

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: S K MOHANTY, WHOLE TIME MEMBER

ORDER

UNDER SECTIONS 11 AND 11B(i) OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 AND REGULATIONS 32 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011 IN THE MATTER OF ACQUISITION OF SHARES OF VKS PROJECTS LTD.

In respect of:

Sl. No.	Noticees /Name of the entities	PAN
1.	Dr. V. K. SUKUMARAN	AJAPS8288D
2.	MS. SARITHA SUKUMARAN	AYFPS1523F
3.	MR. R. SAHADEVAN SUKUMARAN	ACJPR4835P

(Hereinafter individually referred by their corresponding name/number and collectively referred to as "Noticees")

- Securities and Exchange Board of India (SEBI) had conducted an investigation in the matter of disclosure violations by the promoters of VKS Projects Ltd. (hereinafter referred to as "**the target company**") having its registered office at "507, 'B' Wing, Sai Sangam Building, Palm Beach Road, Sector – 15, CBD Belapur (E), Navi Mumbai, Maharashtra 400614.", for the period July 18, 2012 to December 31, 2014. The shares of the target company were listed on Bombay Stock Exchange Limited (hereinafter referred to as "**BSE**") and National Stock Exchange of India Limited (hereinafter referred to as "**NSE**") during the said period. The shares of the target company have been delisted w.e.f. September 11, 2018 on NSE and September 28, 2018 on BSE.
- The promoters of the Target Company during the period of investigation were as under:

Sl. No.	Name	Designation
1.	Dr. V. K. Sukumaran	Managing Director (Promoter & Executive)
2.	Saritha Sukumaran	Promoter
3.	R Sahadevan	Promoter

- It was observed from the demat statements of the above three promoters available with NSDL and

CDSL and from the shareholding pattern of the target company available on the BSE website that as on October 17, 2013, the promoters of the target company were holding 12,23,38,800 shares, amounting to 33.97% of the share capital of the target company. Subsequently, on October 18, 2013, *Dr. V. K. Sukumaran* acquired 3,00,00,000 shares in off-market, as a result of which the shareholding of the promoters in the target company increased from 33.97% to 38.73% (i.e., increase by 4.76%). Further, on November 22, 2013, *Ms. Saritha Sukumaran* acquired 25,00,000 shares through off-market transaction, amounting to 0.40% of the share capital of the target company. The said acquisition on November 22, 2013 triggered open offer obligation for the promoters under regulation 3(2) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as the **“Takeover Regulations, 2011”**) as the gross acquisition by the promoters, during the financial year 2013-14, exceeded 5% as a result of the said acquisition. The details of the acquisition as mentioned above and the resultant change in shareholding of the promoters of the *Company* are presented in the table below:

Name of promoter	Acquirer / PAC	Pre-acquisition holding (As on 17/10/2013)		Acquired on 18/10/2013*		Acquired on 22/11/2013*		Post-acquisition holding (As on 22/11/2013)	
		No. of shares	% share-holding	No. of shares	% share-holding	No. of shares	% share-holding	No. of shares	% share-holding
<i>V K Sukumaran</i>	PAC	122338800	19.42	30000000	4.76	0	0	152338800	24.18
<i>Saritha Sukumaran</i>	Acquirer	91650000	14.55	0	0	2500000	0.40	94150000	14.95
<i>R Sabdevan</i>	PAC	8925	0.00	0	0	0	0	8925	00
Grand Total		213997725	33.97	30000000	4.76	2500000	0.40	246497725	39.13
Total no. of shares		630000000	100	630000000	100	630000000	100	630000000	100

*shares were acquired in off-market

- As can be seen from the above, *Dr. V. K. Sukumaran* and *Ms. Saritha Sukumaran*, who were also the promoters of the target company, had acquired 5.16% share capital during the financial year 2013-14. (i.e., 4.76% on October 18, 2013 and 0.40% on November 22, 2013), without making the mandatory public announcement for open offer in terms of regulation 3(2) of the Takeover Regulations, 2011. Pre-acquisition shareholding of the promoters was 33.97% of the paid up share capital of the target company as on October 18, 2013, which increased to 39.13% of the paid up share capital on November 22, 2013 after the aforesaid acquisition of shares of the target company by the two promoters, as depicted above.
- It was observed that *Dr. V. K. Sukumaran*, *Ms. Saritha Sukumaran* and *Mr. R. Sabdevan* were shown/disclosed as the promoters of the target company during the relevant period and hence, were

persons acting in concert (PACs) in terms of regulation 2(1)(q)(2)(iv) of the Takeover Regulations, 2011.

6. In view of the aforesaid acquisitions apparently in violation of the Takeover Regulations, 2011, SEBI issued a show cause notice dated April 15, 2019 (hereinafter referred to as "the SCN") read with a corrigendum thereto dated July 09, 2019 issued to the promoter group of the target company (hereinafter collectively referred to as "the *Notices*" and individually by their respective names/number) calling upon them to show cause as to why suitable directions under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 ("the SEBI Act, 1992") read with regulation 32 of the Takeover Regulations, 2011 should not be issued against them. Vide corrigendum dated July 09, 2019 SEBI had clarified that as on October 17, 2013 the promoters were holding 21,39,97,725 shares in the target company.
7. The *Notices* had sought inspection of the documents relied upon by SEBI. Accordingly, inspection of the documents relied upon by SEBI while issuing the SCN were granted to the authorized representatives of the *Notices* on June 03, 2019. Vide letter dated July 29, 2019, the *Notices* filed their common reply to the SCN. The submissions of the *Notices* are as under:
 - (1) The *Notices* have not been provided with all the relevant documents and records that have been relied upon by SEBI while making the allegations against them. Although at their request, the *Notices* were offered an opportunity for inspection of documents on June 03, 2019, they were not provided with copies of all relevant documents including the investigation report. The refusal to provide all relevant documents and records has prejudiced the *Notices*' rights in as much as all the facts relevant to the matter have not been disclosed to them and therefore, they are unable to submit a complete reply to the allegations and charges made against them. The refusal of SEBI to provide all the relevant documents and records is against the principles of natural justice, arbitrary, whimsical, and as a result, the present proceedings are vitiated and ought to be terminated forthwith *qua* the *Notices*.
 - (2) Despite their requests, the *Notices* have not been provided with copies of the Investigation Report, therefore, they are unable to confirm that the investigation period was July 18, 2012 to December 31, 2014 ("the investigation period"). The *Notices* are also not aware of the findings of the investigation.
 - (3) The SCN sets out the alleged violations on account of mandatory public announcement for open offer and the penalties for such violations as provided in the SEBI Act, 1992 and the Securities Contracts (Regulation) Act, 1956 ("the SCRA"); however, the said notice does

not set out the penalty proposed to be imposed for the alleged violations. In this regard, the *Notices* submit that the Hon'ble Supreme Court in the case of *Gorkha Security Services vs Government (NCT of Delhi) and others* 2014 (9) SCC 105 have set out the two requirements that a Show Cause Notice should meet to fulfil the requirements of principles of natural justice viz.: -

- (a) the material/grounds to be stated which according to the department necessitates an action;
- (b) particular penalty/action which is proposed to be imposed/taken.

Evidently, since the SCN fails to set out the particular penalty sought to be imposed; the same is not compliant with the principles of natural justice.

- (4) The present proceedings are vitiated by the delay and laches. The alleged violations by the *Notices* took place during the period October - November 2013 and the non-disclosure was committed, till December 2014. Details regarding the same were for the first time sought by SEBI in August 2018, i.e., 4 years after the relevant period. In the meanwhile, during the financial year, 2015-2016, the target company suffered severe losses, its net worth was completely eroded and winding up proceedings were initiated against the *Company*.
- (5) The scrip of the target company was suspended for trading by the NSE w.e.f. October 18, 2017 and the company has been delisted from the NSE w.e.f. September 11, 2018.
- (6) Vide order dated May 3, 2018, the Hon'ble Bombay High Court have ordered winding up of the *Company* and have appointed the Official Liquidator of the High Court as the liquidator to commence winding up of the *Company*.
- (7) *Dr. V.K. Sukumaran* was a promoter and the Chairman & Managing Director of the target company. *Ms. Saritha Sukumaran* was director in the target company from 2005 to 2013. *Mr. R. Sahdevan* is only a shareholder in the target company and is not a promoter. Further, he was not involved in any of the company activities.
- (8) It is a matter of record that as of October 17, 2013, the *Notices* together held 21,39,97,725 shares of the target company, which amounted to 33.97% of the total paid up share capital of the *Company*.
- (9) *Mr. R. Sahadevan* was not declared by the target company as a promoter and he was never in control over the affairs of the company and admittedly, he did not acquire any shares of the *Company* during the investigation period.

- (10) *Dr. V.K. Sukumaran* has not acquired 3,00,00,000 shares of the target company on October 18, 2013 as erroneously alleged. As set out in his email dated September 5, 2018, *Dr. V.K. Sukumaran* had clarified that on and around October 5, 2013, he had approached one *Mr. Piyush Naresb Kothari* for financial assistance and entered into an agreement whereby the said *Mr. Kothari* agreed to provide financial assistance of ₹3 crore against 3 crore shares of the target company. Accordingly, on October 8, 2013, *Dr. V.K. Sukumaran* had transferred a total of 3 crore shares of the target company to the 2 beneficiary accounts of *Mr. Kothari* in off market transaction (1.50 Crore shares to each beneficiary account). However, since the said *Mr. Kothari* was unable to provide the financial assistance as agreed upon, he returned the said 3 crore shares to the beneficiary account of *Dr. V.K. Sukumaran* from his 2 beneficiary accounts (1.50 crore shares each). Thus, it is evident that there was no acquisition of shares by *Dr. V.K. Sukumaran* in October 18, 2013 as erroneously alleged or otherwise.

(A copy of the Share Transfer Agreement dated October 5, 2013, a copy of the transaction statement of the beneficiary account of *Dr. V.K. Sukumaran* with Religare Securities Limited showing the transfer of 3 crore shares to *Mr. Kothari* on October 8, 2013, a copy of the transaction statements of the beneficiary accounts of *Dr. V.K. Sukumaran* with Religare Securities Limited and Anand Rathi Securities Limited showing the return of the said 3 crore shares (1.50 crores each) by *Mr. Kothari* on October 18, 2013 annexed to the said letter.)

- (11) Similarly, 1.50 crore shares of the target company were transferred by *Dr. V.K. Sukumaran* to one *Mr. Mebul Jagdishbbhai Mody* on October 8, 2013 as a security for proposed financial assistance to be offered by *Mr. Mody*. However, since the said *Mr. Mody* could not provide the agreed/promised financial assistance, after a great deal of persuasion and perseverance, 52,94,005 shares were got back from him. He transferred the said 52,94,005 shares to *Dr. V.K. Sukumaran's* account during the period November 23 to 29, 2013. The said *Mr. Mody* also informed that he had sold some of the shares in off-market to several persons, one of whom was one *Mr. Nelesh Devendra Vora* (he received 25 Lakh shares). The *Notices* were able to obtain 25 Lakh shares from *Mr. Nelesh Devendra Vora*, which he transferred to *Ms. Saritha Sukumaran's* beneficiary account on November 22, 2013. The balance 72,05,995 shares could not be recovered and in this regard, the *Notices* filed a complaint with the Economic Offences Wing of the Mumbai Police (hereinafter referred to as “EOW”). Thus, *Ms. Saritha Sukumaran* did not *per se* acquire any shares of the target company on November 22, 2013.

(A copy of the transaction statement of *Dr. V.K. Sukumaran* with Religare Securities showing the transfer of 1.50 crore shares and the return of 52,94,005 shares, a copy of the transaction statement of *Ms. Saritha Sukumaran* showing transfer of 25 Lakh shares to her by the said *Mr. Nelesh Devendra Vora* has been annexed to the letter by the *Notices*.)

- (12) It is pertinent to note that the baseline shareholding for determining as to whether there was actually an increase in the shareholding of the *Notices* would be as of September 30, 2013, i.e., when the target company made quarterly disclosures of the shareholding of its promoters/promoter group. A comparison of the shareholding of the *Notices* as on September 30, 2013 and as on November 22, 2013 will show that there was no increase in the total shareholding of the *Notices*. In fact, there will be a decrease in the shareholding of the said *Notices*.
- (13) In view of the above and with reference to paragraph 5 and 6 of the SCN, the *Notices* submit that the charge in the said notice that there was an acquisition of shares by the promoters during the relevant period and that such acquisition exceeded the annual creeping limit of 5% is erroneous, false and unsustainable. Therefore, the allegation that the *Notices* were required to make a public announcement and an open offer under regulation 3(2) of the Takeover Regulations, 2011 is erroneous, false and unsustainable.
- (14) It is pertinent to note that all the aforesaid documents and records are available with SEBI; yet erroneous and false charges are made in the SCN. Therefore, the said notice ought to be withdrawn *qua* the *Notices* and they may be discharged from the present proceedings.
8. As requested by the *Notices*, a personal hearing was granted to them on August 29, 2019 when Mr. Joby Mathew (Adv.) appeared as their authorized representative alongwith *Dr. V.K. Sukumaran* and made submissions on the lines of the abovestated written submissions filed in the matter on behalf of the *Notices*. During the personal hearing, certain clarifications were sought from the authorized representative of the *Notices*.
9. The authorized representative of the *Notices* sought two weeks' time to file post hearing written submission in the matter for addressing the queries raised during the personal hearing. Vide letter dated September 23, 2019, the *Notices* filed a common additional written submission through their authorized representative reiterating their earlier submissions and additionally submitting, *inter alia*, as under:

- (1) It is pertinent to note that the baseline shareholding for determining as to whether there was an increase in the shareholding of the *Notices* should be taken as of September 30, 2013, i.e., when the target company made quarterly disclosures of the shareholding of its promoters/promoter group. A comparison of the shareholding of the *Notices* as on September 30, 2013 and as on November 22, 2013 will show that there was no increase in the total shareholding of the *Notices*; in fact, there will be a decrease in the shareholding of the said *Notices*.
- (2) Without prejudice to the contentions of *Dr. V.K. Sukumaran* and *Ms. Saritha Sukumaran* that the transfer of shares into their beneficiary accounts on October 18, 2013 and November 22, 2013, respectively were not instances of acquisition of shares by them, *Mr. R. Sabadevan* submits that no shares were transferred to his beneficiary account during the relevant period and therefore, he may not be considered to be a person acting in concert with *Dr. V.K. Sukumaran* and *Ms. Saritha Sukumaran* in respect of the said failed transactions and/or return of shares.
- (3) The target company is presently under liquidation and the Bombay High Court, vide order dated May 3, 2018 have appointed the Official Liquidator as Liquidator to wind up the *Company*. The present status of the winding up petition filed against the *Company* is that the Official Liquidator of the Bombay High Court has taken possession of all assets of the *Company*.
- (4) *Dr. V.K. Sukumaran* is unable to trace copies of the Delivery Instruction Slips ("DIS") used by him to transfer shares to *Mr. Piyush N. Kothari*, *Mr. Mehul Jagdishbhai Mody*, *Mr. Azhar Khan* and *Investeria Financial Services Pvt. Ltd.*
- (5) The shares of the target company have been delisted from BSE since September 28, 2018 and from NSE since September 11, 2018 as per correspondence between SEBI and the aforesaid stock exchanges. As mentioned above, a Liquidator has been appointed by the Bombay High Court and he has taken possession of all assets, offices and records of the *Company*. Correspondence between the stock exchanges and the liquidator regarding delisting have not been shared with the *Notices*.

10. I have considered the SCN, oral/written submissions made by the *Notices* and other material available on record. Before going into the submissions of the *Notices* on merit, I would prefer to deal with the preliminary objections of the *Notices*. The *Notices* have contended that they have not been provided with all the relevant documents and records that have been relied upon by SEBI while making the allegations against them. It is a matter of record that the *Notices* were granted

inspection of the documents relied upon by SEBI while issuing the SCN. It is not in dispute that the SCN has been issued on the basis of the findings in the Investigation Report. Further, a typical investigation report may also contain certain information about other entities which may not be relevant for the entities on whom the SCN has been served. In this regard, I also note that the findings of the Investigation Report have been narrated in detail in the SCN. Thus, the SCN itself is a self-contained document containing all the allegations and charges against the *Notices*. The SCN clearly mentions the provisions of law alleged to have been violated by the *Notices* and the basis of charges framed against them. Further, I note that the relevant extracts of the Investigation Report have been made part of the SCN issued to the *Notices*. In my view, therefore, no prejudice would be caused to the *Notices* even if the complete Investigation Report is not provided to them since all the relevant findings/material from the Investigation Report have been incorporated in the contents of SCN served on the *Notices*. In this regard, it is worthwhile to iterate the findings of the Hon'ble Supreme Court in the matter of *M/s Haryana Financial Corporation vs. Kailashchand Abuja* [2008(9)SCC31] in which the Hon'ble Supreme Court had observed that -"*the theory of reasonable opportunity and principle of natural justice have been evolved to uphold the rule of law and to assist the individual to indicate his just rights. Whether, in fact, prejudice has been caused to an employee or not on account of denial to him of the report has to be considered on the facts and circumstances of each case. Even in cases where procedural requirements have been complied with, action cannot be ipso facto illegal or void, unless it is shown that non-observance has prejudicially affected the delinquent.*" Without prejudice to the foregoing, the Hon'ble Supreme Court have held in the case of *Fortune Impex vs Commissioner – 2004 (167) ELT S 134 (SC)*, that “*non-mentioning of particular section of Customs Act 1962 would not vitiate the proceedings when allegations and charges against the appellants were mentioned in clear terms in the show cause.*” This position has been reiterated by the Hon'ble Supreme Court in several other cases. I reiterate that in the instant proceedings, the SCN contains detailed enumeration of the allegation, the basis of each allegation, the documents relied upon for making such allegations and, wherever necessary, the relevant provisions of the SEBI Act, 1992 and the Takeover Regulations, 2011 and the directions proposed in terms of the said provisions of the SEBI Act, 1992 and the Takeover Regulations, 2011 have been explicitly stated in the SCN. Since, the SCN contains the specific provisions of the Takeover Regulations, 2011 alleged to have been contravened by the *Notices*, I do not find any prejudice have been caused to the *Notices* and therefore do not find any merit in the contention of the *Notices* in this regard.

11. I further note that copy of all the documents that have been relied upon while issuing the SCN have already been furnished to the *Notices* as annexures to the SCN and inspection of such documents have also been provided. At this stage, it is relevant to refer to the decision of Hon'ble Securities Appellate Tribunal (hereinafter referred to as “SAT”) passed in the matter of *Reliance Commodities Ltd. Vs. National Commodity & Derivatives Exchange Ltd.* (*Appeal No 173 of 2019- Date of Decision - 23.07.2019*). In the said matter, the Hon'ble SAT while dealing with the similar issue of providing

copy of documents to the *Notices*, had *inter alia* observed that:

“2. Having heard the learned counsel for the parties and having perused the list of documents so required for inspection we are of the opinion that the documents sought for is nothing but a roving and fishing enquiry. We accordingly do not find any merit in the submission of the learned counsel for the appellant that these documents are essential for the purpose of filing an appropriate reply.

3. However, we are of the opinion that if any document is relied by the respondent while disposing of the matter such document should be made available to the appellant.....”

12. Since, the *Notices* have been provided with all the documents referred to and relied upon in the SCN, the requests made for additional documents does not merit acceptance, more particularly in the absence of any specific mentioning of the specific documents that are required by the *Notices* and the *Notices* having not stated as to how the non-furnishing of these documents would cause prejudice to their interests. Therefore, the stand taken by the *Notices* that they have not been provided with all the documents and records is vague and a general claim which is devoid of any substance hence not tenable.
13. I observe that the *Notices* have in their submission relied upon the findings of the Hon’ble Supreme Court in the matter of *Gorkha Security Services vs Government (NCT of Delhi) and others (Gorkha Security)* to buttress their claim that the SCN in the instant case fails to set out the particular penalty sought to be imposed and hence the same is not compliant with the principles of natural justice. In this regard, I find that the judgment of the Hon’ble Supreme Court in the case of *Gorkha Security* being distinguishable on several counts is not applicable to the present case. The decision in *Gorkha Security* pertained to blacklisting of a contractor by a government agency, which results into depriving the contractor from entering into any public contracts, thus violating the fundamental rights of such person. Further, in *Gorkha Security* case, the contractor was blacklisted for breaching the terms of the contract, whereas the present SCN has been issued for breach of statutory provisions. Also, in *Gorkha Security* case, blacklisting was imposed by way of penalty whereas the instant proceedings propose to issue directions, if found necessary, which are preventive and remedial in nature. Further, in *Gorkha Security* case, provision for blacklisting of the contractor was provided in the contract itself as a penalty to be imposed in case of breach of terms of contract, whereas in the present matter, provisions of law under which directions are contemplated to be issued, confer statutory discretion on SEBI to take such measure as it thinks fit in the interest of investors and the securities market. The SCN has already stated the provisions of law under which the directions proposed to be issued and the specific directions that may be issued by the competent authority can be determined only after the competent authority examines the submissions and explanations of the *Notices*. In my view,

the reliance upon the judgment of the Hon'ble Supreme Court, in the case of *Gorkha Security (supra)*, by the *Notices* is misplaced on facts and is devoid of merit. Considering the foregoing, I find that the judgment of Hon'ble Supreme Court in the matter of *Gorkha Security* is not applicable to the facts and circumstances of the present case and as such will be of no help to the case of the *Notices*.

14. The *Notices* have also raised objection stating that there has been inordinate delay and laches in initiating proceedings against them which has rendered the proceedings incapable of being defended. This argument is misconceived and misplaced. At the outset, I note that there is no provision in the SEBI Act, 1992 which lays down any limitation period for initiating any action under the Act. For ascertaining whether there is any delay in the matter, the date when the violation came to the notice of the SEBI would be the relevant point and not the date of violation. Whether a delay in a particular case is justified or not depends on the facts and circumstances of each case. In the case of *State of AP Vs. N. Radhakrishnan (1998) 4 SCC 154*, the Hon'ble Supreme Court has held that it is not possible to lay down any pre-determined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. Further, In *P. V. Mahadevan Vs. M.D., T.N. Housing Board (2005) 6 SCC 636*, cited by the *Notices*, the Hon'ble Supreme Court referring to *N. Radhakrishnan's* case (*supra*), decided the case in the context of the peculiar facts obtaining in that case. The aforesaid decision is not in contradiction or oppose to the decision in *N. Radhakrishnan's* case (*supra*). The Hon'ble Supreme Court in *Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India)* reported in 2003 (158) ELT 129 (S.C.), held as under:

“.....Based on decision of this Tribunal in case of *HB Stockholdings Ltd. vs. SEBI (Appeal no. 114 of 2012 decided on 27.08.2013)* it is contended on behalf of the appellants that in view of the delay of more than 8 years in issuing the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court in case of *Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India)* reported in 2003 (158) ELT 129 (S.C) has held that if there no statutory bar for adjudicating the matter beyond a particular date, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice.....”

15. In the present case, it is noted that the investigation could be completed in the instant matter in January 2019 and thereafter a show cause notice was issued to the *Notices* on April, 2019. Therefore, there is no delay in dealing with the matter as action has been initiated as soon as the investigation was completed in the matter. Hence, the contention raised by the *Notices*, regarding delay is devoid

of any merit.

16. Having dealt with the preliminary objections of the *Notices*, I now proceed to deal with their submissions on merit. The actual issue for determination before me is whether acquisition of shares of the target company by the *Notices* had triggered regulation 3(2) of the Takeover Regulations, 2011.
17. I note that as per regulation 2(1) (a) of Takeover Regulations, 2011 *Acquirer - means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company.*
18. The definition of “*Promoter Group*” in the ICDR Regulations, 2009 has been adopted in the context of defining “*persons acting in concert*” (PAC) alongwith the “*acquirer*” in the Takeover Regulations, 2011. The question therefore is whether a person falling within the definition of “*promoter group*” can qualify to be a “deemed PAC” for the purpose of ‘acquisition’ automatically, without there being any proof of having acted in concert or without any disclosure to that effect having been made to the public / investors at large through the stock exchange mechanism. I am of the opinion that the “deemed PAC” is a category that can be used either to assert that they have acted along with the acquirer or to deny that they have so acted in a particular acquisition. For instance, the question of whether *Mr. R. Sabdevan* can be treated as a PAC for the acquisition of shares by the other two *Notices* will necessarily depend on the proof of conduct of all the *Notices*. The *Notices* have contended that *Mr. R. Sabdevan* was only a shareholder in the target company during the relevant period and has been erroneously categorized as promoter in the SCN and that no shares were transferred to his beneficiary account during the relevant period and therefore, he may not be considered to be a person acting in concert with *Dr. V.K. Sukumaran* and *Ms. Saritha Sukumaran* in respect of the abovesaid failed transactions entered into by the *Noticee 1* and/or return of those shares to the demat accounts of *Notices 1 & 2*. It is admitted position that *V.K. Sukumaran* and *Saritha Sukumaran* (i.e., the *Notices 1* and *2*) were, at the relevant time, constituting the promoter group of the target company. As regards *Prof. R. Sabadevan*, I also find from the records that he is primarily an academician and there is no evidence to suggest that he was associated with other promoters in promoting the target company. Moreover, his shareholding in the target company remains unchanged and *Prof. R. Sabadevan* has not acquired any further shares in the target company. Keeping this in view and the very fact that the other two *Notices* have themselves explicitly asserted that *Prof. R. Sabadevan* was not a promoter of the target company while not disputing their role as promoters of the *Company*, I do not see any reason as to why *Prof. R. Sabadevan* should be deemed to be a part of the promoter group in terms of regulation 2(1)(pp) of the ICDR Regulations, 2009. Considering the foregoing, *Prof. R. Sabadevan (Noticee 3)* is exonerated from the allegations made in the SCN.

19. The second part of the allegation in the instant case pertains to the violation of regulation 3(2) of the Takeover Regulations, 2011 by the *Notices*. The charge in the SCN is on the premise that the *Notices* holding more than 25% shares in the target company could not have breached the 5% benchmark provided in terms of regulation 3(2) without the requisite public announcement. Before dealing with submissions of the *Notices* in this regard, it is worthwhile to iterate regulation 3(2) of the Takeover Regulations, 2011 as it existed on the date of the alleged violation, which is reproduced hereinbelow:

“CHAPTER -II
SUBSTANTIAL ACQUISITION OF SHARES, VOTING RIGHTS OR CONTROL

Substantial acquisition of shares or voting rights.

3. (1)

.....

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

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

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

- (i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.*
- (ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.”*

20. It is an admitted position that the shareholding of the promoter group in the target company as on October 17, 2013 was 21,39,97,725 which constituted to 33.97% of the total paid up capital of the target company. Further, on October 18, 2013, one of the promoters, namely *Dr. V K Sukumaran*, acquired 3,00,00,000 shares whereby the shareholding of the promoter group had increased by 4.76%. Similarly, on November 22, 2013, *Ms. Saritha Sukumaran*, had acquired 25,00,000 shares resulting in an increase of 0.40% of the total shareholding by the promoter group. Thus, during the relevant period, the total shareholding of the promoter group had increased by 5.16%. The *Notices 1 & 2* have primarily contended that it would be erroneous to call the above noted increase in the shareholding as ‘*acquisition*’ under the Takeover Regulations, 2011 since the said increase in shareholding of the promoter group during the relevant time was on account of return of shares as a result of failed transactions for obtaining financial assistance from certain persons/entities.
21. I have perused the contentions of the *Notices 1 & 2* with regard to increase in shareholding of the promoter group in the target company. I note that the *Notices 1 & 2* have stated that these shares were transferred to certain entities through off-market dealings and were received back in their accounts from certain entities as well in off-market transactions. The *Notices* have submitted a copy of the letter dated October 24, 2013 purportedly written by *Dr. V. K. Sukumaran* to the “*Assistant Commissioner of Police, Economic Offences Wing, Crime Branch, Mumbai?*” with regard to failure of one *Mehul Modi* and other associates to return 1.5 crore shares to the depository account of the said *Noticee*. The said *Noticee* has also attached a copy of the *Agreement of Loan against Shares* (dated October 07, 2013) purportedly signed by one *Mr. Piyush Kothari* on one side and by *Dr. V. K. Sukumaran* on the other side on behalf of an entity called SBFL whereby, the lender therein (*Mr. Piyush Kothari*) had agreed to extend a loan of upto ₹10 crore against the equity shares of VKS Projects Ltd. at the rate of ₹1/- against each of the fully paid up shares of the *Company* on a buyback system. However, the *Notices*, specially, *Dr. V. K. Sukumaran* has neither clarified about the said entity SBFL nor even the full form of the said entity has been furnished in the said Agreement. It is even not known as to what kind of entity is SBFL and what was the nature relationship/association between SBFL and *Dr. V. K. Sukumaran* and why the so called lender *Mr. Piyush Kothari* signed an agreement to give loan to SBFL. It is even not known as to what was the nature of association which SBFL shared with VKS Projects Ltd. Therefore, the entire loan agreement is shrouded under ambiguities and offers no clarity. Further, in terms of the said Agreement, SBFL was required to transfer shares of VKS Projects Ltd. equivalent to 3 times the loan amount as security for the said loan into the account of the lender. I have perused the copies of the complaint and *Agreement of Loan against Shares* submitted by the *Notices*. As regards the complaint to EOW, I find it necessary to state that from the copy of the complaint it is not clear if any case has been registered by the EOW pursuant to the complaint by the *Notices*. Further, there is nothing on record to indicate if the *Notices* have already filed any criminal or civil case against the said lenders in respect of the alleged fraud, breach of trust, or

misrepresentation. Further, the copy of the complaint claimed to have been filed before the EOW and presented before me does not bear any stamp/seal of any police authority, and consequentially, the genuineness of the said complaint remains unverifiable. The *Notices* have also not furnished any updated status on the complaint filed before the EOW. Therefore, the aforesaid two documents, viz. the Loan Agreement and the complaint to EOW submitted by the *Notices* to prove their *bona fide* will not come to their rescue for want of reliability of these documents to be used as any evidence whatsoever. Moreover, even for a moment, if any credence is to be given to the said Loan Agreement, one finds that the *Notices* have agreed to transfer their shares to the lender on a buyback basis which means that the ownership of the shares was intended to be transferred to the lender and again to be re-acquired after the repayment of the loan. Therefore, the so called return of the shares to their accounts by the lender was nothing but acquisition of shares.

22. Notwithstanding the above, it is observed from the copy of the *Agreement of Loan against Shares* that the said copy is not a legible document and contains many rectifications/insertions made by hand. Further, most of the signatories to the said agreement have not appended or mentioned their names while signing the said agreement. As stated above, the said agreement is purportedly entered into between *SBFL* and one of the lenders, namely *Mr. Piyush Kothari*. Further, the said agreement does not enumerate as to how *SBFL* is connected to the promoters of the target company and under what arrangement between *SBFL* and promoters of the target company, *SBFL* can transfer the shares owned by some of the promoters to the lender. Suffice it to say that the copy of the *Agreement* submitted by the *Notices* engenders many questions regarding its authenticity and veracity, and in my opinion does not beg any further inquest. Without prejudice to the foregoing, I would endeavor to deal with the submission of the *Notices* based on their reliance on the *Agreement*. It is noted from the terms of the said *Agreement* that the shares were required to be transferred to the lenders and after the repayment of the loan amount, the said shares were required to be bought back to the account of *SBFL*. Thus, change of beneficial ownership of the impugned shares was inherent in the said *Agreement* both at the time of transferring out and at the time of buying back as per the terms of the *Agreement*. It is also relevant to mention here that it is not a case where the *Notices* have contended that the impugned shares were pledged by them to the lenders. Further, the lenders, as per the terms of the said *Agreement*, are individual lenders. In this regard I find it necessary to discuss the findings of the Hon'ble Tribunal in the matter of *Liquid Holdings Private Limited vs SEBI* (Appeal No. 83 of 2010 – date of decision March 11, 2011) which is reproduced hereinbelow:

“5. The argument of the learned senior counsel that the letters dated December 13, 2004 and December 19, 2007 and the tripartite agreement executed on August 9, 2006 clearly indicate the intention of the parties that the shares were throughout held by the banks as collateral security notwithstanding the fact that they stood transferred in their names is not acceptable. Such an argument would mean circumventing the statutory

provisions of the takeover code and Regulation 58 of the Regulations which cannot be permitted. The way we read these documents is that after the shares were transferred in the names of the banks on the invocation of the pledge, the parties agreed that the banks will transfer the shares back to the pledgors (appellants) upon the loan being repaid. It was open to the banks to transfer the shares to other parties and instead of doing that, they agreed to transfer the shares back to the appellants. This agreement will not override or circumvent the statutory provisions already referred to above and would only result in transfer of shares from the banks to the appellants. This transfer is altogether different from the transfer by which the shares came to the banks upon invocation of pledge and by no process of reasoning can it be said that the banks continued to hold the shares as collateral security which was returned to the appellants on the repayment of the loan.

6. We may now take note of another submission made by the learned senior counsel for the appellants. He contends that the banks may have become beneficial owners of the shares when they were transferred in their demat account but they had not become the real owners of the shares and they could not have gained title to the said shares in the absence of any consideration. There is no merit in this contention at all. The Depositories Act, 1996 provides for only two category of owners viz. 'registered owner' who has necessarily to be a depository and a 'beneficial owner' in whom all the rights vest. Once the beneficial ownership stands transferred to the banks the parties cannot circumvent the legal provisions by entering into an agreement to make a declaration otherwise. The law also prescribes a mode for the creation and revocation of a pledge. The parties cannot agree to create a pledge contrary to the provisions of Regulation 58. The present is, indeed, a case where the shares had been pledged to secure the loan and on default being made in its repayment, the pledge was invoked. Even the Contract Act entitles the pledgee to invoke the pledge when a default occurs. In the case of shares held in demat form, the Depositories Act and the Regulations framed thereunder provide the manner in which the pledge is to be created and invoked and that procedure was duly followed in the present case. As already noticed, when the pledge was invoked, the banks became the beneficial owners of the shares and thereafter on repayment of the loan the shares were transferred back to the appellants on the basis of an agreement between the parties. The appellants did not get back the shares by redeeming the pledge. If that had been the case, the matter would have been different....."

23. The instant case fully fits within the four corners of the above findings of the Hon'ble Tribunal. In the instant case too there is an instant change in the beneficial ownership of shares pursuant to the transfer of shares to the accounts of the purported lenders by the concerned *Notices* and again change in the beneficial ownership occurred when some of the impugned shares were transferred back to the demat accounts of the *Notices 1 & 2* after the so called financial deal with the lenders failed. It is also worth mentioning that the first leg of transaction is between *Noticee 1* and Mr. Piyush Kotbari whereas in the second leg of transaction, 3 crore shares were returned to the demat accounts of Dr. V.K. Sukumaran and 25 lac shares were transferred to the demat account of Ms. Saraitba Sukumaran. There is no dispute over the fact that the pre-acquisition shareholding by the promoters

(*Notices 1 & 2*) together was 33.97% as on October 17, 2013 which means this was the shareholding position of the said two promoters after transferring their shares to *Mr. Piyush N. Kothari* and *Mr. Mebul J. Mody* as per their off-market deals. However, after that it is admitted that the two promoters have received shares of the *Company* constituting more than 5% of the total paid up share capital thereby increasing their shareholding to 39.13% of the total share capital of the *Company*. There is no dispute to the abovesaid incremental acquisition by the said two promoters. Considering the above, I reject the contention of the *Notices* and find that the increase in the shareholding of the promoter group by acquisition of shares on October 18, 2013 and November 22, 2013, respectively had together breached the 5% benchmark prescribed in terms of Explanation (i) to regulation 3(2) of the Takeover Regulations, 2011. However, these two promoters have failed to make the mandatory public announcement in terms of regulation 3(2) read with regulation 13 of the Takeover Regulations, 2011.

24. Considering the above facts and circumstances, I am of the view that the charge in the SCN against the *Noticee nos. 1 & 2* is established. Since these acquisitions were clearly in breach of regulation 3(2) of the Takeover Regulations, 2011 the consequences of this breach must follow. In this regard, I note the Hon'ble SAT vide order dated September 08, 2011 in the matter of *Nirvana Holdings Private Limited vs. SEBI (Appeal no. 31/2011)* have observed as follows:

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

25. Thus, as per the provisions of the Takeover Regulations, 2011, the obligation of the acquirer is to make the open offer, once there is breach of regulation 3(2) no matter whatsoever circumstances or the manner in which the shares were acquired. It is, however, a matter of record that in the instant

matter, the limit of 5% has been exceeded by a mere 0.16% which is very miniscule for a company like the target company. Further, it is clear from the records available before me that the target company has been compulsorily delisted by the concerned stock exchanges and an official liquidator has also been appointed by the Hon'ble Bombay High Court vide its order dated May 03, 2018.

26. Keeping the extant regulatory provisions in the present matter before me, for the purposes of suitable direction under regulation 32 of the Takeover Regulations, 2011, I proceed to examine the facts and circumstances of this case. I note that regulation 32 of the Takeover Regulations, 2011 which provides for the consequences to be visited for the breach of the Takeover Regulations, 2011, as has been observed in this case, gives flexibility to SEBI to enforce regulation 3(2) by way of issuing several possible directions including - (a) disinvestment of the excess shares acquired in breach of regulations; (b) transfer of any proceeds or securities to the investors protection fund; (c) making open offer for acquiring shares of the target company, (d) debarring any person who has violated these regulations from accessing the capital market or dealing in securities for such period as may be directed, having regard to the nature and gravity of the violation, etc. The guiding principles for the issuance of directions as provided in these regulations are the interest of the investors and interest of securities market which are also the statutory guiding principles, as inbuilt into the SEBI Act, 1992 and the Takeover Regulations, 2011. In the present case, the obligation of the *Notices* to make the open offer has been triggered on account of breach of regulation 3(2) of the Takeover Regulations, 2011. As the target company has been compulsorily delisted, it would be fraught with implausibility to direct the acquirers to divest the excess shares of 0.16% of shareholding in the open market and deposit the money in the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009.
27. I am aware of the fact that the target company has been compulsorily delisted by the concerned stock exchanges since, September, 2018. I also note from the record that the target company is under liquidation and the proceedings are underway before the Hon'ble High Court. There is no doubt in my mind that the *Notices 1 & 2* have triggered the open offer by acquiring shares in breach of regulation 3(2) of the Takeover Regulations, 2011 insofar as their acquisition in the target company has exceeded the limit of 5%. Nevertheless, the excess shares that have been acquired by the *Notices 1 & 2* is 0.16% over the threshold limit of 5%. At this juncture, in my view, issuing direction to the *Notices 1 & 2* to give an open offer when the target company itself is compulsorily delisted and is under liquidation, may be fraught with legal and technical challenges for compliance. At the same time, the violations committed by the *Notices 1 & 2* and their vein attempt in hiding their violations under the garb of a loan agreement to evade regulatory action cannot be lost sight of. The acts of the *Notices 1 & 2* in causing such violations without any regard for the regulatory

provisions of the Takeover Regulations, 2011 deserves to be dealt with suitably. I am also informed that for the above breach of provisions, adjudication proceedings is also proposed and same is pending for adjudication.

28. Therefore, in the peculiar facts of the matter and having regard to the nature and gravity of the violation, I, in exercise of powers conferred upon me under sections 11, 11B (1) read with section 19 of the Securities and Exchange Board of India Act, 1992 and regulation 32 of the Takeover Regulations, 2011, hereby restrain *Dr. V.K. Sukumaran* and *Ms. Saritha Sukumaran* (the *Notices 1 & 2*) from accessing the capital market or dealing in securities for a period of 2 years from the date of this Order.
29. It is further clarified that during the period of restrained the existing holding of securities, including the units of mutual funds shall remain under freeze.
30. This Order shall come into force with immediate effect.
31. A copy of this Order shall be forwarded to *Dr. V.K. Sukumaran* and *Ms. Saritha Sukumaran* for ensuring compliance with the above directions.

-Sd/-

DATE: NOVEMBER 28TH, 2019

PLACE: MUMBAI

**S. K. MOHANTY
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**