

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

IN THE MATTER OF ACQUISITION OF SHARES/ VOTING RIGHTS OF M/S. BSEL INFORMATION SYSTEMS LIMITED – VIOLATION OF SUB-REGULATION (1) OF REGULATION 11 OF THE SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997

NO. : CO/295/IES/10/2002

1. BACKGROUND

1.1 There was a sudden spurt in volumes and in price of shares of M/s. BSEL Information Systems Ltd. (hereinafter referred to as "the Target company") during the first week of April 1998. An article also appeared in Business Standard dated May 19, 1998, regarding private placement of shares by the Target company to a Canadian software company at a substantial premium to the prevailing market price. Pursuant thereto the investigations were conducted by Securities & Exchange Board of India (hereinafter referred to as "SEBI") inter alia, into the possible violations of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as "the said Regulations") in the matter of acquisition of shares of the Target company by M/s. Contact Consultancy Services Pvt. Ltd. (hereinafter referred to as "the Acquirer"), and M/s. Total Network Solution Ltd., M/s. Black More Investment & Trading Co. Pvt. Ltd., M/s. Pravara Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Poornima Commercial Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Co. Pvt. Ltd., M/s. Sentosa Investment and Trading Co. Pvt. Ltd., M/s. Timber Hill Engineers Pvt. Ltd and Beachcraft Investment and Trading Co. Pvt Limited (hereinafter collectively referred to as "persons acting in concert").

1.2 During the course of investigations SEBI vide its letter dated 24.04.2002, inter alia, sought the following information from the Target company :-

(i) the address and telephone numbers of the entities (Yogi Sung-Won (India) Ltd., Stock Watch Securities P. Ltd., Paschim Food Industries Ltd., VMC Software Ltd., Contact Consultancy Services P. Ltd., Highway Resorts Ltd. and Reshma Plastics P. Ltd.) along with a copy of their Memorandum and Articles of Association;

(ii) name, address and telephone number of each of the Directors of the aforesaid entities;

i. the shareholding pattern of each of the entities giving the name, address and number of shares held by each of the shareholders of each of the entities.

Further the Target company was also required to submit a copy of audited balance sheet and profit & loss account for the years ending March 1997, 1998, 1999, 2000 and 2001.

Pursuant to the aforesaid letter dated 24.04.2002, the Target company provided the above details vide its letter dated 30.04.2002.

1.3 The Acquirer and the persons acting in concert were also advised by SEBI vide its letter dated 24.04.2002 to furnish the dates on which the shares of the Target company were acquired by them, the names, addresses and telephone numbers of the brokers / sub-brokers through whom the aforesaid shares were purchased along with the proof of such purchase, i.e., copies of the contract note, etc. along with the details of payments made for the shares and copies of bank statements reflecting the payments made for acquisition of shares of the Target company.

The Acquirer and the persons acting in concert replied to SEBI's letter dated 24.04.2002, vide their letter dated 2nd May, 2002.

1.4 It is seen that the Target company was incorporated on November 15, 1995. During November 1996, the Target company came out with a public issue of 71,00,000 equity shares of Rs 10/- each for cash at par. The post issue paid-up capital of the Target company was 1,01,50,000 equity shares. The promoters, directors, associates, friends and relatives held 30,50,000 equity shares which works out to 30.04% approximately of the post-issue capital. After allotment, the shares of the Target company are listed only at The Stock Exchange, Mumbai (hereinafter referred to as "BSE").

1.5 From the information received from the Acquirer / persons acting in concert and the Target company, it was revealed that the shareholding of the Acquirer along with persons acting in concert had increased from 30.04% (pre-acquisition) to 61.6% (post acquisition) in the Target company on 01.04.97. This appeared to be in violation of sub regulation (1) of regulation 11 of the said Regulations.

2.0 SHOW CAUSE NOTICE

In view of the above, a show cause notice dated 17.7.02 was issued to the Acquirer and the persons acting in concert , inter alia, pointing out that –

2.1 M/s Pravara Commercial Pvt. Ltd. , M/s. Poornima Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Company Pvt. Ltd., M/s. Timberhill Engineers Pvt. Ltd., M/s Total Network Solutions Ltd, have collectively acquired approximately 23% of equity capital of the Target company on 1/4/1997 without making a public announcement and therefore, have violated the provisions of regulation 10 and regulation 11 of the said Regulations.

2.2 M/s Pravara Commercial Pvt. Ltd. , M/s. Poornima Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Company Pvt. Ltd., M/s. Timberhill Engineers Pvt. Ltd., M/s Blackmore Investments & Trading Co. Pvt. Ltd, and M/s Sentosa Investment & Trading Co Pvt. Ltd have collectively acquired approximately 24% of equity capital of the Target company on 1/4/1997 without making a public announcement and therefore, have violated the provisions of regulation 10 and regulation 11 of the Regulations.

2.3 The Acquirer, already holding 3.64% shares, has acquired additional shares of the Target company to the tune of approx. 14.97% of the equity capital of the Target company during the period 20/2/1997 and 1/4/1997 without making a public announcement and therefore, has violated the provisions of regulation 10 and regulation 11 of the said Regulations.

2.4 In view of the above mentioned violations of the said Regulations, the Acquirer and persons acting in concert were called upon to show cause as to why appropriate action(s) as provided under regulation 45(6) of the said Regulations read with Section 11B of the Act, including directions to make a public announcement to acquire shares of the Target company, in accordance with the Regulations should not be initiated against them for the violations as specified above.

3.0 REPLY TO THE SHOW CAUSE NOTICE

The Acquirer , in reply to the show cause notice, vide its letter dated 30th July, 2002 stated that he is also making submissions on behalf of the M/s. Total Network Solution Ltd., M/s. Black More Investment & Trading Co. Pvt. Ltd., M/s. Pravara Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Poornima Commercial Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Co. Pvt. Ltd., M/s. Sentosa Investment and Trading Co. Pvt. Ltd., M/s. Timber Hill Engineers Pvt. Ltd and also on behalf of the companies / persons to whom notice has not been issued but who form part of the promoter group, namely, M/s Beachcraft Investment and Trading Company. Pvt. Ltd., Daksha N Goradia, K K Foram and Pooja Kumari. The Acquirer, inter alia , submitted thereby that :-

- i. the alleged acquisition of shares of the Target company did not result in the Acquirer being entitled to exercise 10% or more of the voting rights in the Target company. The Acquirer and the persons acting in concert with it were already holding shares exceeding 10% in the Target company. Regulation 10 applies only when the Acquirer holds less than 10% and then acquires some shares whereby his holding increases beyond 10%. This is clearly not so in the present case and hence the question of regulation 10 being violated does not arise. Regulation 10 has no applicability once the holding of the Acquirer is more than 10%. The holding of the Promoters and persons acting in concert with them was more than 10% at the time of listing itself and at no point of time was less than 10%. That the scheme of the Regulations is clearly that regulation 10 will be attracted for those persons who hold less than 10% and regulation 11 will be applicable for those who hold 10% or more. Regulation 10 thus has no applicability in their case ;
- ii. it is erroneous in law to equate Promoters and members of the Promoter group with persons acting in concert. Nowhere do the Regulations equate these two groups. Nowhere do the Regulations even remotely suggest that if a person is part of the Promoter group then he is deemed to be acting in concert. Therefore, there is misapplication of the definition and terms and hence merely because a person may be alleged to be part of the Promoters group does not mean and conclude that he is also acting in concert with them;
- iii. the acquisition of the shares was clearly inadvertent and not with a malicious intent at all or with an intent to make a profit or with an intent to cause a loss to any person. The Promoter group already held more than 34.42% of the shares of the Target company. No additional benefit to the Promoters could have been caused if further acquisitions of shares were made. The acquisitions were made on account of market exigencies existing at that time and also because of requests of many persons who wished to offload the shares of the Target company. The Target company had to oblige them because it was impossible for them to offload the shares in the market being partly paid up shares. Subsequently, the same were fully paid-up;

Since the persons in control of the Target company would have and actually have remained the same, no benefit to the persons in control or loss to the public shareholders have been caused on account of acquisition of the shares.

On account of this, even if it is alleged that there has been violation of any Regulations, the same would have to be held to be inadvertent and not with any intention to make undue profits. Hence, the charges need to be dropped and no action taken;

(iv) there has been no loss caused to any person and rather the public as a whole has been benefited. The shares were acquired at the open market rate. Thus, all persons who had wished to acquire the shares had an opportunity to sell the shares could have sold the shares.

The market liquidity at that time was relatively poor. In the normal course, no person would have been able to sell such quantity of shares without facing not only a considerable reduction in the realizable price but also facing any impossible situation of no buyers for such quantity of shares and also the shares being partly paid up. In fact, such a situation where the sellers could not have found buyers

would have caused them considerable loss. The Acquirers came forward with the good intention of not allowing any person to suffer a loss and hence acquired their shares even at the cost of their liquidity.

Had the purchases not been made, not only would the sellers would have suffered a loss, but the other small shareholders would also have suffered a loss. This is because there would have been considerable loss of liquidity in the shares as well as reduction in the price of the shares. Small shareholders seeking to realize cash by selling their shares would thus have been unable to do so and this would have caused them considerable loss. The act of the Acquirers thus was actually beneficial not only to the sellers but also to the public shareholders at large;

(v) the alleged violations are one-time and have not been repeated before which once again is an essential pre-requisite for any action under the Act or the Regulations (Section 15J of the Act). Any punitive action has to be judged in the background of these factors. Unless the violation has resulted in any loss to the public, any benefit to the alleged wrong doer and unless the act has been repetitive, the Act does not permit any punitive action;

(vi) in view of Section 15(J) of the Act, it is reiterated that :-

a. No amount of advantage, whether disproportionate or unfair or otherwise has been made on account of the alleged violation.

b. No loss has been caused, whether to an investor or group of investors or others, as a result of the alleged violation.

c. The alleged violation is not repetitive. The alleged violation has taken place in April 1997. More than the 5 years have passed since this date and the record clearly shows that no violation has taken place or alleged of any provision of the Act or Regulations thereunder;

(vii) the shareholding of the Acquirer along with persons acting in concert in the Target company clearly shows that they have always been in control whether before or after the acquisition. Thus the public shareholding has not been affected at all on account of the acquisitions;

(viii) at best, the alleged acquisitions would have increased the existing control of the Promoters in the Target company. The control of the Promoters was always absolute and there at best could have been marginal increase though it may appear to be larger in absolute terms.

At the same time, it has to be noted that all shareholders have totally affirmed their faith in the Promoters. Concerns could have only arisen if there had been even the slightest of doubts expressed over the ability or competence of the Promoters to control and manage the Target company. All resolutions of the Target company at general meetings have always been passed without any negative vote. The directors have always been re-elected.

The whole object of the Takeover Regulations is that if there is a change in control, whether demonstrated by an actual takeover, by substantial acquisition of shares or by consolidation, there should be an opportunity to the shareholders to exit. In other words, the shareholders should have an opportunity to show no-confidence in the new management.

If at all there is any doubt that the alleged acquisitions could be viewed to be having any adverse impact on any of the shareholders, interests, we are happy to have any referendum to the shareholders, whether by way of resolution at any general meeting or even by way of postal ballot. We are fully confident that shareholders have full faith in the Promoters and this would be fully demonstrated by such acts and that being so, no purpose would be served by any action against the Promoters, whether punitive or otherwise;

(ix) it is apparent that the alleged acquisitions did not result in any change or shift that would be of such a nature as would violate the letter and spirit of the Regulations. There was no effective increase in control, the directors were the same, the persons in control and the Promoters remained the same etc. No persons have complained of any wrong doing or loss. The public at large on the contrary has benefited. In other words, nothing has happened that is of such nature that has violated the letter and spirit of the Regulations. The alleged violations are at best technical violations and do not call for any action at all. Technical violations against which action is taken would not serve the purpose of the Act;

(x) under the provisions of the Regulations, there is no provision of a mandatory open offer to be required to be made by SEBI. The provisions of the Regulations merely make a requirement of making an open offer as a prelude to a takeover. If a violation has been found in respect of any past act, there is no question of making an open offer since otherwise it would be making a mockery of the law as well as creating a situation where totally third parties benefit while the original shareholders are out of the picture.

The alleged violation has taken place in April 1997, i.e., more than 5 years ago. In these 5 fateful years for stock exchanges, the picture has changed so much. It may have resulted in a certain set of consequences had an open offer been made in April 1997. However, in these five long years and there have been considerable changes, particularly in the shareholding. Not only would the original shareholders have sold their shares but the shares would have passed in many more hands. Making an open offer would be creating a strange fiction, which would not serve either the letter or spirit of the law.

Requiring an open offer to be made as punitive act would be an even greater travesty of the law. Not a single person would benefit nor, any one lose. If at all someone benefits, it would be a person who has not incurred any loss. Above all, it has been clearly brought out earlier that no punitive action can be taken under law for such an act and hence any action of a punitive action would not be in accordance with the law;

(xi) the acquisitions were made in April 1997 when the ruling market price was Rs. 10. However, this was not the fair market value of the share, which was far lower. It would not be valid, under law or otherwise, to make a requirement to make an open offer with respect to a price that is at variance with such fair value;

(xii) it is also to be noted that in the year 2000, a bonus issue was made in the ratio 1:1. Hence, this factor has to be taken into account while working out the price of the open offer. Effectively, if the shares as at today are to be taken into account, then the price that would have to be considered is half the current market price since the acquisitions have taken place in 1997 when the share capital was exactly half. In other words, the maximum open offer price would be half the fair value of the shares as at April 1997.

4.0 HEARING

A personal hearing before the Chairman was granted to the Acquirer on 31 August, 2002 wherein the Acquirer while admitting having violated the provisions of regulation 10 and regulation 11, reiterated the written submissions already made in the matter which have been reproduced hereinabove.

5.0 ISSUES

5.1 From the facts of the case, the submissions written as well oral as made by the Acquirer during the hearing and also the documents submitted by them in support of their submissions, the following issues arise which need consideration:-

- i. Whether the Acquirer and M/s. Total Network Solution Ltd., M/s. Black More Investment & Trading Co. Pvt. Ltd., M/s. Pravara Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Poornima Commercial Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Co. Pvt. Ltd., M/s. Sentosa Investment and Trading Co. Pvt. Ltd., M/s. Timber Hill Engineers Pvt. Ltd and Beachcraft Investment and Trading Co. Pvt Limited were acting in concert for the purposes of acquiring the shares of the Target company.
- ii. Whether the Acquirer has triggered the said Regulations. If yes, when did the obligation on the part of the Acquirer arise, to make public announcement ?

5.3 CONSIDERATION OF ISSUES

5.3.1 Whether the Acquirer and M/s. Total Network Solution Ltd., M/s. Black More Investment & Trading Co. Pvt. Ltd., M/s. Pravara Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Poornima Commercial Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Co. Pvt. Ltd., M/s. Sentosa Investment and Trading Co. Pvt. Ltd., M/s. Timber Hill Engineers Pvt. Ltd and Beachcraft Investment and Trading Co. Pvt Limited were acting in concert for the purposes of acquiring the shares of the Target company.

Before dealing with the issue it would be pertinent to advert to the relevant regulations.

Regulation 2(1)(e), states that a person acting in concert comprises:

- (1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the Target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the Target company or control over the Target company.
- (2) Without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established:
 - (i) a company, its holding company, or subsidiary of such company or company under the same management either individually or together with each other;
 - (ii) a company with any of its directors , or any person entrusted with the management of the funds of the company;
 - (iii) directors of companies referred to in sub-clause(i) of clause (2) and their associates;
 - (iv) mutual fund with sponsor or trustee or asset management company;

- (v) foreign institutional investors with sub account (s);
- (vi) merchant bankers with their client(s) as Acquirer;
- (vii) portfolio managers with their client(s) as Acquirer;
- (viii) venture capital funds with sponsors;

(ix) bank with financial advisers, stock brokers of the Acquirer or any company which is a holding company, subsidiary or relative of the Acquirer.

Provided that sub-clause (ix) shall not apply to a bank whose sole relationship with the Acquirer or with any company, which is a holding company or a subsidiary of the Acquirer or with a relative of the Acquirer, is by way of providing normal commercial banking services or such activities in connection with the offer, such as confirming availability of funds, handling acceptances and other registration work.

(x) Any investment company with any person who has an interest as director, fund manager, trustee, or as a shareholder having not less than 2% of the paid up capital of that company or with any other investment company in which such person or his associates holds not less than 2% of the paid up capital of the latter company.

Note: For the purposes of this clause 'associate' means:

- (a) any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and
- (b) family trusts and Hindu Undivided Families."

From the above definition it is clear that in terms of regulation 2(1)(e)(1) persons acting in concert comprise persons who for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the Target company pursuant to an agreement or understanding (formal or informal) directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the Target company.

Further, the provisions of regulation 2(1)(e)(2) being a deeming provision must be read in conjunction with regulation 2(1)(e)(1). Further, persons who are deemed to be acting in concert must together have some intention or interest in the acquisition of shares of Target company.

Further , regulation 2(1)(h) defines promoter .It states that "promoter" means –

(1)....

(3) in case of a corporate body

(i) a subsidiary or holding company of that body or

(ii) any company in which the "promoter" holds 10 per cent or more of the equity capital or which holds 10 per cent or more of the equity capital of the promoter, or

(iii) any corporate body in which a group of individuals or corporate bodies or combination thereof who hold 20% or more of the equity capital in that company also holds 90% or more of the equity capital of the promoter.

As per the Target company's filing with the BSE, it is seen that the following have been named as the promoters and persons acting in concert of the Target company and their individual and aggregate holdings as on 20.02.97 has been stated as under :-

Name of the Promoters and Persons acting in Concert (PAC)	No. of Shares held (as on 20.02.97, 31.03.98 & 31.03.99)	% of shares / voting rights held
Babulal Jain	540000	5.32
Kirit Kanakiya	29600	0.29
Yogi Sund – Won (India) Ltd.	510000	5.02
Stock Watch Securities Pvt. Ltd.	302500	2.98
Paschim Food Industry Limited	200000	1.97
VMC Software Limtied (Vidhan Mercantile Co. Ltd.)	315500	3.11

Contact Consultancy Ser. Pvt. LTd.	369000	3.64
Highway Resorts Ltd.	620000	6.11
Reshma Plastics Pvt. Ltd.	162800	1.60
Total	3049400	30.04

From the above information it is observed that the Acquirer has been shown as one of the promoters and person acting in concert of the Target company as per the filings with BSE.

It is observed from the replies of the Acquirer and the persons acting in concert, dated 02nd May, 2002 that on 1.4.97 the persons acting in concert collectively had admittedly acquired 31.56% shares/ voting rights of equity capital of the Target company. The details of the acquisitions made by the persons acting in concert on 1.4.97 was, as given below :

Name of the Entity	Percentage holding of each of the persons acting in concert in Target Company on 1/4/1997
Pravara Commercial Pvt Ltd	3.797
Poornima Commercial Pvt Ltd	3.797
Timberhill Engineers Pvt Ltd	0.760
Pleasant Packaging Co. Pvt Ltd	2.702
Consistent Packagers Pvt Ltd	3.797
Relaxed Packagers Pvt Ltd	3.797
Total Network Solution Ltd	4.557
Blackmore Investment and Trading Co. Pvt Ltd	3.797
Sentosa Investment and Trading Pvt Ltd	1.899
Beachcraft Investment and Trading Co. Pvt Ltd	2.657
Total	31.560

It is also observed that the Acquirer was having the following shareholding in some of the companies belonging to the persons acting in concert :-

Name of the Entity	% age holding of the Acquirer in some of the persons acting in concert
Pravara Commercial Pvt Ltd	45
Poornima Commercial Ltd	49
Timberhill Engineers Pvt Ltd	49
Pleasant Packaging Pvt Ltd	48.44
Consistent Packagers Pvt Ltd	48
Relaxed Packagers Pvt Ltd	49.11
Total Network Solution Ltd	16.55

From the above it is clear that the Acquirer is holding more than 10% of the equity capital in each of the entities as stated above.

It is also observed that Mr Kirit Kanakiya who is one of the promoters of the Target company holds 99.5% of the equity capital of the Acquirer. The indirect holding of Mr Kirit Kanakiya in some of the companies- persons acting in concert viz. M/s Pravara Commercial

Pvt. Ltd. , M/s. Poornima Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Company Pvt. Ltd., M/s. Timberhill Engineers Pvt. Ltd., M/s Blackmore Investments & Trading Co. Pvt. Ltd, and M/s Sentosa Investment & Trading Co Pvt. Ltd, is as under:

Name of the company	Indirect holding of Mr. Kirit Kanakiya in these companies (%)
Poornima Commercial	48.7
Pravara Commercials Pvt Ltd	44.7%
Relaxed Packagers Pvt. Ltd.	48.86
Consistent Packagers Pvt. Ltd.	47.76
Pleasant Packaging Co. Pvt. Ltd.	48.19
Timber Hill Engineers Pvt. Ltd.	48.75
Blackmore Investments and Trading Co. Pvt Limited	48.71
Sentosa Investment & Trading Co.	48.74

It may be mentioned that as per regulation 2 (1)(e)(2) of the said Regulations, a company is deemed to be acting in concert with other companies if such companies are under the same management either individually or together with each other.

Further as per Section 370 (1B)(iii) of the Companies Act, 1956, two bodies corporate shall be deemed to be under the same management – if not less than one-third of the total voting power with respect to any matter relating to each of the two bodies corporate is exercised or controlled by the same individual or body corporate.

Based on the shareholding pattern of the 8 companies acting in concert, it is observed that atleast one-third (i.e.33%) of the total voting power in each of these 8 companies is exercised or controlled by the same individual viz. Mr Kirit Kanakiya through the Acquirer. Therefore these 8 companies belonging to `persons acting in concert` are under the same management and thereby these 8 companies belonging to `persons acting in concert` would be deemed to be persons acting in concert.

From the aforesaid it is clear that the Acquirer as well as M/s. Total Network Solution Ltd., M/s. Black More Investment & Trading Co. Pvt. Ltd., M/s. Pravara Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Poornima Commercial Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Co. Pvt. Ltd., M/s. Sentosa Investment and Trading Co. Pvt. Ltd., M/s. Timber Hill Engineers Pvt. Ltd shall be deemed to be acting in concert on 1.4.97 for the purposes of acquisition of shares of the Target company.

Further, it is also observed that, the Acquirer represented by Mr Kirit Kanakiya has admitted, in the statement made on oath before SEBI on 19/6/02 that after receiving the show cause notice they realized that the M/s. Total Network Solution Ltd., M/s. Pravara Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Poornima Commercial Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Co. Pvt. Ltd. and M/s. Timber Hill Engineers Pvt. Ltd. should also have been classified under the promoters group. The Acquirer also stated that during the initial phase in 1995 – 1998 they were busy in establishing the business of the Target company and were required to look after business prospects, hardware requirements and other infrastructure requirements. The Acquirer also stated that they had been filing regular submissions to the stock exchanges and due to oversight these companies were not classified under the promoter group.

In response to another query whether Black More Investment & Trading Co. Pvt. Ltd., M/s. Pravara Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Poornima Commercial Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Co. Pvt. Ltd., M/s. Sentosa Investment and Trading Co. Pvt. Ltd., M/s. Timber Hill Engineers Pvt. Ltd were the companies under the same management, the Acquirer stated that they agreed that these companies come under the same management and due to oversight these companies were not classified under the category "companies under the same management".

It is also seen that although the Acquirer has pleaded that merely because a person is part of the promoter group does not mean that he is also acting in concert, however, the Acquirer represented by Mr Kirit Kanakiya admitted during the hearing before the Chairman on 31.08.02 that the companies as named hereinbefore were acting in concert with the Acquirer for the purposes of the abovesaid acquisition of the shares of the Target company on 01.04.97 and they also prayed that a lenient view in the matter of the acquisition shares of the Target company by the Acquirer and the persons acting in concert, be taken.

Therefore, in view of the aforesaid and admission, by the Acquirer, it is established that it was acting in concert with M/s. Total Network Solution Ltd., M/s. Black More Investment & Trading Co. Pvt. Ltd., M/s. Pravara Commercial Pvt. Ltd., M/s. Relaxed Packagers Pvt. Ltd., M/s. Poornima Commercial Pvt. Ltd., M/s. Consistent Packagers Pvt. Ltd., M/s. Pleasant Packaging Co. Pvt. Ltd., M/s. Sentosa Investment and Trading Co. Pvt. Ltd., M/s. Timber Hill Engineers Pvt. Ltd., for the purposes of acquisition of shares of the Target company on 1.4.97.

5.3.2 The next issue which needs to be considered is, whether the Acquirer has triggered the said Regulations. If yes, when did the obligation on the part of the Acquirer arise, to make public announcement ?

In this regard it will be pertinent to refer to regulations 11 and 14 which are reproduced hereunder:-

Regulation 11 (Consolidation of holdings) – as it existed on 01.04.1997.

1. "No Acquirer who, together with persons acting in concert with him,

has acquired in accordance with the provisions of law, not less than 10% but not more than 51% of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 2% of the voting rights, in any period of 12 months, unless such Acquirer makes a public announcement to acquire shares in accordance with the Regulations"

From the aforesaid, it is clear that in case if an Acquirer is holding 10% or more of the shares in the Target company but less than 51% shares then he can acquire shares beyond 2% in a Target company in any period of 12 months only if he makes a public announcement for acquiring shares in the Target company in accordance with the said Regulations.

Further regulation 14 (Timing of the public announcement of offer) mandates that 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.

From the facts on record and as declared vide statements filed with BSE, it is clear that before 1.4.97 the Acquirer alongwith the other group companies was holding 30.04% shares in the Target company i.e more than 10% shares of the Target company. On 1.4.97 when the " persons acting in concert" acquired 31.560 % shares of the Target company the shareholding of the Acquirer and the persons acting in concert increased from 30.04% (pre-acquisition) to 61.6 % (Post acquisition) in the Target company i.e. beyond the permissible limit of 2% as provided in sub regulation (1) of regulation 11. Therefore , the Acquirer along with the persons acting in concert crossed the threshold limit specified under sub regulation (1) of regulation 11 on 1.4.97 and triggered the said provisions of the Regulations.

In terms of sub-regulation (1) of regulation 14, a public announcement has to be made by the Acquirer within 4 working days of entering into an agreement or taking any decision which would result in acquisition exceeding the respective percentages specified in regulations 10 & 11 of the said Regulations in the Target company. Accordingly, once the said Regulations had been triggered by the Acquirer, the Acquirer was under an obligation, to make a public announcement in terms of the Regulations.

From perusal of the provisions of regulation 11, it is clear that the acquirer shall not acquire shares or voting rights of the Target company unless the acquirer makes a public announcement to acquire shares in accordance with the Regulations and acquires such shares in accordance with the Regulations. Thus the Regulations not only mandate issuance of public announcement by the acquirer but also requires the acquirer to acquire such shares in accordance with the regulations. It is clear that issuance of public announcement is not a post acquisition requirement but definitely a pre acquisition requirement.

In this regard, the Hon'ble Mumbai High Court in B.P. Plc case has held that - " Even Regulation 12, mentions in categorical terms as "no Acquirer shall acquire control over the Target company unless such person makes a public announcement to acquire shares and acquires such shares". Therefore what is contemplated is that a public announcement must precede any acquisition of shares and then only a person can acquire shares. Any other interpretation would render public announcement superfluous and the objectives sought to be achieved would be lost. This is all the more abundantly clear from Regulation 14(3) mentions about the necessity of public announcement when "any such change or changes are decided to be made as would result in the acquisition of control over the Target company by the Acquirer". That is to say, when any such change is decided to be made, the same would result in acquisition or control, then public announcement will have to be made. Therefore, once a decision is taken, which would result in acquisition or control, then public announcement must precede such acquisition or control. That is the decision to later on result in acquisition or taking control."

Thus, when the Acquirer alongwith the persons acting in concert acquired 31.560% shares of the Target company on 1.4.97, the Acquirer alongwith persons acting in concert triggered the provisions of sub-regulation (1) of regulation 11, as the shareholding of the Acquirer increased from 30.04% (pre-acquisition) to 61.6 % (Post acquisition) in the Target company i.e. beyond the permissible limit of 2% as provided in sub regulation (1) of regulation 11 and the obligation to make Public Announcement arose on that day which was to be made within four working days of 01.4.97.

I have also noted the contention of the Acquirer that the aforesaid acquisition was inadvertent and was not made with a malicious intent at all or with any intent to make a profit or with an intent to cause a loss to any person. Further I have also noted the submission of the Acquirer that since they were already holding more than 34.42% shares of the Target company, no additional benefit to the promoters could have been caused by way of further acquisitions. In this regard, it is stated that the regulations are in no way concerned with the intention behind the acquisitions. Once the acquisition triggers either of the regulations i.e regulations 10, 11 & 12, the Acquirer is under an obligation to make public announcement, so as to provide an exit opportunity to the shareholders of the Target Company.

The Acquirer has also contended that by virtue of such acquisition no loss has been caused to any person and rather the public as a whole has been benefited. In this regard, it may be mentioned that the scheme of the regulations is clear i.e when the Acquirer triggers any of the regulations 10, 11 & 12, the Acquirer has to make public announcement so as to provide an exit opportunity to the shareholders of the Target Company. By not making of public announcement by the Acquirer, the shareholders of the Target company have been deprived of the exit opportunity . Therefore, the contention of the Acquirer that no loss has been caused to the shareholders is not tenable.

Further, the Acquirer has also submitted that the alleged violations were only one time and the punitive action under the regulations has to be judged in the background of these factors. In this regard, it is stated that under regulations 10, 11 & 12, the Acquirer has to make public announcement so as to provide an exit opportunity to the shareholders of the Target Company. Further, the direction to make public announcement under the Regulations is not a punitive action and is rather remedial in nature. The same provides the shareholders an opportunity to exit, if they so desire, in the event of substantial acquisition of shares / control by any person. In the instant case, the shareholders were deprived of the said opportunity by the Acquirer by not making the public announcement.

I have also noted the submissions of the Acquirer that the shareholding of the Acquirers along with the persons acting in concert in the Target company shows that they have always been in control whether before or after the acquisition. Further submitted that the control of the promoters was always absolute and by such acquisition at best there could have been marginal increase in their control though it may appear to be larger in absolute terms. In this regard, it may be mentioned that irrespective of the fact whether there has been substantial or marginal increase in the shareholding or control of the Target company an open offer has to be made in case the acquisition triggers any of the regulations i.e. 10, 11 or 12. It may also be stated that the control in the instant case might not have changed from the Acquirers to any other person but, there has been change in quantum of control by virtue of the acquisition of shares made by the "persons acting in concert" as stated hereinbefore since the shareholding of the Acquirer increased from 30.04% (pre-acquisition) to 61.6 % (Post acquisition) in the Target company. Therefore, the Acquirer was under an obligation to make public announcement so as to provide an exit opportunity to the shareholders of the Target company.

It is also seen that the Acquirer has submitted that there is no provision of a mandatory open offer to be required to be made by SEBI and the provisions of the said Regulations merely make a requirement of making an open offer as a prelude to a takeover. It has further been submitted that, if a violation has been found in respect of any past act there is no question of making an open offer since it would be making a mockery of the law as well as creating a situation where third parties will benefit while the original shareholders are out of the picture. In this regard, it may be mentioned that the provisions of the regulations 10, 11 & 12 are the substantive provisions of the Regulations and are mandatory in nature. These provisions are beneficial in nature to protect the interest of the shareholders of the Target company. The Regulations provide for making of public announcement in the event of substantial acquisition of shares or change in control over the Target company so that the shareholders get an exit opportunity if they do not wish to continue with the company in view of the change in control or substantial acquisition of shares of the Target company by any person. Regulations 10, 11 & 12 mandate making of public announcement before acquiring the shares of a company beyond the limit as specified therein and the control over the company. In the instant case the Acquirer has alongwith persons acting in concert acquired the shares without making the public announcement, which is in contravention of regulation 11(1) . Thus by directing the Acquirer to make public announcement is only calling upon the Acquirer to do what it ought to have done under the Regulations. Therefore, the argument of the Acquirer that there is no provision of mandatory open offer required to be made, is not tenable.

I find that the Acquirer along with persons acting in concert crossed the threshold limit specified under sub regulation (1) of regulation 11 on 1.4.97 and triggered the said provisions of the Regulations and the Acquirer was under obligation under sub regulation (1) of regulation 14 to make a public announcement within 4 days thereof. I find that as required under the aforesaid regulations, no public announcement has been made by the Acquirer and the persons acting in concert in terms of sub regulation (1) of regulation 11 read with sub regulation (1) of regulation 14 of the said Regulations.

6.0 **CONCLUSION**

In view of the aforesaid, I find that the Acquirer and the persons acting in concert have violated sub regulation (1) of regulation 11 read with sub-regulation (1) of regulation 14, as the Acquirer along with the persons acting in concert have acquired 31.56% shares/voting rights in the Target company i.e beyond the permissible creeping limit of 2% as provided in sub regulation (1) of regulation 11, without making public announcement to acquire shares/voting rights of the Target company in accordance with the said Regulations

7.0 **ORDER**

7.1 In view of the findings made above, in exercise of the powers conferred upon me under sub-section (3) of Section 4 read with Section 11B SEBI Act 1992 read with regulations 44 and 45 of the said Regulations, I hereby direct the Acquirer to make a public announcement as required under Chapter III of the said Regulations in terms of sub regulation (1) of regulation 11 taking 1/4/97 as the reference date for calculation of offer price. The public announcement shall be made within 45 days of passing of this order.

7.2 Further, in terms of sub regulation (12) of regulation 22, the payment of consideration to the shareholders of the Target Company has to be paid within 30 days of the closure of the offer. The maximum time period provided in the said Regulations for completing the offer formalities in respect of an open offer, is 120 days from the date of public announcement. The public announcement in the instant case ought to have been made taking 1/4/97 as a reference date and thus the entire offer process should have been completed latest by 31/07/1997. Since no public announcement for acquisition of shares of the Target Company has been made, which has adversely affected interest of shareholders of Target Company, it would be just and equitable to direct the Acquirer along with persons acting in concert to pay interest @ 15% per annum on the offer price. The Acquirer along with persons acting in concert are hereby directed to pay interest @ 15% per annum to the shareholders for the loss of interest caused to the shareholders from 1/8/1997 till the date of actual payment of consideration to the shareholders, who may tender the shares in the offer, as directed hereby, to be made by the Acquirer along with persons acting in concert.

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

Date: October 23, 2002

Place: Mumbai G.N. BAJPAI

CHAIRMAN

SECURITIES AND EXCHANGE BOARD OF INDIA