700017**	**26**	**Aarti Kejriwal - Trustee of Sreeji Family Benefit Trust 19, Camac Street, Kolkata, 700017**	**27**	**Mayank Kejriwal 19, Camac Street, Kolkata, 700017**
28	**Aarti Kejriwal 19, Camac Street, Kolkata, 700017**				

BACKGROUND

1. Electrosteel Castings Limited. (hereinafter referred to as "**ECL / Target Company**") was incorporated on November 26, 1955 and has its registered office at Rathod Colony, Sundergarh, Rajgangpur, Odisha, 770017. It is engaged in the water infrastructure business. Its securities are listed on BSE Limited and National Stock Exchange of India Limited. As on March 31, 2019, the Promoter and Promoter Group of the Target Company holds 50.62% of the total share capital and the remaining

49.38% is held by public shareholders.

2. An application was filed with Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") by Sreeji Family Benefit Trust (hereinafter referred to as "**Trust**") seeking exemption from open offer obligations, under Regulation 11(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as "**Takeover Regulation**"), for the proposed acquisition of shares from promoter group entities in the Target Company. The Trust belongs to the promoter group of Target Company.The aforesaid application was placed before the Takeover Panel. Pursuant to deliberations in its meeting held on October 20, 2016, the Panel recommended rejection of the request for exemption. The following is the recommendation of Panel in this regard:

   "The Panel took note of the clause in the trust deed which provides for appointment of additional trustees (out of common friends and relatives) and also the submission of the applicant that it is not in a position to amend the said clause to do away with this provision. The Panel did not accept the submission of the applicant and recommended that the matter be rejected…"

3. Meanwhile, the Trust had already undertaken part of the proposed transaction without exemption being granted by SEBI. SEBI received a report dated April 9, 2015 from Sreeji Family Benefit Trust (hereinafter referred to as "**Acquirer / Trust**") under Regulation 10 (7) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as "**Takeover Regulation**") from the Trustees of the Acquirer that they had acquired 22.78% voting rights in the Target Company on March 31, 2015.

4. Pursuant to the aforesaid report, an examination was carried out by SEBI *inter alia* to ascertain whether there were any possible violations of provisions of Securities and Exchange Board of India, Act 1992 (hereinafter referred to as the "**SEBI Act**") and Takeover Regulations at the time of the acquistion of shares in the Target Company.

SHOW CAUSE NOTICE

5. Consequent to the completion of examination, a common Show Cause Notice (hereinafter referred to as "**SCN**") dated February 14, 2018 was served on the Promoter group of the Target Company as disclosed by ECL to BSE Ltd. as on quarter ending December, 2014, namely Ms. Uma Kejriwal, Mr. Ghanshyam Kejriwal, Mayank Kejriwal HUF, Mr. Mayank Kejriwal (as trustee of Priya Manjari Trust), Mr. Uddhav Kejriwal, Uddhav Kejriwal HUF, Mr. Shaswat Kejriwal, Ms. Pallavi Kejriwal, Ms. Samriddhi Kejriwal, Mr. Uddhav Kejriwal (as trustee of Samriddhi Trust), Malay Commercial Enterprises Limited, G K & Sons Private Limited, Uttam Commercial Company Limited, Electrocast Sales India Limited , Escal Finance Services Limited, Global Exports Limited, Cubbon Marketing Private Limited, Sri Gopal Investment Ventures Limited, Quinline Dealcomm Private Limited, Ellenbarrie Developers Private Limited, Greenchip Trexim Private Limited, Calcutta Diagnostics Centre Private Limited, Mr. Umang Kejriwal (as trustee of Sreeji Family Benefit Trust), Mr. Mayank Kejriwal (as trustee of Sreeji Family Benefit Trust), Ms. Asha Kejriwal (as trustee of Sreeji Family Benefit trust), Ms. Aarti Kejriwal (as trustee of Sreeji Family Benefit Trust), (hereinafter collectively referred to as "**Noticees**") in the extant matter. As disclosed by ECL to BSE Ltd. as on quarter ending December, 2014, the aforesaid Noticees being part of the Promoter Group were holding 53.01% of shareholding in the Target Company.

6. The facts and allegations as set out in the SCN were as follows:

   6.1. An application dated August 07, 2014 was filed by the Acquirer trust, viz. Sreeji Family Benefit Trust seeking exemption from open offer obligations, under Regulation 11(1) of the Takeover Regulations, for the proposed acquisition of shares from Promoter Group entities in the Target Company.

   6.2. The said application was referred to the Takeover Panel for making recommendations in terms of the proviso to Regulation 11(5) of Takeover Regulations. Pursuant to deliberations in its meeting held on October 20, 2016, the Takeover Panel recommended rejection of the request for exemption.

Meanwhile, the Acquirer, vide its letter dated October 18, 2016, withdrew the application. However, the Acquirer had already acquired part of the proposed transaction on March 31, 2015 without receiving any exemption from SEBI (Initially the Trust in its proposed exemption application had proposed to acquire 11.47% directly and 41.54% indirectly from the Promoter Group entities.).

6.3. Subsequent to the acquisition on March 31, 2015, SEBI received a report dated April 9, 2015 under Regulation 10(7) of Takeover Regulations, from Trustees of the Acquirer, wherein the following observations were made:

6.3.1. 8.26% shareholding in the Target Company was directly acquired by the Acquirer from eight Promoter Group entities of Target Company i.e., Mr. Umang Kejriwal, Ms. Asha Kejriwal, Mr. Madhav Kejriwal, Umang Kejriwal (HUF), Ms. Nityangi Kejriwal, Ms. Priya Sakhi Kejriwal Mehta, Mr. Mayank Kejriwal and Ms. Aarti Kejriwal.

6.3.2. The right to exercise voting rights on 14.51% shareholding held by two Promoter Group companies viz. G.K. Investments Ltd. (hereinafter referred to as "**GKIL**") and Murari Investment & Trading Co. Ltd. (hereinafter referred to as "**MITL**") in the Target Company was also indirectly acquired by the Acquirer by way of acquisition of shareholding in these two Promoter Group companies from five entities belonging to the promoter group of the Target Company.

6.3.3. In GKIL, 93.72% shareholding was acquired by the Trust.

6.3.4. In MITL, 70.84% shareholding was acquired by the Trust.

6.4. Thus, by virtue of aforesaid direct and indirect acquisitions, approximately 22.78% voting rights in the Target Company was acquired by the Acquirer. This led to an increase in voting rights (both direct and indirect) of the Acquirer in the Target Company from 0% to 22.78%.

6.5. The Acquirer is a trust, on whose behalf shares have been acquired by the

Trustees from a few individuals and HUFs. The said inter-se transfers, it is alleged that do not fall under the exempted category of transfer between 'immediate relatives'. As per Trust Deed constituting the said Trust, there are four Trustees of the Trust divided into two groups i.e., Mr. Umang Kejriwal along with his wife, Ms. Asha Kejriwal and Mr. Mayank Kejriwal and his wife, Ms. Aarti Kejriwal.

6.6. On March 31, 2015, Mr. Umang Kejriwal, Ms. Asha Kejriwal, Mr. Madhav Kejriwal, Umang Kejriwal (HUF), Ms. Nityangi Kejriwal, Ms. Priya Sakhi Kejriwal Mehta, Mr. Mayank Kejriwal, Ms. Aarti Kejriwal, GKIL and MITL (hereinafter collectively referred to as "**Sellers**") transferred 22.78% voting rights (both direct and indirect) of the Target Company to the Acquirer.

6.7. It is alleged that the Promoter Group entities excluding sellers' along with Ms. Asha Kejriwal and Ms. Aarti Kejriwal are PACs for the acquisition made on March 31, 2015.

6.8. As on December 31, 2014 (as per disclosures made to BSE Ltd.), total shareholding of the Promoter Group in the Target Company was 53.01%. To arrive at the pre and post-acquisition shareholding of the Acquirer along with PACs, entire shareholding of Promoters who have directly transferred their holding (i.e. sellers) to the Acquirer and also the shareholding of GKIL and MITL in the Target Company (which has been indirectly acquired by Trust) has been excluded. Thus, the following increase in the shareholding is observed pursuant to the transaction dated March 31, 2015 based on shareholding filed by the Target Company as on quarter ending December 2014, report dated April 9, 2015 and disclosures filed by the Trustees with BSE Ltd. under Regulations 10(5) and 10(6) of Takeover Regulations:

Sl. No.	Name of Acquirer/ PAC	Pre-acquisition shareholding (Number) as on December 31, 2014	Pre-acqn shareholding (%)	Post-acquisition shareholding (Number) as on March 31, 2015	Post-acqn shareholding (%)
1	Sreeji Family Benefit Trust*	200	0	81281750	22.78
2	Uddhav Kejriwal	3227540	0.9	3227540	0.9
3	Uddhav Kejriwal HUF	1554550	0.44	1554550	0.44
4	Mayank Kejriwal HUF	1022940	0.29	1022940	0.29
5	Shashwat Kejriwal	742310	0.21	742310	0.21
6	Ghanshyam Kejriwal	576100	0.16	576100	0.16
7	Uma Kejriwal	336000	0.09	336000	0.09
8	Pallavi Kejriwal	187950	0.05	187950	0.05
9	Samriddhi Kejriwal	156100	0.04	156100	0.04
10	Priya Manjari Trust	27000	0.01	27000	0.01
11	Samriddhi Trust	24500	0.01	24500	0.01
12	G K & Sons Pvt Ltd	36731833	10.29	36731833	10.29
13	Electrocast Sales India Ltd	29899981	8.38	29899981	8.38
14	Uttam Commercial Co. Ltd.	18590570	5.21	18590570	5.21
15	Malay Commercial Enterprises Ltd	3748190	1.05	3748190	1.05
16	Sri Gopal Investment Ventures Ltd	3732885	1.05	3732885	1.05
17	Cubbon Marketing Pvt Ltd	2500000	0.7	2500000	0.7
18	Quinline Dealcomm Pvt Ltd	319962	0.09	319962	0.09
19	Escal Finance Services Ltd	250000	0.07	250000	0.07
20	Ellenbarrie Developers Pvt. Ltd.	213308	0.06	213308	0.06
21	Global Exports Ltd	200000	0.06	200000	0.06
22	Greenchip Trexim Pvt Ltd	155000	0.04	155000	0.04
23	Calcutta Diagnostics Centre Pvt Ltd	120000	0.03	120000	0.03
	Total	**104316919**	**29.23**	**185598469**	**52.01**

**Note - The post-acquistion shareholding of Sreeji Family Benefit Trust consists of 2,94,88,910 shares (8.26% holding) acquired by the trust directly from a few other promoters and control over voting rights on 5,17,92,640 shares (14.51%) acquired indirectly by virtue of transfer of shareholding in two promoter group entities, viz. G K Investments Ltd and Murari Investment & Trading Company Ltd.*

6.9. From the above, it is observed that the shareholding of the Acquirer along with

PACs has increased from 29.23% on December 31, 2014 to 52.01% on March 31, 2015. It is alleged that no public announcement was made for open offer by the Acquirer along with PACs for the said acquisition of shares. In view of the increase in shareholding and voting rights from 29.23% to 52.01%, it is alleged that the Acquirer along with PACs has triggered open offer obligations under Regulation 3(2) of Takeover Regulations.

7. Thus, based on the above, the Noticees were advised to show cause as to why suitable directions in terms of Sections 11 and 11B of SEBI Act read with Regulation 32 of Takeover Regulations should not be initiated against them for the alleged violation of failure to make public announcement for open offer.

REPLY and HEARING

8. In response to the SCN, the authorised representative of the Noticees, Khaitan & Co. (hereinafter referred to as "**AR**") vide its letters dated March 9, 2018 and March 15, 2018, requested for inspection of documents in the matter. Noticees request was accede to and vide an email dated April 3, 2018, Noticees were granted an opportunity of inspection on April 17, 2018. The inspection was conducted by the AR on the scheduled date and photocopy of certain documents was also given to the Noticees.
9. The AR vide its letter dated May 7, 2018 requested for photocopy of all the documents in the possession of SEBI in the instant matter irrespective of whether the same has been relied upon for approval of initiation of proceedings. SEBI vide its letter dated May 16, 2018 provided photocopy of few more documents to the Noticees and advised the Noticees to submit a reply to the SCN within 21 days as inspection of all the documents relied upon to issue the SCN has already been provided to them.
10. The AR vide its letter dated August 7, 2018 *inter alia* made the following submissions on behalf of the Noticees:

    10.1. In 2014, the members of the promoter and promoter group of the Target Company decided to realign their shareholding with a view to provide joint

family control over the Target Company through a trust mechanism. Accordingly, the Sreeji Family Benefit Trust was established under the Indian Trusts Act, 1882 (hereinafter referred to as "**Trusts Act**") through a deed of indenture dated June 4, 2014. The settlors, the trustees and the beneficiaries of the Trust all form part of the Promoter and Promoter Group of the Target Company and are all part of the same family, i.e., the Kejriwal family. Mr. Umang Kejriwal and Mr. Mayank Kejriwal, the settlors of the Trust, each settled 100 equity shares of the Target Company in the Trust for the objects set out in the deed of indenture. The trustees of the Trust are Mr. Umang Kejriwal and his wife, Ms. Asha Kejriwal, and Mr. Mayank Kejriwal and his wife, Ms. Aarti Kejriwal (the trustees of the Trust are hereinafter referred to collectively as "**Trustees**"). The object of the Trust is to hold and apply the trust property and income therefrom for the common benefit of the beneficiaries, namely, Ms. Asha Kejriwal, Mr. Mayank Kejriwal and Ms. Aarti Kejriwal.

10.2. In order to give effect to the above specified objects of the Trust, it was decided that the Trustees would receive by way of gift: (1) equity shares of the Target Company held by the persons forming part of the Promoter and Promoter Group of the Target Company; and (2) equity shares of companies forming part of the promoter and promoter group of the Target Company which were held by persons forming part of the Promoter and Promoter Group of the Target Company. Such transfers would be effected without resulting in any increase or change in the overall Promoter and Promoter Group shareholding in the Target Company.

10.3. It was determined that the acquisitions envisaged would be eligible for an exemption under Regulation 10(i)(a)(i) of the Takeover Regulations, i.e., the exemption available for acquisitions of shares pursuant to inter-se transfers among immediate relatives. From the details of the direct and indirect transfers provided above, it can be noted that the transferors and the transferees all formed part of the Kejriwal family and were immediate relatives of each other, thereby satisfying the condition laid down in Regulation 10(1)(a)(i) of the

Takeover Regulations.

10.4. By relying on the order of the Hon'ble Supreme Court of India dated August 4, 2014 in *Gorkha Security Services* v. *Government (NCT of Delhi),* (2014) 9 SCC 105, it was submitted that the SCN is vague, ambiguous and does not satisfy

the principles of natural justice as it does not put to notice about what is the specific measure intended to be adopted by SEBI against the Noticees. Therefore, it must be recalled and discharged on this ground alone.

10.5. The SCN is issued nearly 3 years after the facts occurred, i.e., on February 14, 2018, which in itself violates principles of natural justice. No explanation has been provided for this inordinate delay. In the aforesaid circumstances, we submit that the SCN is liable to be recalled and discharged.

10.6. The concept of a trust is the relationship between the Trustee and the beneficiary in connection with any property, with the Trustee holding the property in question for the benefit of the beneficiary. If the property in question are shares of a company, it is submitted that the Trustee or Trustees would be the "member" of the company. This is supported by the contents of the SEBI Circular dated July 20, 2006 issued to depositories and the guidelines issued by depositories on the subject (for instance, the National Securities Depository Limited circular dated March 24, 2008 on 'Guidelines for Opening of Trust Accounts'), wherein it has been clarified that in the case of private trusts, Hindu Undivided Families and partnership firms under the Partnership Act, 1932, the beneficial owner account should be opened in the name of the natural person (Trustee in the case of a trust, karta in the case of a HUF or a partner in the case of a partnership firm). In the case of a private trust, the NSDL circulars further provide that only the Trustee's name shall be entered in the record as a beneficial owner.

10.7. Further, under the Companies Act, 2013, it is only a "member" who can exercise voting rights i.e. whose name is entered in the register of members or whose name is entered in the records of the depository as the beneficial owner

of the shares. Therefore, in the case of trusts, it is submitted that it is the Trustee who would be the "member" and thereby would be the person entitled to exercise voting rights pertaining to shares held in trust.

10.8. Applying the above submissions to the context of the Takeover Regulations, it is submitted that implications under the Takeover Regulations for creation of a trust over a company's shares must necessarily have regard to who the Trustees are as they are the ones entitled to exercise the voting rights. In the case of an acquisition by a Trustee on behalf of a trust, it is submitted that, apart from considering whether such acquisition by a Trustee would attract an open offer obligation, one must also consider whether any exemption provision would become available by considering the Trustee as the Acquirer.

10.9. In the instant case, as discussed earlier, two of the Trustees, namely Mr. Umang Kejriwal and Mr. Mayank Kejriwal, have acquired shares of the Target Company both directly and indirectly from their immediate relatives. Therefore, by virtue of such relationship of the Trustee with the transferors, the exemption available for inter-se transfer of shares among 'immediate relatives' contained in Regulation 10(1)(a)(i) of the Takeover Regulations becomes squarely applicable.

11. Vide hearing notice dated July 24, 2018, Noticees were granted an opportunity of hearing on October 3, 2018 at SEBI Bhavan, Mumbai. The AR vide its email dated October 1, 2018, requested to adjourn the hearing as its counsel was pre-occupied with a hearing in a separate matter before SEBI. Vide an email dated October 3, 2018, Noticees were informed that their request for adjournment was acceded to and they were granted another opportunity of hearing on October 17, 2018.

12. On the day of scheduled hearing, due to paucity of time, the matter was part heard and a mutually convenient date i.e. November 16, 2018 was fixed to complete the hearing in the matter. However, Noticees were informed vide an email dated October 29, 2018 that the scheduled hearing on November 16, 2018 has been postponed to December 11, 2018. In response to the same, the AR vide its email dated November 1, 2018 informed SEBI about the unavailability of its counsel on December 11, 2018

and requested to adjourn the hearing. Noticees were granted another opportunity of hearing on January 9, 2019 and the same was informed to them vide an email dated November 30, 2018. The ARs again requested vide its email dated January 3, 2019, to adjourn the hearing as the counsel was unavailable on the scheduled date of hearing. The next hearing in the matter was scheduled on February 14, 2019 but the same was also adjourned due to administrative exigencies. Subsequently, Noticees were granted an opportunity of hearing on April 9, 2019 to complete the hearing in the extant matter. The same was informed to them, vide an email dated March 5, 2019. In response to the same, the AR again vide its email dated April 8, 2019 requested to adjourn the hearing due to an urgent unexpected development before Hon'ble Supreme Court of India wherein its counsel had to appear on April 9, 2019. In view of the same, the Noticees were granted a final opportunity of hearing in the matter on April 24, 2019. The same was informed to them vide an email dated April 8, 2019.

13. On the day of scheduled hearing, i.e., on April 24, 2019 Mr. Somasekhar Sundaresan, Mr. Abhishek V., Mr. Manish C., Mr. Tomu Francis, Ms. Yamini Kumar and Ms. Kruthi Murhty appeared as ARs on behalf of the Noticees in the matter. The ARs drew reference to the earlier arguments made on behalf of the Noticees on October 17, 2018 when the arguments could not be completed due to paucity of time and the matter was adjourned part heard. The ARs referred to the factual background of the matter and the applicable provisions of the SEBI Act which he had submitted in the earlier hearing. At the time of the hearing, the following was *inter alia* submitted on behalf of the Noticees:

    13.1. The Companies Act, 2013 is the law under which voting rights are exercised. Section 47 of the Companies Act, 2013 (corresponding to Section 87 of the erstwhile Companies Act, 1956 deals with the rights of equity and preference shareholders. Section 47(1)(a) provides that equity shareholders shall have the right to vote on every resolution placed before the company.

    13.2. Only a member whose name appears in the register of members would

have the right to vote. A depository is the statutory kind of a trust. Shares are held in the name of NSDL / CDSL while the shareholders are the beneficial owners.

13.3. Where shares are held in demat form, a person named as the beneficial owner in the records of the depository, would have the right to vote (Reference drawn to Section 2(55) of the Companies Act 2013 for definition of "member").

13.4. The trustees are the members under the Companies Act and they acquire the voting rights and the entitlement to exercise voting rights.

13.5. The difference between the Trustee Hat i.e. person (in the capacity of a trustee) and the Individual Hat i.e. person (as an individual) is irrelevant for the purpose of Takeover Regulations. The individual is sovereign to say in what manner he will vote.

13.6. SEBI has rightly always considered who has acquired the entitlement to vote as opposed to considering who enjoys the benefits. Such a consistent adherence to this well accepted position of law focusing on legal estate as opposed to beneficial estate, when it comes to the Takeover Regulations is borne out not only in informal guidance issued by SEBI but also in the legislative changes made by SEBI in the form of circulars and guidelines. The foregoing is borne out by the following:-

13.6.1. SEBI's informal guidance dated July 7, 2004 in the matter of Praj Industries where SEBI opined that the beneficial interest in relation to the shares vested in a trust would not be relevant and what would matter is the entitlement to voting rights that would be held by a trustee.

13.6.2. SEBI's informal guidance in the matter of Mukta Arts Ltd dated May 12, 2005, where SEBI clearly articulated the distinction between trustees and beneficiaries.

13.7. The *inter-se* transfers are merely a re-alignment of existing shareholding held by the Promoter Group and there has been no acquisition from any third

parties. Therefore, the collective shareholding of the Promoter Group in the Target Company which was 52.01% prior to the inter-se transfers, has remained unchanged post the inter-se transfers.

13.8. There is an error in the SCN with respect to computation of shareholding. To illustrate, even assuming that the Family Trust was the "acquirer", the SCN's approach in computing the pre and post-acquisition holding of the Family Trust suffers from a fundamental contradiction, as stated below:-

13.8.1. In arriving at the pre-acquisition holding of the Family Trust, the SCN excludes the shareholding of the sellers i.e. Noticee Nos. 1 to 24 who have vested their shares in the Family Trust, on the unstated and incorrect premise that a buyer and seller cannot act in concert; and

13.8.2. Yet, in computing the post-acquisition holding, it includes not only the shareholding vested in the Family Trust but also adds the entitlement to voting rights of the very same persons it excluded above as not being in concert, resulting in the patently erroneous conclusion that the "Family Trust" has acquired 52.01% of the voting rights and triggered Regulation 3(2) read with Regulation 3(3) of the Takeover Regulations.

13.9. The above computation is apparently based on the Hon'ble Bombay High Court judgment in the matter of K K Modi which has no application in the present case as the facts and circumstances of the present case are entirely different from the K K Modi case.

Noticees were granted two weeks' time to file their additional written submissions in the matter.

14. Post hearing, the AR vide its letter dated May 15, 2019 *inter alia* made the following submissions:

14.1. For purposes of Takeover Regulations, the charging provisions which explicitly deal with acquisition to entitlement of voting rights as the heart of the Section 10(3) of the Depositories Act, 1996 triggering ingredient, regard must

be had to who the "member" is. This is because it is a member who is entitled to exercise voting rights.

14.2. In fact, Parliament has taken care to specially legislate stipulate disclosure of a beneficial interest when the benefits to shares held by a member flows to a different beneficiary with the member being a trustee. Under Section 187C of the Companies Act, 1956 and Section 89 of the Companies Act, 2013, disclosure of shares held in trust has always been and is a statutory requirement. This requirement is only because the beneficial owner has no voting rights. In the absence of voting rights, the Takeover Regulations have no application at all.

14.3. Under Section 153 of the Companies Act, 1956, a company was barred from taking notice of a trust, whether express, implied or constructive, in its register of members. Under the Companies Act, 2013, with the introduction of the Beneficial Owner Rules, this framework was modified to take note of the same. In any event and in any view of the matter, what would stand out clearly is that the beneficiary of a trust can never be entitled to exercise the voting rights attached to equity shares held by the Trustee under the trust except where the beneficiary and the Trustee are one and the same. Put differently, it is the Trustee who is the member and who would be entitled to vote.

14.4. On facts, when the Promoters of a Target Company settle the benefits in a trust, one must see whether there is acquisition of voting rights distinct from who enjoys the benefits.

14.5. The *inter-se* Transfers are merely a re-alignment of existing shareholding held by the promoter group and there has been no acquisition from any third parties. Therefore, the collective shareholding of the promoter group in the Target Company which was 52.01% prior to the Inter-se Transfers, has remained unchanged post the Inter-se Transfers. Regulation 3(l) therefore has no application since the collective holding of the promoter group of the Target Company is already above 25%. Likewise. therefore, there has been no "additional acquisition" of shares and voting rights by the promoter group as a

whole under Regulation 3(2) since the collective holding has remained unchanged;

14.6. Regulation 3(1) of Takeover Regulations therefore has no application since the collective holding of the Promoter Group of the Target Company is already above 25%. Likewise there has been no "additional acquisition" of shares and voting rights by the Promoter Group as a whole under Regulation 3(2) of Takeover Regulations since the collective holding has remained unchanged.

14.7. Similarly, Regulation 3(l) read with Regulation 3(3) of Takeover Regulations would also have no application since no individual constituent of the Promoter Group of the Target Company has acquired 25% or more of the voting rights, following the inter-se transfers. Both, the individual as well the collective shareholding of the Promoter Trustees (ignoring holds of all PACs) is below 25%.

14.8. Regulation 3(2) read with Regulation 3(3) of Takeover Regulations can also have no application as the pre-acquisition holding of the Promoter Trustees (ignoring holdings of all persons acting in concert) was less than 25%. Regulation 3(2) read with Regulation 3(3) can apply only if the pre-acquisition holding of the individual acquirer (ignoring holding of all PACs) was over 25%.

14.9. If Noticee Nos. 1-24 are not persons acting in concert with the Family Trust for purposes of the inter-se transfer, they cannot become persons acting in concert post the inter-se transfers, for their shareholding to the be aggregated with that of the Family Trust. Therefore, the Family Trust's holding alone, post the inter-se transfer would be 22.78% which admittedly would not trigger the Takeover Regulations.

14.10. Yet another error relates to the manner in which the SCN determines the persons who are acting in concert with the Family Trust. The SCN excludes the holdings of the two Promoter Trustees who are managing trustees and who are entitled to exercise the voting rights in relation to the shares vested in the Family

Trust. Yet, two other trustees (Noticee Nos. 25 and 26) who do not have any entitlement to voting rights in relation to the shares vested in the Family Trust are treated as persons acting in concert with the Family Trust. This is an unsustainable position.

14.11. The constituents of the Promoter Group are deemed persons acting in concert, unless the contrary is established (Regulation 2(1)(q)(2)(iv) of the Takeover Regulations). Nothing to the contrary exists.

14.12. Indeed, Regulation 3(3) (whether applied in conjunction with Regulation 3(1) or Regulation 3(2)) of the Takeover Regulations, requires SEBI to have regard to the individual holding of the Acquirer, while disregarding the holding of persons acting in concert. Therefore, the aggregation of holdings of persons acting in concert post the inter-se transfers with that of the Family Trust is in any case erroneous.

14.13. Apart from these contradictions, such an incorrect reading of the law, would mean that acquisition of a single share by a constituent of the Promoter Group would be deemed to be an acquisition of all shares and voting rights held by other members of the group and trigger an open offer. This could never have been the intention behind the charging provisions of the Takeover Regulations which are aimed at giving an exit to shareholders in the event of a substantial acquisition of shares or change in control. It is well settled that an interpretation which produces absurd consequences ought not to be adopted.

14.14. The Family Trust being a private trust, cannot hold shares in its own name. The "Acquirers" in the inter-se transfers, who are entitled to the voting rights in the Target Company are the Promoter Trustees. The size of the entitlement to voting rights that is changing hands i.e. 22.7 8% with each Promoter Trustee holding 11.39%, does not result in charging provisions of the Takeover Regulations being triggered.

FINDINGS & CONSIDERATIONS

15. I have perused the SCN, oral submissions, written submissions and other materials

available on record. On perusal of the same, the following issues arise for consideration:

i. *(a) Who are the Acquirers, (b) who are PACs for the purpose of acquisition of shares in the Target Company and (c) what is the percentage of additional shares with an entitlement to voting rights, acquired by the Acquirers and PACs?*
ii. *Whether the acquisition of shares by the Acquirers and PACs has led to the violation of Regulation 3(2) of Takeover Regulations?*
iii. *If answer to the aforesaid question is in affirmative, what directions, if any have to be issued against the Acquirers and PACs?*

16. Before delving into the merits of the case, I deem it necessary to deal, at the outset, with the preliminary objections raised by the Noticees. One of the objections raised by the Noticees is that the SCN is vague, ambiguous and does not satisfy the principles of natural justice as it does not put to notice about what is the specific measure intended to be adopted by SEBI against the Noticees. Reliance has been placed by the Noticees on the order of the Hon'ble Supreme Court of India dated August 4, 2014 in the matter of *Gorkha Security Services* v. *Government (NCT of Delhi),* (2014) 9 SCC 105. In this regard, I note that Regulation 3(2) of the Takeover Regulations whose violation has been alleged in the SCN itself spells out the consequences of the trigger of the said provision, that is, the liability to make open offer. Therefore, it is not sustainable to argue that Noticees were not aware of the specific measure intended to be adopted by SEBI against the Noticees as the specific measure is already mentioned in the Regulation 3(2) itself. Thus, even if the case law in *Gorkha Security Services* were to be applicable, the argument of the Noticees is not sustainable, as the specific measure intended to be adopted by SEBI against the Noticees is envisaged under the Regulation 3(2) of the Takeover Regulations, itself.

17. I also note that the matter of *Gorkha Security Services* is factually distinguishable from the extant matter. The matter of *Gorkha Security Services* dealt with the liability arising out of the breach of contractual terms which was penal in nature and resulted in the entity being blacklisted from entering into future public contracts floated by

the government. In the current matter, the issue at hand is breach, if any, of the mandatory provisions of law and subsequently any directions, if issued, will be for the orderly growth of the securities market and protection of the interests of the investors. The very approach and principles based on which the questions raised in the matter of *Gorkha Security Services* were settled was in relation to fundamental right of the entity emanating from Article 14 of the Constitution of India, 1950 which speaks of equality before the law and equal protection of the laws and consequential deprivation of entity's equality of opportunity in the matter of public contract. Whereas, the extant matter deals with the provisions of a comprehensive Regulation framed under SEBI Act with the object of ensuring investors' protection and the orderly and healthy growth of the securities market. Directions, if issued any, would be remedial in nature and, therefore, the current matter cannot be compared, in my considered opinion with the matters relating to person's fundamental rights.

18. The other preliminary objection raised by the Noticees is that there has been inordinate delay in initiating proceedings against them and therefore the SCN should be discharged. I note that the Noticees have merely made the aforesaid submission without demonstrating, how the delay, if any, has materially effected them to present their case before SEBI. In other words, Noticees have not shown, how the delay as claimed by them, has prejudiced them. It is also noted that there is neither any specific provision contained in the Takeover Regulations to issue the SCN nor there is any provision in the Takeover Regulations which lays down any limitation period for initiating any action under it.

19. Further, in the case of *Metex Marketing Pvt. Ltd.* vs. *SEBI et.al* decided on June 4, 2019, Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**SAT**") held as under:

"This Tribunal has consistently held that in the absence of any specific provision in the SEBI Act or in the Takeover Regulations, the fact that there was a delay on the part of SEBI in initiating proceedings for violation of any provision of the Act cannot be a ground to quash the penalty imposed for such violation."

20. In the present case following is the chronology of the events that took place prior to the issuance of SCN on February 14, 2018:

Sl. No.	Date	Particulars
1	25/8/2014	Exemption application received by SEBI.
2	11/4/2015	Further information received by email from the Noticees.
3	13-15/7/2015	Examination of the application.
4	19/9/2015	Matter was taken up for deliberation by the Takeover Panel.
5	26/10/2015	Recommendation of Takeover Panel was forwarded to the Noticees.
6	9/11/2015	Noticees provided undertaking to make necessary amendments in the Trust Deed.
7	February – April, 2016	Correspondence between SEBI and Noticees. Further, examination of subsequent material submitted by the Noticees.
8	May 27, 2016	Noticees expressed their inability to amend the relevant clause in the Trust Deed.
9	20/10/2016	Matter was again taken up for deliberation by the Takeover Panel.
10	28/11/2016	Minutes of the Takeover Panel's deliberation finalised.
11	December, 2016-October, 2017	Based on the recommendation of Takeover Panel, the matter was further examined.
12	10/11/2017	Approval by the Competent Authority to initiate proceedings against the Noticees.
13	14/2/2018	SCN issued to the Noticees.

21. The Hon'ble Supreme Court of India recently in the case of *Adjudicating Officer, SEBI* vs. *Bhavesh Pabari* (2019) SCC Online SC 294 has held as follows:

"There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc."

22. From the aforesaid table, it can be seen that in the facts and circumstances of the matter, the lapse of time is not fatal as there was, on a periodic basis, correspondence between SEBI and the Noticees for information / material in the matter at hand. After conducting the requisite examination in the matter, the SCN has been issued to the Noticees within a reasonable period of time. Therefore, in the peculiarity of the case, there is no delay in dealing with the matter. Hence, the contention raised by the Noticees, regarding delay lacks merit.

23. Looking from another perspective, the obligation, if any, on the Noticees to make an open offer is not dependent on SEBI acquiring knowledge about the violation or dependent on SEBI initiating action against the Noticees for the alleged non-compliance of the open offer obligations. In other words, delay on part of SEBI in initiating action does not absolve the Noticees from their obligation, if any, to make open offer. Therefore, if the Noticees have not discharged the open offer obligations contained in the Takeover Regulations, they cannot escape liability by alleging that there is delay on part of SEBI in initiating action against them for non-compliance of their open offer obligations.

24. I now proceed to deal with the merits of case.

Issue No. 1 - *(a) Who are the Acquirers, (b) who are PACs for the purpose of acquisition of shares in the Target Company and (c) what is the percentage of additional shares with an entitlement to voting rights, acquired by the Acquirers and PACs?*

ACQUIRERS

25. It is noted from the report dated April 09, 2015 filed with SEBI under Regulation 10(7) of Takeover Regulations that on March 31, 2015, 22.78% of voting rights (both direct and indirect) was acquired by Mr. Umang Kejriwal and Mr. Mayank Kejriwal in their capacity as Trustees of the Sreeji Family Benefit Trust from the Sellers (10 in nos.). There is no dispute on the factum of this acquisition. Though SCN proceeded on the basis that the "Trust" is the Acquirer, in law and fact and as submitted by the Noticees, the Trustees are the Acquirers. Therefore, Mr. Umang Kejriwal and Mr. Mayank Kejriwal in their capacity as Trustees are two of the Acquirers.

26. The following is noted from the Trust Deed:

"…

23…. In case of difference of opinion existing among the Managing Trustees regarding the management, administration, dissolution of Trust, sale/transfer of the Trust Property, and/or transfer of the Trust Property in favour of any Beneficiary and / or the proportion of holding / vesting of the same, alteration / modification in the terms and regulations of the Trust Deed and ***right to exercise the voting right of shares held****; then in such event the decision of the majority of the Trustees shall prevail and be final and binding."*

27. Before proceeding further, I would like to note that "*all the Trustees in law are joint owners of the property but they are obliged to use the same in a particular manner*", as held by the Hon'ble High Court of Madras in the matter of *V. Chandrasekaran* vs. *Venkatanaicker Trust* decided on November 29, 2016 and Hon'ble High Court of Delhi in the matter of *Duli Chand* vs. *Mahabir Pershad Trilok Chand Charitable Trust*, AIR 1984 Del 145. Thus, Ms. Asha Kejriwal and Ms. Aarti Kejriwal in their capacity as Trustees are also the owners of the shares held by the Trust. This finding when read with the aforementioned provisions of Trust Deed makes it clear that in a situation where the Managing Trustees are not on the same page when it comes to exercising the voting rights, the decision of the majority of the Trustees shall prevail and be final and binding, which brings into the picture, Ms. Asha Kejriwal and Ms. Aarti Kejriwal in their capacity as Trustees, whose decision will be taken into consideration before the voting rights are exercised. Thus, by virtue of the authority vested in them (Ms. Asha Kejriwal and Ms. Aarti Kejriwal in their capacity as Trustees) by the Trust Deed which enables their decision to be factored in before voting rights are exercised on behalf of the Trust, though in a specific situation, it can be held that they also have **entitlement to exercise voting rights within the meaning of Regulation 3(2) of Takeover Regulations.** It is noted that the "entitlement to exercise voting rights" can be conferred either by law or by agreement. Though the Companies Act, 1956 provides for the right to vote on the Members of the Company, as observed by

the Hon'ble High Courts of Delhi and Madras, as per Trust Law, all the Trustees are joint owners of the property and voting rights being an incident of owning shares and as observed by Hon'ble High Court of Bombay in *Rolta India Ltd.* vs *Venire Industries Ltd.* decided on October 29, 1999 voting rights being in the nature of proprietary rights, in the context of Trust Law, all the Trustees are joint owners of voting rights and therefore, have entitlement to exercise voting rights, though such entitlement can be restricted as per the Trust Deed. In other words, right to vote exercisable by the Members of the Company can be further subject to the entitlement of voting rights conferred on all the Trustees as joint owners under the Trust Law. Since, Ms. Asha Kejriwal and Ms. Aarti Kejriwal in their capacity as Trustees have an entitlement to exercising voting rights conferred under Trust law and limited by the Trust Deed (by weighing in their decision), they can be termed as Acquirers when it comes to the purposes of the acquisition of 22.77% voting rights of shares in the Target Company held in the name of the Managing Trustees, on March 31, 2015.

28. Considering that entitlement to voting rights have to be taken into account to determine who is an Acquirer as per the provisions of Takeover Regulations, the submission of the Noticees that a beneficial owner who does not have any voting rights but is only a recipient of the benefits flowing from the shares held in cases of Trust by a Trustee and as such have to be excluded for the purposes of Takeover Regulation, is acceptable. However, in a scenario where the beneficial owners are also given rights to influence the voting rights of the Trustees the position may be different.

29. In view of the aforesaid discussions, it is held that the Acquirers namely Mr. Umang Kejriwal, Mr. Mayank Kejriwal, Ms. Asha Kejriwal and Ms. Aarti Kejriwal in their capacity as Trustees, have directly acquired, 8.26% shareholding in the Target Company from eight Promoter Group entities of the Target Company. The said eight Promoter Group entities of the Target Company are Mr. Umang Kejriwal, Ms. Asha Kejriwal, Mr. Madhav Kejriwal, Umang Kejriwal (HUF), Ms. Nityangi Kejriwal, Ms. Priya Sakhi Kejriwal Mehta, Mr. Mayank Kejriwal and Ms. Aarti Kejriwal. The Acquirers have also indirectly acquired 14.51% shareholding held by two Promoter

Group companies viz. GKIL and MITL in the Target Company by directly acquiring 93.72% shareholding in GKIL and 70.84% shareholding in MITL.

PERSON ACTING IN CONCERT

30. The next question that needs to be addressed is who all are the PACs for the purpose of the aforesaid acquisition by the Acquirers? As per the SCN, the Promoter group entities excluding Sellers are PACs for the acquisition made on March 31, 2015. The Noticees, on the other hand have contended that all the Promoters are deemed to be PACs unless the contrary is established. As per the Noticees nothing contrary is on record.

31. Noticees also submitted that the Hon'ble Bombay High Court judgment in the matter of *K K Modi* to the effect that seller and buyer cannot act in concert, has no application in the present case as the facts and circumstances of the present case are entirely different from the *K K Modi* case.

32. I find that the submission of the Noticees has merit in the present facts of the case. It is noted that in the *K K Modi* case, it was held that all the Promoters need not be PACs for every acquisition. The question as to whether all the Promoters are PACs, is a question of fact which will be determined in the facts and circumstances of each case. In this regard, the Hon'ble High Court held as follows:

"…It, therefore, follows that the mere fact that a person is a promoter does not make him an acquirer, unless it is shown that he either intends to acquire or is acting in concert with the acquirer for the acquisition of shares of the target company. Before he can be said to be acting in concert with the acquirer, it must be shown that he shares with the acquirer a common objective or purpose for substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding and directly or indirectly co-operates with the acquirer or agrees with him to acquire shares or voting rights in the target company or control over the target company. It is significant that the definition of acquirer does not include a promoter, but includes persons acting in concert with an acquirer. The question as to whether a person is acting in concert with the acquirer, is essentially a question of fact.

A promoter may not act in concert with the acquirer, whereas a stranger might.

As the Tribunal has rightly pointed out, there is no hard and fast rule that a promoter must always be deemed to be an acquirer or a person acting in concert with the acquirer. On the facts, it may be held that a promoter shares the common objective or purpose of substantial acquisition of shares with the acquirer. It may well be that he may not share the said common objective or purpose. If he does, he shall be deemed to be a person acting in concert with the acquirer, but if he does not, he cannot be deemed to be an acquirer merely because he happens to be a promoter. Regulation 2(1)(e)(2) also makes this clear. The persons named therein are deemed to be persons acting in concert with other persons in the same category, unless the contrary is established. It, therefore, follows that even though there is a presumption that the persons described therein may be deemed to be persons acting in concert with the acquirer, the presumption is rebuttable, and, therefore, in each case, the facts have to be examined to reach a conclusion as to whether a person is or is not acting in concert with the acquirer for the purpose of substantial acquisition of shares or voting rights or gaining control over the target company…"

Constituents of a Promoter Group are deemed to be persons acting in concert, unless the contrary is established as per Regulation 2(1)(q)(2)(iv) of the Takeover Regulations. In a deeming fiction where all Promoters are being considered as persons acting in concert, the Promoters are deemed to have common objective of acquiring substantial stakes or control in some Target Company unless the contrary is established.

As observed by Hon'ble Supreme Court of India in the matter of *Daiichi Sankyo Company Ltd.* vs. *Jayaram Chigurupati [*2010] 157 Comp Cas 380 (SC) *"…Therefore, whether a person is or is not acting in concert with the Acquirer would depend upon the facts of each case*…" Further, Hon'ble High Court of Bomaby in *KK Modi* case observed as follows: "*…The question as to whether a person is acting in concert with the acquirer, is essentially a question of fact… therefore, in each case, the facts have to be examined to reach a conclusion as to whether a person is or is not acting in concert with the acquirer for the*

purpose of substantial acquisition of shares or voting rights or gaining control over the target company….".

In the particular facts and circumstances of a case, the mere fact of one Promoter selling to another Promoter, is not the only fact that establishes that promoters are not PACs. The very act of selling, inter se, may be a ground to make a presumption that the selling promoter are not PAC with the acquiring promoter. However, in view of the deeming fiction being rebuttable, the attendant facts also have to be looked into before making a final determination of whether the promoters are PACs or not PACs.

For example, if there are two warring factions of Promoters, the additional fact that they are warring Promoters coupled with the fact that one warring group sells its holding to another Promoter/s can establish that promoters are not PACs. In that scenario selling Promoter may not be persons acting in concert with the Acquiring Promoter as they may not have the common objective or purpose of substantial acquisition.

In certain other circumstances of a case, if the acquisition of shares is made by the Acquiring Promoters for instance, in furtherance of estate planning or restructuring, and there is no evidence of warring factions, then the fact that there is a an estate planning or restructuring and there are no warring factions coupled with the fact of transfer by one set of Promoter to other set of Promoters can establish that the promoters have common objective of acquiring substantial stakes or control in the Target Company and are therefore PACs.

The above illustration brings out the true purport of the expression "*unless the contrary is established*" which expression finds place in Regulation 2(1)(q)(2) of Takeover Regulations. In the instant case, Noticees also contended that the transfer is pursuant to the family arrangement. I further find from the material available on record that there is no evidence of dispute among the promoters. In view of the family arrangement, the members of the promoter group are having a common objective of substantial acquisition *inter-se* the promoters. Thus, I note in the present case, the acquisition being

inter-se between the Promoters pursuant to family arrangement without dispute, all the promoters are PACs.

ADDITIONAL SHARES WITH ENTITLEMENT TO VOTING RIGHTS

33. Before, proceeding further, I would like to refer to the provisions of Regulation 10 of Takeover Regulations which deal with General Exemptions. Broadly speaking, under the said Regulation, certain acquisitions are exempted to make an open offer which would otherwise have entailed open offer obligations under Regulations 3 and 4 of Takeover Regulations. One such acquisition is *inter-se* transfer among PACs subject to certain conditions. In light of Regulation 10 of Takeover Regulations the exemption related to *inter-se* transfer among PACs presupposes the following things:

    33.1. There is an acquirer and a seller i.e. two sets of parties are involved because in the absence of two distinct parties, the transaction cannot be termed as a transfer.

    33.2. The transfer happens among PACs. Therefore, the sellers are also PACs and the Acquirers are also considered as PACs (by virtue of deeming fiction) for the limited purpose of *inter-se* transfer as the transfer is among PACs. In other words, in the context of *inter-se* transfer among PACs, the buyer-PAC is an Acquirer and PAC (by virtue of deeming fiction) built into one.

    33.3. The exemption is available only in certain situations mentioned in the Takeover Regulations and then the *inter-se* transfer is exempted from the liability to make open offer. In other cases, the *inter-se* transfer also triggers the Regulations 3 and 4 of the Takeover Regulations.

    33.4. Such a trigger is possible only when "acquisition" or "additional acquisition" of shares or voting rights are made or control is acquired as envisaged under Regulations 3 and 4 of the Takeover Regulations. In the situation of *inter-se* transfer among PACs, the Acquirers and Sellers may have a shared common objective of the acquisition of shares by buyer PAC (Acquirer)

from seller PAC.

33.5. In the instant matter, considering the acquisition of voting rights is *inter-se* among the PACs, all of them share a common objective (All the PACs have been disclosed as Promoters of the company, it is their own submission that all the Promoter Group entities shares a common objective for the purposes of transfer shares in the extant matter and there is no evidence available to show the contrary that the Promoter Group entities are not acting in concert with each other).

34. The point of immediate relevance is that transfer of shares between PACs stands on a footing comparable to any other acquisitions that trigger Regulations 3 and 4 of Takeover Regulations and that is precisely why such acquisitions have been brought under the ambit of conditional exemption under Regulation 10 of Takeover Regulations. If it were not the case, there would be no need for exemption under Regulation 10 of Takeover Regulations. Further, such harmonious interpretation is necessitated among the provisions of Regulations 3, 4 and 10 of Takeover Regulations so that the said Regulations are read as a whole and one provision when construed with reference to the other provision is consistent with the object sought to be achieved.

35. The above discussion makes it clear that in *inter-se* transfer among PACs, the buyer (Acquirer) and seller may be PACs and whatever percentage of shares which are transferred between them are either acquisition of shares/voting rights under Regulation 3(1) of Takeover Regulations, or additional acquisition of shares/voting rights under Regulation 3(2) of Takeover Regulations.

36. This brings us to the discussion and determination of what is the additional acquisition of shares / voting rights as envisaged under Regulation 3(2) of Takeover Regulations, as the charge in the present matter is violation of Regulation 3(2) of Takeover Regulations. Regulation 3(2) states as follows:

"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

….

….”

37. The Noticees have argued that there is no acquisition of additional shares, as the shareholding/voting rights of the Promoters who are deemed to be PACs remain to be same before and after the realignment of the shareholding through the transfers to the trust. In essence, this argument discounts the fact of acquisition/additional acquisition as if there is no such acquisition/additional acquisition at all. However, this argument does not stand the scrutiny of law, as permitting such interpretation, would mean rendering the provision of *inter-se* exemption nugatory. As already explained, exemption for *inter-se* transfer, which is built on the foundation of acquisition of shares/voting rights above the permissible threshold percentage among PACs would be exempted from obligation to make open offer in certain situations. To countenance an argument that there cannot be any acquisition of shares among PACs, as their ultimate shareholding/voting rights continue to remain the same before and after the transfer to the Trust, would require the Regulator to close its eyes, to what is vivid transfer among PACs and conclude that there is no trigger of open offer obligations. However, that is not the scheme of Takeover Regulations. Takeover Regulations, clearly envisages a situation where the overall shareholding of the *inter-se* Promoters(PACs) will continue to be the same prior and

after such *inter-se* transfer and still the trigger can happen and against such trigger, exemption is possible in certain situations.

38. It is further noted that Regulation 3(2) of Takeover Regulations starts with "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" and continue by stipulating that no such acquirer "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".

39. Therefore, the first requirement is to find out whether the Acquirer/PACs were already having shareholding with an entitlement to exercise more than 25 per cent of voting rights and less than maximum permissible non-public shareholding. It has already been held that the four trustees, namely, Mr. Umang Kejriwal, Mr. Mayank Kejriwal, Ms. Asha Kejriwal and Ms. Aarti Kejriwal in their capacity as Trustees, are the Acquirers in the present matter. It has also been accepted that the remaining members of the Promoter Group are deemed to be PACs with the Acquirer. However, though everyone is a PAC with the Acquirers, for the purpose of computing pre-acquisition shareholding, emphasis has to be laid on that particular set of shares whose legal ownership has not changed hands. In other words, since there is an acquisition of shares and considering that acquisition is among PACs, shares whose status quo is maintained in terms of its legal ownership stand on a different footing vis-à-vis shares that have been acquired / whose legal ownership has changed. It has also been held that the "additional acquisition" by the Acquirers, in *inter-se* transfer, is in essence is the quantum of shares transferred by selling (transferring) PACs to the Acquirer / shares whose legal ownership has changed.

40. Therefore, the percentage of shares acquired (in this case via gifting) / whose legal ownership has changed should be considered as "additional shares" acquired by the

Acquirer. The remaining shareholding i.e., shares whose legal ownership has not changed would be considered as the pre-acquisition shareholding.

41. Any other interpretation would defeat the rationale behind the provision of exemption from making open offer among PACs and lead to the absurd conclusion that Regulation 10 of Takeover Regulations is redundant. For the sake of clarity, as per Regulation 10(1) (a)(ii) of Takeover Regulations, the exemption from making open offer is available, in the *inter-se* transfer between Promoters, only when such transfer is between persons named as Promoters in the shareholding pattern filed by the Target Company for not less than three years prior to the proposed acquisition. The foundation behind the exemption provision, as available to Promoters who are deemed to be PACs (unless evidence to the contrary exists) is only when a) Promoters trigger any of the triggering provisions such as Regulation 3 or 4 of Takeover Regulations, b) three years period is satisfied, c) such trigger presupposes, pre-acquisition shareholding with an entitlement to voting rights of Acquirer / PAC, additional acquisition with an entitlement to voting rights by the Acquirer /PAC and post-acquisition shareholding with an entitlement to voting rights by Acquirer and PAC.

42. Noticees have contended that the SCN's approach in computing the pre and post-acquisition holding of the Trust suffers from a fundamental contradiction, as in arriving at the pre-acquisition holding of the Trust, the SCN excludes the shareholding of the Sellers who have vested their shares in the Trust, on the unstated and incorrect premise that a buyer and seller cannot act in concert and yet, in computing the post-acquisition holding, it includes not only the shareholding vested in the Trust but also adds the entitlement to voting rights of the very same persons it excluded.

43. With respect to the submission of the Noticees with respect to the pre- acquisition holding, it is noted that the submission of the Noticees is on the footing that the Sellers in *inter-se* transfer have to be treated as PACs. As already determined, in facts and circumstances of this case, Sellers are also PACs. However, for the reasons above

explained in paragraphs 39-41, only those shares whose legal ownership has not changed i.e., shares which were not acquired by the Acquirers, are to be considered for the purpose of pre-acquisition shareholding.

44. With respect to the post acquisition shareholding submission of the Noticees, the same is not sustainable, as post acquisition shareholding should necessarily include the shareholding transferred by the "Sellers" as they become the shareholding of the Acquirers. Moreover, the submission of the Noticees that the SCN alleges that the Family Trust has acquired 52.01% of voting rights is incorrect, as the SCN has unequivocally stated at paragraph 7 that the Acquirer i.e. the Trust has acquired approximately 22.78% voting rights in the Target Company.

45. The calculation of pre and post-acquisition shareholding with an entitlement to voting rights of Acquirers along with PACs apart from being a fall out of the Regulation, 3(2) of Takeover Regulations, is also supported by the justification given by the Noticees for the purpose of the *inter-se* transfer which is to realign the shareholding of the Promoter Group of the Target Company with a view to provide joint family control over the Target Company through the mechanism of Trust. Thus, in other words, it means that the Promoter Group entities / PACs who wanted to cede with their voting rights completely or partially have actively done so pursuant to the arrangement arrived at along with other PACs whereas PACs who still wanted to retain shareholding of the Target Company along with the Acquirers have not transferred their voting rights completely or partially. Therefore, in the facts and circumstances of the matter and considering the acquisition / transaction is *inter-se* transfer among PACs, as noted above, I find that where shares that have not been acquired / transferred i.e., legal ownership remains the same, the said shares have to be considered along with the shares held by the Acquirers before the acquisition, in order to arrive at the pre- acquisition voting rights of Acquirers along with PACs. For the purpose of post-acquisition shareholding, the shareholding of the Acquirers post acquisition and shares whose legal ownership has not changed subsequent to the acquisition, have to be considered as such.

46. The above discussion leads to the following table which reflects the shareholding of the Promoter Group entities / PACs including Acquirers, the number of shares transferred to the Acquirers, shares with an entitlement to voting rights to be considered for the purposes of pre-acquisition and post-acquisition shareholding, for the acquisition of the shares with an entitlement to voting rights done by the Acquirers and PACs of the Target Company on March 31, 2015:

Sl. No.	**Name of Acquirer/ PAC**	**Shares held (Number) as on December 31, 2014**	**No. of Shares transferred on March 31, 2015**	**% of Shares transferred**	**Shares to be considered for Pre-acquisition voting rights (Number)**	**Shares to be considered for Pre-acquisition voting rights (%)**	**Post-acquisition shares (Number) as on March 31, 2015**	**Post-acquisition voting rights (%) held**
1	Umang Kejriwal, Mayank Kejriwal, Asha Kejriwal and Aarti Kejriwal as Trustees of Sreeji Family Benefit Trust (Acquirers)	200	0	0	200	0	29489110	8.26
2	Uddhav Kejriwal	3229540	0	0	3229540	0.9	3229540	0.9
3	Uddhav Kejriwal HUF	1554550	0	0	1554550	0.44	1554550	0.44
4	Mayank Kejriwal HUF	1022940	0	0	1022940	0.29	1022940	0.29
5	Shashwat Kejriwal	744310	0	0	744310	0.21	744310	0.21
6	Ghanshyam Kejriwal	576100	0	0	576100	0.16	576100	0.16
7	Uma Kejriwal	336000	0	0	336000	0.09	336000	0.09
8	Pallavi Kejriwal	187950	0	0	187950	0.05	187950	0.05
9	Samriddhi Kejriwal	157100	0	0	157100	0.04	157100	0.04
10	Mayank Kejriwal as Trustee of Priya Manjari Trust	27000	0	0	27000	0.01	27000	0.01
11	Uddhav Kejriwal as Trustee of Samriddhi Trust	24500	0	0	24500	0.01	24500	0.01
12	G K & Sons Pvt Ltd	36731833	0	0	36731833	10.29	36731833	10.29

Sl. No.	Name of Acquirer/ PAC	Shares held (Number) as on December 31, 2014	No. of Shares transferred on March 31, 2015	% of Shares transferred	Shares to be considered for Pre-acquisition voting rights (Number)	Shares to be considered for Pre-acquisition voting rights (%)	Post-acquisition shares (Number) as on March 31, 2015	Post-acquisition voting rights (%) held
13	Electrocast Sales India Ltd	29899981	0	0	29899981	8.38	29899981	8.38
14	Uttam Commercial Co. Ltd.	18590570	0	0	18590570	5.21	18590570	5.21
15	Malay Commercial Enterprises Ltd	3748190	0	0	3748190	1.05	3748190	1.05
16	Sri Gopal Investment Ventures Ltd	3732885	0	0	3732885	1.05	3732885	1.05
17	Cubbon Marketing Pvt Ltd	2500000	0	0	2500000	0.7	2500000	0.7
18	Quinline Dealcomm Pvt Ltd	319962	0	0	319962	0.09	319962	0.09
19	Escal Finance Services Ltd	250000	0	0	250000	0.07	250000	0.07
20	Ellenbarrie Developers Pvt. Ltd.	213308	0	0	213308	0.06	213308	0.06
21	Global Exports Ltd	200000	0	0	200000	0.06	200000	0.06
22	Greenchip Trexim Pvt Ltd	165000	0	0	165000	0.04	165000	0.04
23	Calcutta Diagnostics Centre Pvt Ltd	130000	0	0	130000	0.03	130000	0.03
24	Mayank Kejriwal as an Individual	11391632	7817322	2.18	3574310	1	3574310	1
25	Aarti Kejriwal as an Individual	1741800	1715207	0.48	26593	0.01	26593	0.01
26	Asha Kejriwal as an Individual	15247870	15247870	4.27	0	0	0	0
27	Madhav Kejriwal as an Individual	2056400	2056400	0.58	0	0	0	0
28	Umang Kejriwal HUF	1415011	1415011	0.4	0	0	0	0
29	Priya Sakhi Kejriwal Mehta as an Individual	637500	637500	0.18	0	0	0	0

Sl. No.	Name of Acquirer/ PAC	Shares held (Number) as on December 31, 2014	No. of Shares transferred on March 31, 2015	% of Shares transferred	Shares to be considered for Pre-acquisition voting rights (Number)	Shares to be considered for Pre-acquisition voting rights (%)	Post-acquisition shares (Number) as on March 31, 2015	Post-acquisition voting rights (%) held
30	Nityangi Kejriwal as an Individual	597800	597800	0.17	0	0	0	0
31	Umang Kejriwal as an Individual	1800	1800	0	0	0	0	0
	Sub Total (a)	**13,74,31,732**	**2,94,88,910**	**8.26***	0	**30.24**	**13,74,31,732**	**38.5**
32	GKIL	21739560	21739560	6.09	0	0	21739560	6.09
34	MITL	30053080	30053080	8.42	0	0	30053080	8.42
	Sub Total (b)	**51792640**	**51792640**	**14.51****	**0**	**0**	**51792640**	**14.51**
	Total (a+b)	**189224372**	**81281550**	**22.77**	**0**	**30.24**	**189224372**	**53.01**

** Directly acquired*

***Indirectly acquired*

47. It is observed from the aforesaid table that the shareholding with an entitlement to voting rights of the Acquirers and PACs have increased from 30.24% to 53.01% i.e. an increase of 22.77%. In other words, the shareholding with an entitlement to voting rights whose legal ownership did not change constituted 30.24% of the total shareholding of the PACs. Therefore, in this case, the Acquirers along with PAC satisfy the first requirement under Regulation 3(2) of Takeover Regulations of their pre-acquisition shareholding with an entitlement to voting rights standing at more than 25%, which is in this case is 30.24%. I find that an additional acquisition of shares with an entitlement to exercise 22.77% voting rights has been made by the Acquirers along with PACs in the financial year 2014-2015, satisfying the other requirement of Regulation 3(2) of Takeover Regulations i.e., additional acquisition of shares entitling them to exercise more than 5% voting rights. I further find the post-acquisition shareholding of Acquirer along with PAC is 53.01%.

48. It is noted that the figures arrived at for pre-acquisition shareholding with an entitlement to voting rights of PACs and post-acquisition shareholding with an entitlement to voting rights of PACs including the number of PACs in this order are

at variance with the figures and number of PACs in the SCN. The reason for the same is that in the SCN, the voting rights retained by Mr. Mayank Kejriwal and Ms. Aarti Kejriwal was not considered, as the basis of SCN was to exclude their holding completely as they were not considered as PACs in the SCN. However, for the reasons mentioned in preceding paragraphs, Mr. Mayank Kejriwal and Ms. Aarti Kejriwal are also PACs. No detriment in this regard can be raised by the Noticees, as it is the case of Noticees themselves that all the Promoters are PACs which includes, Mr. Mayank Kejriwal and Ms. Aarti Kejriwal. Even otherwise, it is not detrimental to the interests of the Noticees to present an effective defence as neither the percentage of voting rights acquired / transferred has changed nor the charging provision. To put it differently, mention of additional percentage figures and number of PACs does not render the SCN bad in law as the charging and liability provisions under which the SCN was issued does not undergo any change or modifications. This is especially so in view of Noticee's own case that Mr. Mayank Kejriwal and Ms. Aarti Kejriwal are also PACs by virtue of their deemed PAC status and the fact that no evidence to the contrary is on record.

49. It is further noted in the SCN that Noticees No. 1 to 22 have been alleged to be PACs but Noticees No. 23 and 24 were not alleged to be the Acquirers. Instead it is alleged that Noticees No. 23 and 24 are PACs with the Acquirer Trust. Paragraph 11 of the SCN is reproduced below:

> *11. The promoters group entities excluding sellers i.e. noticee no. 1 to 24 along with noticee no. 25 and 26 are PACs for the acquisition made on March 31, 2015.*"

50. In view of the finding and based on the Noticees own case, that the Promoters are deemed to be PACs in this case and it is the Trustees who are the Acquirers and not the Trust as alleged in the SCN, the allegation made in the SCN to the extent that Trust is the Acquirer and therefore, treating the Noticees No. 23 and 24 (Managing Trustees) as mere PACs with the Trust is not sustainable as Noticees No. 23 and 24 are determined in this order as two of the four Acquirers.

51. Noticees have contended that there is an error when it comes to the manner in which the SCN determines the persons who are acting in concert with the Trust. The SCN excludes the holdings of the two Promoter Trustees who are Managing Trustees and who are entitled to exercise the voting rights in relation to the shares vested in the Trust. Yet, two other Trustees, Ms. Asha Kejriwal and Ms. Aarti Kejriwal who do not have any entitlement to voting rights in relation to the shares vested in the Trust are treated as persons acting in concert with the Trust. This is an unsustainable position according to the Noticees.

52. In this regard, I find that the SCN has proceeded on the basis that Sellers are not PACs. Therefore, the shareholding with an entitlement to voting rights of Mr. Umang Kejriwal and Mr. Mayank Kejriwal, in their individual capacity were excluded from the shareholding with an entitlement to voting rights of other PACs and Acquirers, in their capacity as "Sellers". However, as noted in the preceding paragraphs, per the finding of this order and based on the Noticees own case, Mr. Umang Kejriwal and Mr. Mayank Kejriwal, in their individual capacity are PACs and accordingly, depending on the legal ownership of the shares with an entitlement to voting rights, the same has been taken into consideration for the purposes of acquisition on March 31, 2015. Therefore, the percentage of shareholding with an entitlement to voting rights retained (Mr. Mayank Kejriwal, in his individual capacity) is included as part of the pre-acquisition voting rights of PACs in view of the reasons mentioned in previous paragraphs.

53. As regards the contention on Ms. Asha Kejriwal and Ms. Aarti Kejriwal, I note that it is already found that the entire group of Promoters in this case are PACs. This is also the averment of the Noticees themselves. I find that SCN has proceeded on the basis that the Trust is the Acquirer and Ms. Asha Kejriwal and Ms. Aarti Kejriwal being the Trustees are the PACs with the Trust. However, as per the finding of this order, it has already been held that Ms. Asha Kejriwal and Ms. Aarti Kejriwal, in their capacity as Trustees, are two of the Acquires as they have an entitlement to voting rights in relation to the shares registered in the name of other two Managing Trustees although in a limited scenario. Further, for reasons as discussed in preceding

paragraphs, as per the findings of the order, Ms. Asha Kejriwal and Ms. Aarti Kejriwal in their individual capacity have been considered as PACs.

54. At the time of the hearing, the Noticees had submitted that neither Mr. Umang Kejriwal nor Mr. Mayank Kejriwal held a majority equity shareholding in GKIL, which in turn held 6.09% voting rights in the Target Company before the transactions covered by the SCN. The transactions did not result in either Mr. Umang Kejriwal or Mr. Mayank Kejriwal owing majority in GKIL. Consequently, applying the indirect shareholding test under Regulation 5(1), the entitlement to exercise voting rights pursuant to GKIL's shareholding in the Target Company, did not vest in Mr. Umang Kejriwal or Mr. Mayank Kejriwal and therefore neither of them acquired any new additional share or voting right due to the re-arrangement of the equity shares of GKIL. Similar argument was made with respect to the acquisition of shares of MITL that no individual constituent of the Promoter Group, held majority of shares in the equity share capital of MITL. In this regard, I find that the submissions of the Noticees that the entitlement to exercise voting rights in GKIL and MITL did not vest in Mr. Umang Kejriwal or Mr. Mayank Kejriwal. The same have been vested with Mr. Umang Kejriwal, as a Trustee and Mr. Mayank Kejriwal, as a Trustee, who for the purpose of acquisition on March 31, 2015 are two of the Acquirers. Since, Mr. Umang Kejriwal, Trustee and Mr. Mayank Kejriwal, Trustee being Acquirers who are acting in concert with each other and thus their shareholding together in GKIL and MITL have to be taken into consideration. On such consideration, they have acquired 93.72% and 70.84% of shares in GKIL and MITL, respectively which in turn holds 6.09% and 8.42% respectively in the Target Company, it is held that the Acquirers, namely, Mr. Umang Kejriwal, Trustee and Mr. Mayank Kejriwal, Trustee have indirectly acquired 14.51% shares in the Target Company. Moreover, Mr. Umang Kejriwal, Trustee and Mr. Mayank Kejriwal, Trustees, being Acquirers together, their joint holding in the said companies, has to be taken into account for the purpose of determining whether by their joint holding can cause MITL and GKIL to exercise 14.51% of voting rights held by MITL and GKIL in the Target Company. In the present case it is held that Mr. Umang Kejriwal, as a Trustee and Mr. Mayank Kejriwal, as a Trustee can cause to

exercise 14.51% of voting rights held MITL and GKIL the Target Company. Therefore, they have indirectly acquired 14.51% of voting rights held MITL and GKIL in the Target Company.

55. In view of the aforesaid discussions, it is held that the Acquirer along with PACs have acquired directly and indirectly 22.77% from other PACs. Hence, the shareholding of the Acquirers namely, Mr. Umang Kejriwal, Trustee, Ms. Asha Kejriwal, Trustee, Mr. Mayank Kejriwal, Trustee and Ms. Aarti Kejriwal, Trustee along with PACs had increased from 30.24% on December 31, 2014 to 53.01% on March 31, 2015 in the Target Company.

Issue No. 2 *- Whether the acquisition of shares by the Acquirers and PACs has led to the violation of Regulation 3(2) of Takeover Regulations?*

56. Before proceeding further, it will be relevant to reproduce the relevant provision of Takeover Regulations as under:

Substantial acquisition of shares or voting rights.

3 (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 (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.*

57. Noticees have submitted that there has been no "additional acquisition" of shares and voting rights by the Promoter Group as a whole under Regulation 3(2) of Takeover Regulations since the collective holding has remained unchanged. The said submission of the Noticees is erroneous, as it has been already held that the pre-acquisition shareholding with an entitlement to exercise voting rights of the Acquirers along with PACs has been considered as 30.24%, additional acquisition of shares with an entitlement to exercise voting rights of 22.77% was acquired by the Acquirers along with PACs and thus, post-acquisition shareholding with voting rights in the Target Company is considered as 53.01%. The overall shareholding of the Promoter Group remained unchanged as the Acquirers along with PACs were belonging to the Promoter Group and it was a case of *inter-se* transfer among PACs.

58. It has been further submitted by the Noticees that Regulation 3(2) read with Regulation 3(3) of Takeover Regulations can apply only if the pre-acquisition holding of the individual Acquirer (ignoring holding of all PACs) was over 25% and in the instant case that is not the case. In this regard, I note that Regulation 3(2) of Takeover

Regulations is an independent and self-contained Regulation from Regulation 3(3) of Takeover Regulations. Regulation 3(3) of Takeover Regulations does not curtail the applicability of Regulation 3(2) of Takeover Regulations in situations where Acquirer along with PACs having 25% voting rights or more in Target Company acquires additional 5% voting rights in Target Company in any financial year. I find that to give effect to the provisions of Regulation 3(2) of Takeover Regulations in the extant matter there is no requirement to read it with Regulation 3(3) of Takeover Regulations as in the facts and circumstances of the matter the pre-acquistion shareholding with an entitlement to voting rights of the Acquirers along with PACs has been considered at 30.24% in Target Company and they had acquired additional shareholding with an entitlement to exercise 22.77% of voting rights in the Target Company on March 31, 2015. Moreover, the shareholding of PACs cannot be ignored, as submitted by the Noticees, in light of the explicit provision of Regulation 3(2) of Takeover Regulations. Furthermore, the expression 'Acquirer' defined under Regulation 2(1)(a) makes it clear that purchase of shares by 'Any Acquirer' under Takeover Regulations would mean acquisition of shares effected by the Acquirer either by himself or with persons acting in concert with the Acquirer and would not be relatable to purchase of shares by the Acquirer alone. Thus, the holdings of PACs cannot be ignored in the extant matter. In any case there is no allegation of violation of Regulation 3(3) of the Takeover Regulations.

59. Noticees have also submitted that the size of the entitlement to voting rights that is changing hands i.e. 22.77% with each Promoter Trustee holding 11.39%, does not result in charging provisions of the Takeover Regulations being triggered. The argument is sequel to the defense of not violating Regulation 3(3) of Takeover Regulations which in any case is not the allegation in the SCN. What has to be determined is the pre-acquisition shareholding with an entitlement to voting rights of the Acquirers along with PACs in the Target Company and whether there was additional acquisition of shares with an entitlement to voting rights in the Target Company entitling them to exercise more than five per cent of the voting rights, within a financial year.

60. Noticees have also contended that two of the Trustees, namely Mr. Umang Kejriwal and Mr. Mayank Kejriwal, have acquired shares of the Target Company both directly and indirectly from their immediate relatives. Therefore, by virtue of such relationship of the Trustees with the transferors, the exemption available for *inter-se* transfer of shares among 'immediate relatives' contained in Regulation 10(1)(a)(i) of the Takeover Regulations becomes squarely applicable. It is noted from the definition of the expression 'immediate relative' from Regulation 2 (1)(l) of Takeover Regulations that the same does not include 'Trust'. Further the Trustees and the individuals who are acting as Trustees have two different legal capacities. When an individual takes the legal capacity of a Trustee, the benefit of relationship which is enjoyed by the natural person is not available to the legal entity i.e. a Trustee. This is more so as a natural person has a free will to exercise the voting rights in the way he deems fit subject to the extant law. However, the legal entity i.e. a Trustee is bound by the covenants of the Trust Deed. The exemption available to immediate relatives is they have share interests by virtue of their natural relationship. However, the same is not available once the natural person wears the cap as a "Trustee". Therefore, in a case where the Trustee is a natural person, the benefit of exemption is not available as per the Regulation 10(1)(a)(i) of the Takeover Regulations.

61. In view of the aforesaid discussions, it is held that on account of acquisition of shareholding with an entitlement to exercise 22.77% voting rights in the Target Company by the Acquirers and PACs on March 31, 2015 (in the financial year 2014-2015) whose pre-acquisition shareholding with an entitlement to exercise voting rights has been considered to be 30.24% in the Target Company and in the absence of any exemption available automatically under Regulation 10 or under Regulation 11 of Takeover Regulations, to the Acquirers and PACs, it is held that Acquirers and PACs have violated Regulation 3(2) of the Takeover Regulations.

Issue No. 3 **-** *If answer to the aforesaid question is in affirmative, what directions, if any have to be issued against the Acquirers and PACs?*

62. As per the mandatory provisions of Regulation 3 (2) of Takeover Regulations, no Acquirer who together with persons acting in concert with him, has acquired and holds 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, 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. Thus, as a normal rule, once the provisions of Regulation 3 (2) of Takeover Regulations are triggered and the Acquirer together with PACs has acquired additional 5% shares without making a public announcement and in the absence of any exemption available automatic under Regulation 10 or under Regulation 11 of Takeover Regulations, a direction to make public announcement should be issued to the Acquirer together with the PACs. Such an obligation cannot be imposed on an exiting Promoter/PAC who has transferred *inter-se* all the shares held by them as they do not have any more shares with an entitlement to exercise voting rights in concert with the remaining PACs. However, if the entire shareholding is not transferred *inter-se*, then he would continue to be PAC with Acquirer in respect of the remaining shares/voting rights held by him. The liability of the PACs is joint and several with the Acquirers and the same can be seen from the provision of Regulation 7(1) of Takeover Regulations which deals with Offer Size. It reads as follows:

"7 (1). The open offer for acquiring shares to be made by the acquirer and persons acting in concert with him under regulation 3 and regulation 4 shall be for at least twenty six per cent of total shares of the target company, as of tenth working day from the closure of the tendering period".

63. In view of the aforesaid, the liability to make the public announcement in the instant matter is on the Acquirers namely, Mr. Umang Kejriwal, Mr. Mayank Kejriwal, Ms. Asha Kejriwal and Ms. Aarti Kejriwal in the capacity as Trustees and on the PACs namely, Ms. Uma Kejriwal, Mr. Ghanshyam Kejriwal, Mayank Kejriwal HUF, Mr. Mayank Kejriwal (as trustee of Priya Manjari Trust), Mr. Uddhav Kejriwal, Uddhav Kejriwal HUF, Mr. Shaswat Kejriwal, Ms. Pallavi Kejriwal, Ms. Samriddhi Kejriwal, Mr.

Uddhav Kejriwal (as trustee of Samriddhi Trust), Malay Commercial Enterprises Limited, G K & Sons Private Limited, Uttam Commercial Company Limited, Electrocast Sales India Limited , Escal Finance Services Limited, Global Exports Limited, Cubbon Marketing Private Limited, Sri Gopal Investment Ventures Limited, Quinline Dealcomm Private Limited, Ellenbarrie Developers Private Limited, Greenchip Trexim Private Limited, Calcutta Diagnostics Centre Private Limited, Mr. Mayank Kejriwal, as an Individual and Ms. Aarti Kejriwal, as an Individual.

64. I note that in the SCN Sellers have not been alleged as PACs. Similarly "Trustees" were not alleged as "Acquirers" and "Trust" was alleged as the Acquirer. In the SCN, Mr. Mayank Kejriwal and Mr. Umang Kejriwal (in their individual capacity) were not considered as PACs, presumably because Sellers were not considered as PACs in SCN. However, Mr. Mayank Kejriwal and Mr. Umang Kejriwal in their capacity as Trustees were treated as PACs to the Acquirer "Trust" in the SCN. The pre-acquisition shareholding, as per the allegation, does not include the shareholding of Ms. Aarti Kejriwal and Mr. Mayank Kejariwal (in their individual capacity) presumably as they were treated as Sellers in SCN. However, on consideration of the materials available on record including the submissions of the Noticees, the following findings which are in effect, contrary to the allegations made in SCN have been made. For instance, the "Trust" is not considered as an Acquirer. The four Trustees are considered as "Acquirers". The Sellers are considered as PACs. As far as the pre-acquisition shareholding is concerned, the pre-acquisition shareholding of Ms. Aarti Kejriwal and Mr. Mayank Kejariwal (in their individual capacity) are also included as they are PACs in their individual capacity. The question may arise whether these findings contrary to the allegations would require any hearing for the concerned Noticees in tune with the principles of natural justice. The question assumes significance if an adverse obligation is determined or direction is imposed on them, the same could cause prejudice to them. Therefore, it also requires consideration whether any prejudice is caused to them in view of the aforesaid findings in terms of loss of defence, if any. I consider that it is the case of the Noticees themselves that everyone is a PAC. It is also a finding of this order. Once every one is a PAC, it goes without

saying that the pre-acquisition shareholding of Ms. Aarti Kejriwal and Mr. Mayank Kejariwal (in their individual capacity to that extent its legal ownership did not change hands) should also be included as they are PACs in their individual capacity. It is also the finding of this order. It is also the case of the Noticees that Trustees and not the Trust is the Acquirer. It is also the finding of this order. Therefore, in effect, the findings in this order are also the case of the Noticees to that extent. In other words, the findings of this order vis-à-vis the submissions of the Noticees with respect to who is an Acquirer and who are PACs, in the given facts and circumstances are in sync with each other. The only point of variance is the applicability of Regulation 3(2) of Takeover Regulations, which for reasons recorded in preceding paragraphs is applicable in the given situation. As already pointed out, it is the case of the Noticees that they are all PACs and since it is a statutory consequence of being PACs to make open offer, the principles of natural justice have been complied with in this case.

65. I note that development of the securities market stands on the edifice of effective harmonization of the competing interests of the participants in that market. The Delegated Regulations, effectively harmonises the competing interests of such participants in various fields covered by it. Takeover Regulations, while providing for a delegated statutory frame work for recognizing such competing interests of participants in the takeover regime kept equality of treatment of shareholders as one of the guiding principles of open offer requirement. However, the Regulation itself recognizes that the interests of investors and development of securities market is best served, by expressly making exemptions to make open offer, subject to certain conditions. The underlying principle in such exemption is that the interests of the investors are best served by not requiring open offer in the specified exemptions. The Takeover Regulations, further do recognize, the situations in which interests of investor would be better served by not requiring mandatory open offer, cannot be only those which are mentioned in automatic exemptions. It recognizes there could be further situations where the interests of investors and development of securities market is best served by exempting the open offer obligations, by vesting

discretionary power on the Board under Regulation 11(1) of Takeover Regulations.

66. The Hon'ble SAT in the matter of *Nirvana Holdings Private Limited* vs. *SEBI* (Appeal no. 31/2011) further recognized even in cases where enforcement proceedings for failure to make open offer has been taken, there exists discretionary power with the quasi-judicial authority and observed that *"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."*

67. I note that the Noticees had approached SEBI with an application under Regulation 11(1) of Takeover Regulations for granting them exemption from the mandatory provisions of Regulation 3 of Takeover Regulations. The exemption would have been granted to the Noticees but for their insistence on not amending paragraph 9 of the Trust Deed which deals with the appointment of external Trustees other than members of the Promoter Group. Keeping the above observation in mind, it is my considered opinion that the interests of investors, and securities market would be served, if the Noticees are directed to amend paragraph 9 of the Trust Deed. Needless to say, if the Noticees fail to amend the Trust Deed as directed herein, the Noticees will have to make open offer in line with the directions contained in the following paragraphs (68 (b) & 68 (c)).

ORDER

68. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11(1) and 11B of the SEBI Act read with Regulation 32 of the Takeover Regulations, hereby issue the following directions:

a) Paragraph 9 of the Trust Deed shall be suitably amended within a period of four weeks from the service of this order to reflect the following:
   - Only individual Promoters or their immediate relatives or lineal descendants

/ ascendants will be Trustees and beneficiaries;

- The Trustees will not be entitled to transfer or delegate any of their powers to any person other than one or more of themselves.

b) The copy of amended trust deed as certified by the Notary shall be submitted to SEBI within seven days from the expiry of the period mentioned in para 68(a)

c) In case of failure to comply with the aforesaid direction at paragraph 68 (a) and (b), Mr. Umang Kejriwal, Mr. Mayank Kejriwal, Ms. Asha Kejriwal and Ms. Aarti Kejriwal as Trustees of Sreeji Family Benefit Trust and PACs namely, Ms. Uma Kejriwal, Mr. Ghanshyam Kejriwal, Mayank Kejriwal HUF, Mr. Mayank Kejriwal (as trustee of Priya Manjari Trust), Mr. Uddhav Kejriwal, Uddhav Kejriwal HUF, Mr. Shaswat Kejriwal, Ms. Pallavi Kejriwal, Ms. Samriddhi Kejriwal, Mr. Uddhav Kejriwal (as trustee of Samriddhi Trust), Malay Commercial Enterprises Limited, G K & Sons Private Limited, Uttam Commercial Company Limited, Electrocast Sales India Limited , Escal Finance Services Limited, Global Exports Limited, Cubbon Marketing Private Limited, Sri Gopal Investment Ventures Limited, Quinline Dealcomm Private Limited, Ellenbarrie Developers Private Limited, Greenchip Trexim Private Limited, Calcutta Diagnostics Centre Private Limited, Mr. Mayank Kejriwal, in his individual capacity and Ms. Aarti Kejriwal, in her individual capacity shall make a public announcement to acquire shares of the target company in accordance with the applicable provisions of the Takeover Regulations, within a period of 45 days from the date of expiry of the period mentioned at paragraph 68 (b) of this Order.

d) The aforesaid entities shall along with the consideration amount, pay interest at the rate of 10% per annum from March 31, 2015 till 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 are accepted in the open offer, after adjustment of dividend paid, if any.

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

70. A copy of this order shall be served upon the Noticees for necessary action and

compliance with the above directions as well to the Exchanges for information.

71. This order is without prejudice to any other actions that SEBI may take in accordance with securities laws.

DATE: September 26, 2019
PLACE: Mumbai

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