REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

**CIVIL APPEAL NO.9103 OF 2014**

PRAMOD JAIN AND OTHERS ...APPELLANT(S)

**VERSUS**

SECURITIES AND EXCHANGE BOARD OF INDIA ...RESPONDENT(S)

**J U D G M E N T**

**ADARSH KUMAR GOEL, J.**

1. This appeal has been preferred under Section 15 Z of the Securities and Exchange Board of India Act, 1992 (the Act) against order dated 6th August, 2014 passed by the Securities Appellate Tribunal, Mumbai (the SAT) in Appeal No.111 of 2012. The SAT upheld the order of Securities and Exchange Board of India (SEBI) dated 13th April, 2012 rejecting the application of the appellants for withdrawal of the public offer to acquire shares of the Golden Tobacco Ltd. in terms of public announcement (PA) dated November 12, 2009 under the provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the Takeover Regulations).

**FACTS :**

2. Golden Tobacco Limited (the target company) is a company having its registered office at Tobacco House, S.V. Road, Vile Parle (West), Mumbai – 400 056. The equity shares of the target company are listed on the Bombay Stock Exchange Limited (BSE) and the National Stock Exchange of India Limited (NSE).

3. On November 12, 2009, Mr. Pramod Jain and Pranidhi Holdings Private Limited (the acquirers) along with J.P. Financial Services Private Limited (the person acting in concert (PAC) made PA through VC Corporate Advisors Private Limited (the merchant banker) in accordance with regulations 10 and 12 read with regulation 14. As on the date of the PA, the acquirers and PAC collectively held 11, 39, 002 equity shares (6.47%) of the target company. The PA was voluntarily made by the acquirers and the PAC to acquire 44, 02, 201 equity shares (25%) of the target company from its equity shareholders at a price of Rs.101/- (the offer price) per equity share. At that time, market price of the target company shares was Rs.109/- per share. Networth of the target company as on 31st March, 2009 was Rs.42.44 crores. Net current assets were

Rs.134.4 crores and gross sales were Rs.173.68 crores. The offer was for hostile takeover of the target company. The PA mentioned that the prime object of the offer was to acquire substantial shares/voting rights accompanied with the change and control of the management of the target company. The acquisition was in the nature of strategic investment for diversification and growth and to reap the benefit of corporate opportunities. The draft letter of offer also mentioned that the PAC had advanced loan against shares of the target company and on account of default, it acquired the said shares representing 5.05% of the equity share capital. The acquirers and the PAC had also acquired 71034 equity shares at highest and average price of Rs.100.15 and Rs.89.13 respectively. Thus, the acquirers and the PAC had 6.47 % of the issue of equity share capital as on the date of PA. The background of the acquirers mentioned in the DLO was that Mr. Pramod Jain was prime Director of PHPL and had experience in financial and consultancy services.

4. The acquirers and PAC, through the merchant banker, filed the draft letter of offer (DLO) with SEBI on November, 26, 2009. During examination of the DLO, certain complaints were received by SEBI against the acquirers

and PAC as well as against the target company and its promoters. The appellants (the acquirer) in their complaints to SEBI and other proceedings including petition under Section 397/398 of the Companies Act before the Company Law Board and a suit before the Civil Court *inter alia* questioned the transaction for joint development of Vile Parle Property in terms of Memorandum of Understanding (MoU) dated 26th September, 2009 with Sheth Developers and Suraksha Realty Ltd. Various correspondences were exchanged between SEBI and the merchant banker, acquirers, PAC, the target company and certain other entities in respect of such complaints.

SUPREME COURT OF INDIA
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JUDGMENT

5. The appellants *vide* application dated 8th October, 2011 sought permission to withdraw the offer under Regulation 27(1)(d). The stand of the appellants in the said letter was that the SEBI had not taken any decision on the DLO in two years during which period the management of the target company had systematically siphoned off its coffers, depleted its valuable fixed assets and eroded its net worth substantially with the intention of making it a shell company. This has defeated the very object of the

offer, without any fault on the part of the acquirers. The management had availed huge high cost borrowing from banks and financial institutions against its property, including 18.7 per cent shares out of the promoters' shareholdings. Disputes were pending before the arbitrator arising out of default in payments. Most valuable assets of the target company had been encumbered in violation of SEBI regulations and against the interest of minority shareholders and the acquirers. Since the date of PA, financial position of the target company had deteriorated substantially.

**ORDER OF SEBI**

6. The SEBI *vide* order dated 13th April, 2012 declined to permit withdrawal of the PA but observed that alleged violation of Regulation 23 by the target company shall be investigated. It was held that as per Regulation 23(1), the target company was entitled to dispose of its assets with the approval of the shareholders even after the PA. Correspondence which the SEBI had with the acquirers was referred to, with a view to explain the delay in deciding the DLO. It was observed that the SEBI had informed the merchant banker of the appellants on 3rd February, 2010

that it was not competent to administer the authenticity of the process of Resolution in the General Body Meeting (GBM) dated 18th January, 2010. The merchant banker *vide* letter dated 5th May, 2010 informed the SEBI that the acquirers had reached a settlement with the target company and withdrawn their petition before the Company Law Board (CLB) against the Resolution dated 18th January, 2010. SEBI had also advised the merchant banker that it had not been provided any material in support of the allegation of violation of Regulation 23 by the target company in selling its assets. The merchant banker informed the SEBI *vide* letter dated 19th May, 2011 that the acquirers had filed a suit for restraining the target company from creating any third party interest in the assets of the target company. The SEBI had also received complaints against the acquirers and the PAC which were being looked into when the PAC *vide* letter dated 2nd August, 2011 sought permission to withdraw the PA. *Vide* letter dated 9th August, 2011, the acquirers requested that the process of open offer be kept in abeyance. SEBI *vide* e-mail dated 9th September, 2011 responded to the merchant banker, seeking tabulated list of the allegations of the acquirers and the PAC but instead of doing so, the

merchant banker forwarded request for withdrawal of the PA. It was observed that in the circumstances there was no delay on the part of the SEBI. It was further observed that the acquirers had challenged the Resolution of the Extra Ordinary General Meeting (EGM) and had also filed a suit. The acquirers entered into an amicable settlement before the CLB. SEBI had no jurisdiction in the matter. Referring to Regulation 22, it was observed that the acquirers could make PA only after most careful consideration and must ensure that it is able to implement the offer. Referring to Regulation 27, it was observed that public offer once made could not be withdrawn except in the circumstances provided in the said Regulation which had to be construed strictly. Unchecked automatic withdrawal of offer was capable of being misused. It was also observed that the acquirers should have used due diligence with regard to the allegation in FIR dated 25th July, 2009 about personal borrowings by promoters of the target company by sale of prime properties as the PA was much after the FIR. The acquirers and the PAC had already purchased substantial shares of the target company and thus, could not make PA without exercising due diligence regarding the financial condition and quality of

SUPREME COURT OF INDIA JUDGMENT

management of the target company. The acquirers were not strangers to the target company. They had 6.47 per cent shares. Discovery of adverse effects pertaining to financial health subsequent to the PA could not be a ground to withdraw the PA. Doing so will jeopardize the interests of the shareholders. The takeover regulations laid down a self-contained code and withdrawal of public offer was not governed by principles of withdrawal of an offer under the Contract Act, 1872.

**ORDER OF SAT**

7. The above view has been affirmed by the SAT in its impugned order (by majority). As regards the timeline stipulated in Regulation 18, it was observed that under the second proviso thereto, the SEBI could take time in making inquiry on a complaint and thereafter could call for a revised letter of offer with or without re-scheduling the date of opening or closing the offer. However, it was observed that in the present case, SEBI was wholly unjustified in taking more than two years for offering its comments on the letter of offer submitted by the appellants. This, however, did not constitute a ground to permit withdrawal of the PA. As regards the contention



SUPREME COURT OF INDIA JUDGMENT

that the public offer was frustrated and became impossible of implementation on account of encumbering of the most valuable property of the target company in violation of Regulation 23 and other steps of the promoters making the target company a shell company, it was observed that the target company had taken decision to develop its Vile Parle property even before the PA. Appellant No.1 had given his offer for joint development of the said property on 29th September, 2008 but the said offer was rejected and Sheth Developers were shortlisted for the purpose. It was thereafter that the appellants decided to make hostile takeover public offer to frustrate the decision of the target company to develop the property with Sheth Developers. It will be appropriate to refer to the findings of the SAT in this regard:

> *"14. We see no merit in the above contentions. Admittedly, GTL had decided to develop the Vile-Parle property even before public offer was made by appellants on November 12, 2009. In fact Appellant No. 1 had made an offer to GTL on September 29, 2008 for joint development of Vile-Parle property by offering ` 150 crores as non refundable amount and had suggested profit sharing in the joint venture at a ratio 50:50. However, GTL rejected the offer made by appellants and on recommendation of Ernst & Young shortlisted Sheth Developers as best 20 bidder for joint development of Vile-Parle property. Thereupon appellants decided to make hostile public offer on November 12, 2009 with a view to frustrate decision of GTL to develop the Vile-Parle property jointly with Sheth*

*Developers. Although object of the proposal to acquire 25% shares of GTL at Rs. 101/- per share as against the market price of Rs.109/- per share, as stated in the public offer was to obtain substantial stake/voting rights of GTL, it is not in dispute that appellants were basically interested in developing the Vile-Parle property. Thus, it is evident that appellants being frustrated in their endeavour to develop the Vile-Parle property, had resorted to the mechanism of public offer with a view to frustrate the decision of GTL in jointly developing the Vile-Parle property with Sheth Developers. Therefore, appellants having made public offer out of frustration on account of not being able to develop the Vile-Parle property, are not justified in alleging that entrusting the development of Vile-Parle property to Sheth Developers has frustrated the public offer made by appellants.*

*15. Admittedly, after making public offer, appellants had filed Company Petition No. 3 of 2010, wherein specific grievance was made to the effect that GTL had entered into MOU with Sheth Developers without disclosing all material facts to the shareholders and without the approval of shareholders which was in gross violation of regulation 23 of SAST Regulations, 1997. It was also alleged in the Company Petition that the promoters of GTL have been mismanaging the affairs of the company and have siphoned of huge amounts from the company, as a result whereof, there has been deep decline in the performance and profitability of the company. Appellants had also sought an order restraining GTL from holding EGM which was scheduled to be held on January 18, 2010.*

*16. Company Law Board in its order dated January 19, 2010, recorded statement made by counsel for GTL that in the EGM held on January 18, 2010 requisite resolutions have been passed in relation to development of Vile-Parle property and in implementation of the said resolution third party rights have been created. By that order Company Law Board directed that during the pendency of Company Petition No. 3 of 2010 GTL shall not act upon resolution dated January 18, 2010 any further. From aforesaid order passed by Company Law Board it is clear that in view of resolution passed in the*

*EGM held on January 18, 2010, violation of regulation 23 committed by GTL in relation to development of Vile-Parle property stood rectified. Dispute, if any in relation to passing of resolution on January 18, 2010 was to be considered at the hearing of Company Petition No. 3 of 2010.*

*17. However, on February 8, 2010, appellants withdrew Company Petition No.3 of 2010 by merely recording that the parties have amiably settled the matter without any further claims against each other. Having settled the dispute relating to development of Vile-Parle property with the promoters/management of GTL on the basis of undisclosed reasons and having withdrawn Company Petition No. 3 of 2010 unconditionally, it is not open to appellants to allege that their public offer is frustrated on account of GTL entering into MOU with Sheth Developers for development of Vile-Parle property.*

*18. Similarly, having settled the dispute relating to siphoning of funds by GTL during 2009-2010 which plea was specifically raised in Company Petition No. 3 of 2010, appellants are not justified in agitating the very same issue before SEBI on ground that GTL has siphoned of its funds during the year 2009-2010 and 2010-2011. In other words, since the plea of siphoning of funds by GTL during the year 2009-2010 and prior thereto having been specifically raised in Company Petition No. 3 of 2010 and that issue having been settled by appellants with the promoters/ management of GTL for undisclosed reasons, the appellants are not justified in reagitating the very same issue before SEBI in relation to siphoning of funds either during 2009-2010 or during 2010-2011.*

*21. It is relevant to note that appellants, subsequent to withdrawal of Company Petition No. 3 of 2010 in February 2010, have filed S. C. Suit No. 817 of 2011 in April 2011 before the City Civil Court at Mumbai, alleging for the first time that the Company Petition No. 3 of 2010 was withdrawn on account of oral assurance given by promoters of GTL that Vile-Parle property would be developed only after holding public auction and that the promoters of GTL have committed breach of that oral assurance.*

*22. Admittedly, City Civil Court at Mumbai has granted ad- interim relief in favour of appellants on April 26, 2011 and that ad- interim order continues to be in operation till date. Therefore, irrespective of the fact that SEBI was not justified in taking more than two years for approving the draft letter of offer, in the facts of present case, grievance of appellants that the public offer is frustrated and has become impossible of performance cannot be accepted, because, both grounds based on which appellants had sought withdrawal of public offer, were in fact settled by appellants on the basis of oral assurance given by promoters of GTL and further, for the alleged breach of oral assurance, appellants have filed Suit in the Bombay City Civil Court and obtained stay of development of Vile-Parle property and that stay is admitted operating till date.*

*23. Strong reliance was placed by counsel for appellants on decision of SEBI dated February 14, 2014 wherein penalty of ` 1 crore has been levied against the promoters of GTL interalia for violating regulation 23 of SAST Regulations, 1997. No doubt that entering into an MOU by GTL with Sheth Developers on November 26, 2009 without obtaining approval of general body of shareholders was in violation of regulation 23 of SAST Regulations, 1997. However, admittedly on January 18, 2010 the general body of shareholders has authorized GTL to enter into Joint Development Agreement is in respect of Vile-Parle property. In view of approval granted by the general body of shareholders on January 18, 2010, grievance of appellants that Vile-Parle property has been encumbered in violation of regulation 23 does not survive at least from January 18, 2010.*

*26. Apart from above, as late as on August 9, 2011 appellants had addressed a letter to SEBI requesting them to keep the process of open offer in abeyance, because, in the proceedings pending before the City Civil Court at Mumbai, GTL had filed an affidavit stating that in the board resolution dated May 25, 2011 company has decided not to proceed further with the MOU dated November 26, 2009 (wrongly stated therein as December 26, 2009) entered with Sheth Developers and instead take necessary steps to develop the Vile-Parle property by the company of its own. By the said letter dated August 9, 2011*

*appellants called upon SEBI to investigate about the exact legal status of the Vile-Parle property, investigate regarding possession of the original title deeds of Vile-Parle property and investigate regarding possession of the original title deeds of Vile-Parle property, investigate regarding usage of funds etc. It was further stated in the said letter until appellants are assured of their concern on the above issues, SEBI should keep the process of open offer in abeyance.*

*27. Aforesaid letter dated August 9, 2011, clearly falsifies the case of appellants that the actions taken by promoters of GTL during the course of two years has frustrated the public offer, because, if public offer was frustrated, appellants would not have asked SEBI to keep the process of public offer in abeyance. Having asked SEBI on August 9, 2011 to keep the process of public offer in abeyance, appellants were not justified in filing application on October 11, 2011 seeking permission to withdraw the open offer on ground that inordinate delay has frustrated the open offer."*

8. We have heard learned counsel for the parties.

**CONTENTIONS OF THE APPELLANTS**

9. Main contention raised on behalf of the appellants is that there is no justification for long delay on the part of the SEBI in granting approval to the offer of the appellant and situation having changed to the prejudice of the appellant, the appellants are entitled to withdraw their offer. Since under the scheme of the regulations, the appellants could not withdraw the offer once made except in circumstances mentioned in Regulation 27, the

regulation should be read as creating an obligation on the part of the SEBI to take speedy decision and if there was unexplained delay resulting in prejudice to the appellants-acquirers, the appellants are entitled to be absolved of the liability to honour the offer. GTL had become a BIFR company on account of siphoning off funds by the promoters. It was submitted that in absence of obligation to approve the offer within reasonable time, the promoters could take steps to siphon the funds or dispose of the assets which could prejudice the interests of the acquirer. Thus, it could not be held that the acquirer was indefinitely bound by the offer. Reference was also made to the timeline provided in Regulation 22 and the provisions of Regulation 23. It was submitted that while normal ups and downs in the market may not be a ground to permit withdrawal of offer, unilateral action of the promoters resulting in transfer of assets could certainly be the ground to permit withdrawal of offer. The object of binding an acquirer to the offer is to protect the interest of the shareholders but this was required to be balanced with the interest of the acquirer. If the assets are unduly transferred by the promoters after the PA, the acquirer was entitled to be relieved from the offer. SEBI in its capacity

as regulator has to adopt an approach which is fair to all. In the facts of present case, the decisions of this Court in ***Nirma Industries Limited vs. Securities and Exchange Board of India***[1] and ***Securities and Exchange Board of India vs. M/s. Akshya Infrastructure Pvt. Ltd.***[2] relied upon in the impugned order are not applicable. Even if clause (d) of regulation 27 is read *ejusdem generis* so as to apply only in situations where it is impossible for the acquirer to perform the public offer, it cannot exclude situations where SEBI itself is satisfied that serious prejudice was caused to the acquirer by intervening actions of the promoters in alienating or encumbering the assets of the company, rendering it inequitable to require the acquirer to be bound by its offer. Thus, the obligation of the acquirer cannot be divorced from the conduct of the promoters in the intervening period. Apart from distinguishing the judgment in ***Nirma Industries Limited*** **(supra)** which has been followed in the impugned order, the judgment in ***M/s. Akshya Infrastructure Pvt. Ltd*** **(supra)** was also sought to be distinguished as being limited to cases where

1 (2013) 8 SCC 20

2 (2014) 11 SCC 112

delay by SEBI does not cause any serious prejudice to the acquirer.

10. Thus, the submissions of the appellants are two fold :

(i) The SEBI failed to adhere to the timeline prescribed under the Takeover Code which rendered it impossible for the appellants to conclude their open offer. Adherence to timeline prescribed under Regulations 18(2), 22(2), (3) and (4) are critical under the Takeover Code, the Bhagwati Committee Report and the International Practice. The time is of essence in cases of hostile takeover.

(ii) The existing promoters should not be given an opportunity to administer a poison pill to defeat the offer of the potential acquirers. This principle is recognized under Regulation 23.

11. Adverting to the facts it was submitted that first complaint against the appellants was received on 8th January, 2010 i.e. 21 days after the PA. Complaints against the appellants were frivolous. The appellants duly responded to the complaints in timely manner. The complaints were made at the behest of the promoters. The appellants pointed out various illegal acts of the promoters but the SEBI failed to take any action. The appellants requested the SEBI to keep the open offer in abeyance till action was taken against the promoters. This

justifies the prayer of the appellants to withdraw the open offer.

12. Shri C.A. Sundaram, learned senior counsel for the appellants submitted that all the members of the SAT (majority as well as minority) have held the delay by SEBI to be unjustified but still, on erroneous interpretation, right of the appellants to withdraw the public offer has not been upheld. Reference was made to the complaint about transfer of valuable property of the Company which was un-encumbered at the time of PA. The funds raised from the transaction have been siphoned off. One of the key promoters was arrested by the Economic Offences Wing of the Police and remained in jail for one and a half years. Chargesheet was filed against him. The financial ratio of the target company reflects manner in which financial position quickly deteriorated after the PA. The petition filed by the acquirers before the Company Law Board was withdrawn on the assurance of the promoters that the assets will not be encumbered without the public auction. Thereafter, the matter was pending in the civil suit. Thus, there was a breach of Regulation 23.

13. Shri Sundaram submitted that open offer was not a concluded contract but mere invitation to the public to offer their shares. The result of not allowing the offer to be withdrawn will be that the promoters will be able to sell their shares at the price specified in open offer even when the value of the shares was far lower. This will be against the policy of law underlying the Takeover Regulations. Moreover, the action of the SEBI was required to be fair, reasonable and consistent with Article 14 of the Constitution.

14. Shri Sundaram sought to distinguish the judgments of this Court in ***Nirma Industries Limited*** **(supra)** and ***M/s. Akshya Infrastructure Pvt. Ltd.*** **(supra)** by submitting that unlike the said cases, in the present case, there was undue delay on the part of the SEBI and prejudice was caused to the acquirers for reasons not attributable to them. He submitted that doctrine of frustration under Section 56 of the Contract Act will clearly apply. As a regulator, the SEBI is duty bound to protect the interest of the acquirer and also to ensure that a genuine attempt by an acquirer is not defeated by the promoters by their unilateral action.

**RESPONSE BY THE SEBI**

15. Shri Arvind P. Datar, learned senior counsel for the SEBI opposed the above submissions, he submitted that adverse finding against SEBI on the issue of delay was unjustified, but even if the said finding was upheld, the withdrawal of open offer was not permissible under Regulation 27(1)(d) of the Takeover Regulations. The acquirers held 6.47% share and had lent Rs.8.5 crores to the target company. They had purchased shares worth Rs.63.33 lakhs before making the PA. The first appellant was aware of the acts of mismanagement by the promoters of the target company. The PA was made with the intention of curbing fraudulent and the illegal practices of the promoters and for the target company's benefit. The appellants approached SEBI to investigate the illegalities knowing fully well that SEBI's role was only to regulate the security market. For mismanagement or other illegalities, remedy was under Section 397/398 of the Companies Act which remedy the appellants had taken. The appellants reached an amicable settlement with the target company and thereafter approached the civil court. It was wrong to state that the target company had become

defunct. The target company continued to own the Vile Parle property worth Rs.2000 crores.

16. Shri Datar submitted that more than 43 complaints/letters were received which were to be dealt with by SEBI. In such circumstances, it could not be held that there was undue delay on the part of the SEBI in dealing with the DLO.

17. It was submitted that the appellants ought to have exercised due diligence before making the PA. The appellants were not strangers and had 6.47% shares. They had advanced loan of Rs.8.5 crores and acquired shares worth Rs.66.33 lakhs before the PA. They were aware of the FIR and alleged acts of mismanagement they had resorted to public offer out of frustration against the decision of the target company developing the Vile Parle property with Sheth Developers. They settled the matter before the Company Law Board with the target company and also approached the civil court for alleged breach of settlement and obtained stay of development of the Vile Parle property. In these circumstances, the plea of frustration could not be allowed to be raised by the appellants. The PA could not be allowed to be withdrawn

merely on the ground that the acquirers find it not to be a prudent decision. Moreover, the company still owns assets and was not a shell company and no prejudice was suffered by the acquirers. Referring to the penalty levied by SEBI on the target company for entering into a MoU without approval of the General Body, it was submitted that this could not furnish a ground for withdrawal of the PA. Appellants had raised the issue before the CLB and settled the matter.

**QUESTIONS**

18. The rival submissions require us to determine the following questions :

(i) To what extent is the timeline laid down under the Takeover Regulations required to be adhered to and effect of delay by SEBI in the present case?

(ii) To what extent unilateral action of the target company in dealing with the property of the company after a hostile public offer is made furnish cause of action to the acquirers to withdraw the public offer and whether in the present case, decision not permitting withdrawal of public offer is justified?

**THE TAKEOVER REGULATIONS**

19. Needless to mention that mergers and takeovers are well known processes in the corporate world. Acquisition

of controlling interest of a company can be friendly or hostile. In a friendly acquisition, management of the target company sells its controlling shares to the acquirer. Where management of the target company is unwilling to negotiate with an acquirer, the acquirer can directly approach the shareholders by making an open offer which is called Hostile takeover. A Hostile takeover helps to unlock the hidden value of the shares and puts pressure on the management to work efficiently. On the other hand, it has potential of unduly upsetting the normal functioning of a target company. Thus, there is an undoubted need to regulate the process of acquisition and takeovers in post- liberalisation era after 1991. It is well known that takeover attempt being unpleasant for the target company is normally met with defence strategies such as 'Poison Pills' (making takeover unviable for the acquirer by making the cost of acquisition unattractive), 'Shark Repellents' (measures to repel an unwanted takeover) sale of valuable assets, etc.

20. Justice P.N. Bhagwati Committee was appointed in November, 1995 to review the existing framework of regulations and to suggest amendments in the interest of investors and all parties concerned in the acquisition

process. The Committee kept in mind the following principles :

"i. Equality of treatment and opportunity to all shareholders.

ii. Protection of interests of shareholders.

iii. Fair and truthful disclosure of all material information by the acquirer in all public announcements and offer documents.

iv. No information to be furnished by the acquirer and other parties to an offer exclusively to any one group of shareholders.

v. Availability of sufficient time to shareholders for making informed decisions.

vi. An offer to be announced only after most careful and responsible consideration.

vii. The acquirer and all other intermediaries professionally involved in the offer, to exercise highest standards of care and accuracy in preparing offer documents.

viii. Recognition by all persons connected with the process of substantial acquisition of shares that there are bound to be limitations on their freedom of action and on the manner in which the pursuit of their interests can be carried out during the offer period.

ix. All parties to an offer to refrain from creating a false market in securities of the target company.

x. No action to be taken by the target company to frustrate an offer without the approval of the shareholders."[3]

3 Justice P.N. Bhagwati Committee Report on Takeovers

The Committee made various recommendations including requirement of disclosure by the acquirers, procedure for public announcements, obligations of the acquirers and the target company. This led to the adoption of the 1997 Takeover Regulations.

21. We may reproduce some of the Regulations which are necessary for the decision of controversy in the case before us :

" ***Acquisition of fifteen per cent or more of the shares or voting rights of any company.***

*10. No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations.*

***Acquisition of control over a company.***

*12. Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations.…*

***Timing of the public announcement of offer.***

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

***Submission of letter of offer to the Board.***

*18.* *(1) Within fourteen days from the date of public announcement made under regulation 10, 11 or 12 as the case may be, the acquirer shall, through its merchant banker, file with the Board, the draft of the letter of offer containing disclosures as specified by the Board.*

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

*Provided that if, within 21 days from the date of submission of the letter of offer, the Board specifies changes, if any, in the letter of offer (without being Page 35 of 75 under any obligation to do so), the merchant banker and the acquirer shall carry out such changes before the letter of offer is despatched to the shareholders :*

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

*(3) The acquirer shall, while filing the draft letter of offer with the Board under sub-regulation (1), pay a fee as mentioned in the following table, by bankers' cheque or demand draft drawn in favour of the 'Securities and Exchange Board of India'….*

***General Objections of the acquirer.***

*22.* *(1) The public announcement of an offer to acquire the shares of the target company shall be made only when the acquirer is able to implement the offer.*

*(2) Within 14 days of the public announcement of the offer, the acquirer shall send a copy of the draft letter of offer to the target company at its registered office address, for being placed before the board of directors and to all the stock*

*exchanges where the shares of the company are listed.*

*(3) The acquirer shall ensure that the letter of offer is sent to all the shareholders (including non-resident Indians) of the target company, whose names appear on the register of members of the company as on the specified date mentioned in 1 Inserted by the SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002, w.e.f. 9-9-2002. Page 47 of 75 the public announcement, so as to reach them within 45 days from the date of public announcement....*

***General obligations of the board of directors of the target company.***

*23. (1) Unless the approval of the general body of shareholders is obtained after the date of the public announcement of offer, the board of directors of the target company shall not, during the offer period,—*

*(a) sell, transfer, encumber or otherwise dispose of or enter into an agreement for sale, transfer, encumbrance or for disposal of assets otherwise, not being sale or disposal of assets in the ordinary course of business, of the company or its subsidiaries; or*

*(b) issue 2 [or allot] any authorised but unissued securities carrying voting rights during the offer period; or*

*(c) enter into any material contracts.*

***Withdrawal of offer.***

*27. (1) No public offer, once made, shall be withdrawn except under the following circumstances:—*

*(a) [***]*

*(b) the statutory approval(s) required have been refused;*

*(c) the sole acquirer, being a natural person, has died;*

*(d) such circumstances as in the opinion of the Board merit withdrawal.*

***Board's right to investigate.***

*38. The Board may appoint one or more persons as investigating officer to undertake investigation for any of the following purposes, namely:—*

*(a) to investigate into the complaints received from the investors, the intermediaries or any other person on any matter having a bearing on the allegations of substantial acquisition of shares and takeovers ;*

*(b) to investigate suo motu upon its own knowledge or information, in the interest of the securities market or investors' interest, for any breach of the regulations;*

*(c) to ascertain whether the provisions of the Act and the regulations are being complied with for any breach of the regulations."*

22. In ***Nirma Industries Limited*** **(Supra)**, the acquirer after making PA sought withdrawal therefrom on the ground of embezzlement of funds by the target company. SEBI rejected the application with the observation that the acquirer ought to have used due diligence prior to making the public offer. Rejecting the plea that the embezzlement and siphoning off of funds by the target company could not have been found by third party even after exercising diligence, this Court held under the scheme of the takeover code public offer once made could not be withdrawn so as to deprive the shareholders of their

valuable right to have exit option and also to ensure that public announcement is not made by way of speculation. The scheme of takeover code was held to be as follows:

*" 59. A conspectus of the aforesaid Regulations would show that the scheme of the Takeover Code is: (a) to ensure that the target company is aware of the substantial acquisition; (b) to ensure that in the process of the substantial acquisition or takeover, the security market is not distorted or manipulated; and (c) to ensure that the small investors are given an option to exit, that is, they are offered a choice to either offload their shares at a price as determined in accordance with the Takeover Code or to continue as shareholders under the new dispensation. In other words, the Takeover Code is meant to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers and that the process does not take place in a clandestine manner without protecting the interest of the shareholders. It is keeping in view the aforesaid aims and objects of the Takeover Code that we shall have to interpret Regulation 27(1)."*

23. As regards the scheme of Regulation 27, it was further observed :

*"62. A bare perusal of the aforesaid Regulations shows that Regulation 27(1) states the general rule in negative terms. It provides that no public offer, once made, shall be withdrawn. Since clause (a) has been omitted, we are required to interpret only the scope and ambit of clauses (b), (c) and (d). The three sub-clauses are exceptions to the general rule and, therefore, have to be construed very strictly. The exceptions cannot be construed in such a manner that would destroy the general rule that no public offer shall be permitted to be withdrawn after the public announcement has been made. Clause (b)*

*would permit a public offer to be withdrawn in case of legal impossibility when the statutory approval required has been refused. Clause (c) again provides for impossibility when the sole acquirer, being a natural person, has died. Clause (b) deals with a legal impossibility whereas clause (c) deals with a natural disaster. Clearly clauses (b) and (c) are within the same genus of impossibility. Clause (d) also being an exception to the general rule would have to be naturally construed in terms of clauses (b) and (c). Mr. Divan has placed a great deal of emphasis on the expression "such circumstances" and "in the opinion" to indicate that the Board would have a wide discretion to permit withdrawal of an offer even though it is not impossible to perform. We are unable to accept such an interpretation.*

*67. Applying the aforesaid tests, we have no hesitation in accepting the conclusions reached by SAT that clauses (b) and (c) referred to circumstances which pertain to a class, category or genus, that the common thread which runs through them is the impossibility in carrying out the public offer. Therefore, the term "such circumstances" in clause (d) would also be restricted to a situation which would make it impossible for the acquirer to perform the public offer. The discretion has been left to the Board by the legislature realising that it is impossible to anticipate all the circumstances that may arise making it impossible to complete a public offer. Therefore, certain amount of discretion has been left with the Board to determine as to whether the circumstances fall within the realm of impossibility as visualised under clauses (b) and (c). In the present case, we are not satisfied that circumstances are such which would make it impossible for the acquirer to perform the public offer. The possibility that the acquirer would end-up making losses instead of generating a huge profit would not bring the situation within the realm of impossibility.*

*70. Mr. Venugopal, in our opinion, has rightly submitted that the Takeover Regulations, which is a special law to regulate "substantial acquisition of shares and takeovers" in a target company lays down a self-contained code for open offer; and also that interest of investors in the present case required that they should be given an exit route when the*

*appellants have acquired substantial chunk of shares in the target company. He has correctly emphasized in his submissions that the orderly development of the securities market as a whole requires that public offers once made ought not to be allowed to be withdrawn on the ground of fall in share price of the target company, which is essentially a business misfortune or a financial decision of the acquirer having gone wrong. SEBI as well as SAT have correctly concluded that withdrawal of the open offer in the given set of circumstances is neither in the interest of investors nor development of the securities market.*

*90. We are inclined to agree with the submission made by Mr Venugopal that the appellants cannot be permitted to wriggle out of the obligation of a public offer under the Takeover Regulation. Permitting them to do so would deprive the ordinary shareholders of their valuable right to have an exit option under the aforesaid Regulations. The SEBI Regulations are designed to ensure that public announcement is not made by way of speculation and to protect the interest of the other shareholders. Very solemn obligations are cast on the Merchant Banker under Regulation 24(1) to ensure that—*

> *"24. (1)(a) the acquirer is able to implement the offer;*
>
> *(b) the provision relating to escrow account referred to in Regulation 28 has been made;*
>
> *(c) firm arrangements for funds and money for payment through verifiable means to fulfil the obligations under the offer are in place;*
>
> *(d) the public announcement of offer is made in terms of the Regulations;*
>
> *(e) his shareholding, if any in the target company is disclosed in the public announcement and the letter of offer."*

*91. Regulation 24(2) mandates that the Merchant Banker shall furnish to the Board a due diligence certificate which shall accompany the draft letter of offer. The aforesaid Regulation clearly indicates that any enquiries and any due diligence that has to be made by the acquirer have to be made prior to the public announcement. It is, therefore, not possible to accept the submission of Mr Shyam Divan that the appellants are to be permitted to withdraw the public*

*announcement based on the discovery of certain facts subsequent to the making of the public announcement. In such circumstances, in our opinion, the judgments cited by Mr Shyam Divan are of no relevance. "*

24. As regards the effect of delay on the part of SEBI, it was observed:

"94*. A perusal of the aforesaid Regulation clearly shows that the acquirer is required to file the draft letter of offer containing disclosures as specified by the Board within a period of 14 days from the date of public announcement. Thereafter, letter of offer has to be dispatched to the shareholders not earlier than 21 days from its submission to the Board. Within 21 days, the Board is required to specify changes if any, that ought to be made in the letter of offer. The merchant banker and the acquirer have then to carry out such changes before the letter of offer is dispatched to the shareholders. But there is no obligation to do so. Under the second proviso, the Board may call for revised letter of offer in case it finds that the disclosures in the draft letter of offer are inadequate or the Board has received any complaint or has initiated any enquiry or investigation in respect of the public offer. It is important to notice that in the first proviso the Board does not have any obligation to specify any change in the draft letter of offer within a period of 21 days. In the present case, in fact, the Board had not specified any changes within 21 days. We have already noticed earlier that the letter of offer was lacking and deficient in detail. The appellants themselves were taking time to submit details called for, by their merchant bankers through various letters between 8-8-2005 to 20-3-2006. We have already noticed the repeated advice given by the Merchant Banker to enhance the issue size of the open offer and to comply with other requirements of the Takeover Regulations. The appellants, in fact, were prevaricating and did not agree with the interpretation placed on Regulation 27(1)(d) by the Merchant Banker. We, therefore, reject the submission of Mr Shyam Divan that there*

*was delay on the part of SEBI in approving the draft letter of offer. "*

25. In ***M/s. Akshya Infrastructure Pvt. Ltd.*** **(supra)**, this Court held that SEBI is not justified in causing delay in dealing with the issuance of its comments on a letter of offer as delay can lead to controversy as to whether the belated action was *bona fide* exercise of statutory power. However, delay by itself may not vitiate action of the SEBI. The SEBI has to be guided by the overall interest of the shareholders in dealing with the prayer for withdrawal from the public offer. The economic unviability is no ground to justify prayer for such withdrawal. The relevant observations are:

*"30. With regard to delay, we do not find much substance in the submission of Mr C.U. Singh. Mr Singh has sought to explain the delay on the ground that information sought by the appellant was not given by the respondent. In our opinion, this was no ground for the appellant to delay the issuance of comments on the letter of offer, especially not for a period of 13 months. In the event the information was not forthcoming, the appellant had the power to refuse the approval of the public offer. It is true that under Regulation 18(2), SEBI was required to dispatch the necessary letters to the shareholders within a reasonable period. It is a matter of record that the comments were not offered for 13 months. Such kind of delay is wholly inexcusable and needs to be avoided. It can lead to avoidable controversy with regard to whether such belated action is bona fide exercise of statutory power by SEBI. By adopting such a lackadaisical, if not callous attitude, the very object for which the Regulations have been*

*framed is diluted, if not frustrated. It must be remembered that SEBI is the watchdog of the securities market. It is the guardian of the interest of the shareholders. It is the protective shield against unscrupulous practices in the securities market. Therefore, SEBI like any other body, which is established as a watchdog, ought not to act in a lackadaisical manner in the performance of its duties. The time-frame stipulated by the Act and the Takeover Regulations for performing certain functions is required to be maintained to establish the transparency in the functioning of SEBI.*

*31. Having said this, we are afraid such delay is of no assistance to the respondent. It will not result in nullifying the action taken by SEBI, even though belated. Ultimately, SEBI is charged with the duty of ensuring that every public offer made is bona fide for the benefit of the shareholders as well as acquirers. In the present case, SEBI has found that permitting the respondent to withdraw the public offer would be detrimental to the overall interest of the shareholders. The only reason put forward by the respondent for withdrawal of the offer is that it is no longer economically viable to continue with the offer. Mr Nariman has referred to a tabular statement and data to show that there is no substantial variation in the share prices that ensued making of the public offer. Having seen the Table, we find substance in the submission of Mr Nariman that there is hardly any variation in the shares of the target company from 20-10-2011 till 30-11-2011. The variation seems to have been between Rs 78.10 (on 24-11-2011) and Rs 87.60 (on 20-10-2011). Such a variation cannot be said to be the result of the public offer. But this will not detract from the well-known phenomena that public announcement of the public offering affects the securities market and the shares of the target company. The impact is immediate.*

*35. We are also not impressed by the submission of Mr Nariman that it has now become economically impossible to give effect to the public offer. This very submission has been rejected in Nirma Industries Ltd. We reiterate our opinion in Nirma Industries Ltd. that under Regulations 27(1)(b), (c) and (d), a public offer, once made, can only be permitted to be withdrawn in circumstances which make it virtually impossible to*

*perform the public offer. In fact, the very purpose for deleting Regulation 27(1)(a) was to remove any misapprehension that an offer once made can be withdrawn if it becomes economically not viable. We are of the considered opinion that the distinction sought to be made by Mr Nariman between a voluntary public offer and a triggered public offer is wholly misconceived. Accepting such a submission would defeat the very purpose for which the Takeover Code has been enacted."*

**OUR FINDINGS**

**Re. Question (i)**

26. Applying the decisions of this Court to the facts of the present case, we are in agreement with the finding recorded by the SAT that there was undue delay on the part of the SEBI in dealing with the DLO. No doubt, in a given case timeline prescribed under the Regulations may not be adhered to when the SEBI justifiably takes time in dealing with the complaints, as rightly submitted by Shri Datar, in the present case, the stand of the SEBI itself is that it could not go into the complaints for which the right forum was CLB. As regards the time taken in dealing with the complaints against the acquirers, the SEBI could have promptly proceeded with the matter. However, mere upholding of finding of SAT on the aspect of delay by SEBI is not enough to hold that the appellants are entitled to withdrawal of the public offer. The withdrawal has to be dealt with under Regulation 27, as held by this Court. The

general principle is that public offer once made cannot be withdrawn. Exception to the rule is the specified situations under the Regulation as laid down by this Court in above decisions particularly in ***Nirma Industries Limited* (Supra)**[4]. In the present case, though SEBI was not justified in causing delay in giving its comments on public offer, this by itself is not enough to justify withdrawal from public offer so long as the case does not fall under Regulation 27. First question is answered accordingly.

**Re. Question (ii)**

27. As already observed above, under the scheme of the regulations public offer has to be made after due diligence (Regulation 22). Obligation of the board of directors under Regulation 23 against alienation of assets, issuance of unissued securities carrying voting rights or entering into material contracts is applicable only if approval of general body of shareholders is not obtained. We are not dealing with validity of imposition of fine on the target company for its decision in dealing with Vile Parle property, without approval of the general body as this issue is not before us. The fact remains that *ex post facto* approval of the general body has since been obtained. Moreover, SEBI had

4 (2013) 8 SCC 20 para 67

observed that this aspect of the matter will be separately enquired into. It is clear that under the scheme of Regulation 23, there is no bar to a decision with the approval of the general body of shareholders, if otherwise valid. The question whether unilateral decisions of the target company have rendered the carrying out of the public offer possible, is a question to be decided on facts of each case. In the present case, the SEBI as well as the SAT have concurrently held that public offer is capable of being carried out and has not become impossible. The assets are available with the target company. Finding has also been recorded about the circumstances preceding the public offer and the conduct of the acquirer which is based on record. The steps for development of the Vile Parle property had already been initiated and the acquirer had taken remedies before the CLB against the decision of the target company and had settled the matter with the target company. It is clear from the scheme of the regulations that there is no absolute bar for the target company to take decision about its assets, subject to compliance with statutory procedure and subject to the decision being otherwise valid. There is no doubt that against any *mala fide*, illegal or unjustified decision of the target company,



SUPREME COURT OF INDIA
JUDGMENT

remedies at appropriate *fora* are available to the aggrieved parties. Thus, there is no justification for automatic withdrawal from public offer without clear prejudice to the acquirer to the extent of rendering the carrying out of public offer impossible. In the facts of the present case, we do not find any ground to interfere with the concurrent finding of the SEBI and the SAT that request for withdrawal from public offer was not justified. Question (ii) is answered accordingly.

28. In view of the above, we do not find any merit in this appeal and the same is accordingly dismissed. There shall be no order as to costs.

SUPREME COURT OF INDIA
॥ यतो धर्मस्ततो जयः ॥
JUDGMENT

……………………………………………….J.
[ ANIL R. DAVE ]

……………………………………………….J.
[ ADARSH KUMAR GOEL ]

NEW DELHI
NOVEMBER 07, 2016