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'non-disclosure of acquisition of shares'*

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A landmark judgement in the matter of 'non-disclosure of acquisition of shares'

History:

Companies Act, 1956 gave immense power to the company and its shareholders to approach Company Law Board ("CLB") for the non-compliance / default occurrence on the part of the other party. With the reformation of the company law, most of the pending cases before the Court / CLB was put into question about the jurisdiction. One of the landmark case held before the National Company Law Tribunal ("NCLT"), Kolkata Bench, gave clarity on few topics.

On examining various cases laws and judgement passed by the judicial bodies like Court, Securities Exchange Board of India ("SEBI"), National Company Law Tribunal ("NCLT"), it could be concluded that the default in complying with the provisions of SEBI Regulations like SEBI (Substantial Acquisition and Substantial Takeover) Regulations, 1997 (hereinafter referred to as "Takeover Code") and SEBI (Prohibition of Insider Trading) Regulation, 1992 (hereinafter referred to as "Insider Trading Regulation"), the said matter to be referred to SEBI and Securities Appellate Tribunal ("SAT"). But in the above decided matter, according to Section 111A of the Companies Act, 1956, the correct authority was the then Company Law Board to give the direction / order in the said matter. How it was proved that the then CLB was the correct authority to give the order, let's discuss and understand the same in detail in line with the order passed by Hon'ble NCLT of Kolkata Bench.

Background of the facts:

IFB Agro Industries Limited (hereinafter to be referred as "Petitioner" or "IFB"), is the company incorporated on February 19, 1982 under Companies Act, 1956 with its registered office in Kolkata, is into manufacture and sale of rectified spirit, country liquor, IMFL, marine products, carbon-dioxide, etc. IFB is the listed entity with its shares is listed on the stock exchange of Mumbai, Kolkata, Delhi and National Stock Exchange.

SICGIL India Limited (hereinafter to be referred as "Respondent" or "SICGIL"), is the listed company incorporated under Companies Act, 1956 with its Registered Office located at Chennai in the district of Annasalai. SICGIL is into the business of manufacturing of carbon dioxide and dry ice.

Both the companies had the business of the similar nature and that the Respondent company had once approached Petitioner to join hands in the business for the expansion and growth. The proposed business was about marketing of CO₂ manufactured by the petitioner and to get associated with the Petitioner Company in dry ice business carried out by Nurpur Gases Private Limited, with whom the petitioner had close business relationship. However, the petitioner denied the business deal with SICGIL.

Matter that enlightened the facts:

The Petitioner filed the original petition before the then Company Law Board by invoking the provision of Section 111A of the Companies Act, 1956, seeking for some interim relief from the illegal acquisition of the shares by the Respondent Company alongwith the person acting in concert. While acquisition of the shares in the petitioner company, certain compliance got triggered which was not complied with, led to the violation of Regulation 13 of SEBI (Prohibition of Insider Trading) Regulation, 1992.

The authorised share capital of the Petitioner Company is Rs. 12 Crore and the then issued, subscribed and paid up capital of the Petitioner Company was Rs. 7,70,71,110/- of 77,07,111 Equity shares of Rs. 10/- each fully paid up. Respondent company steadily acquired the shares in the petitioner company, after their proposal of the deal into business with Petitioner company remained unsuccessful. Most of the acquisition of the shares were not legal and that the adequate disclosures under Insider Trading Regulation and Takeover code was not in place. This led to the suppression of the information with the Petitioner company about the consolidated holding of the Respondent company along with the person acting in concert.

Details of Petitioner and Respondent:

(A) Petitioner - IFB Agro Industries Limited is listed company which is into manufacturing business of rectified spirit, country liquor, etc.

(B) Respondent

- (i) SICGIL India Limited is R-1,
- (ii) F.L. Dadabhoy – Managing Director is R-2,
- (iii) Ms. Persis F. Dadabhoy is R-3,
- (iv) Ruqshad F. Dadabhoy is R-4,
- (v) Nauzer F. Dadabhoy is R-5,
- (vi) Shirin F. Dadabhoy is R-6

Ms. Persis (R-3) is wife of R-2 and R4 to R-6 are interrelated to R-2. All the respondent individually holds the shares in the Petitioner Company, and hence, collectively all the parties are interconnected to each other and all of them hold the shares in the petitioner company.

Time frame explaining the entire events:

August 2003:

Respondent company had approached the Petitioner company, for the business deal of marketing for CO₂, which were manufactured by the Petitioner company and for being associated in the business of dry ice which was carried out in association with Nurpur Gases Pvt. Ltd., which had very close business relationship with the Petitioner company. The Learned Counsel of the Petitioner company stated that the above deal was dismissed, where it was decided that the Petitioner company will not deal with Respondent in any manner whatsoever.

August 2003 to July 2004:

It was noted that since the deal got dismissed, there was subsequent acquisition of shares in the Petitioner company since then. The Petitioner Company had received the letter from R-1 on January 22, 2004 intimating the company under Regulation 7(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, whereby notifying the petitioner company that they have acquired 600 equity shares, thereby increasing the shareholding of the Respondent Company beyond 5%.

It was also learnt by the Petitioner Company that post such disclosure, there was drastic increase in the shareholding of the company. The acquisition of shares beyond 5% in one company triggered additional compliance as per the then SEBI (Prohibition of Insider Trading) Regulation, 1992. Post-acquisition of additional shares in compliance of the disclosure made on January 22, 2004, the Respondent Company acquired further 2% shares in the company, the same was brought to the notice of the Petitioner Company by the depositories, in reference to the "BENPOS" (list of Beneficiaries / Beneficial owners) on May 21, 2004. The said acquisition of shares was in violation of Regulation 13(1) and 13(3) of SEBI (Prohibition of Insider Trading) Regulations, 1992.

Extract of the said regulation:

"13(1) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company in Form A, the number of shares or voting rights held by such person, on becoming such holder, within 2 working days of: — (a) the receipt of intimation of allotment of shares; or (b) the acquisition of shares or voting rights, as the case may be."

***"Continual disclosure.** (3) Any person who holds more than 5% shares for voting rights in any listed company shall disclose to the company [in Form C] the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company."*

In reference to the above quoted regulation, Respondent were already holding more than 5% of shares in the Petitioner company, and that their further acquisition of 2% shares (as per the BENPOS reported by the Depositors), disclosures under Regulation 13(1) and 13(3) was not complied with.

Important point to be noted in the above discussion is that requirement of Regulation 13(3) is very important in the matter, and that it leads to the suppression of the facts, as this could have led to the Petitioner Company to build their safeguard measures. Respondent company had aimed to build up the pressure on the Petitioner company by systematically acquiring the shares in the Petitioner company and that the major decision-making stake will lie with them.

July 19, 2004:

Petitioner company filed the company petition under Section 111A of the Companies Act, 1956 before the jurisdiction of the then CLB of Kolkata bench, where the Registered Office of the company is located, praying for the following relief:

- a. Declaration that such acquisition of shares by the R-1 to 6 as illegal, null and void and of no effect;*
- b. Necessary direction be given for ratification of the register of records by deleting the names of the Respondent Nos. 1 to 6;*
- c. Permanent injunction restraining the Respondents from exercising any rights or receiving any benefits in respect of shares held by Respondents in the Petitioner Company in any manner whatsoever.*

Extract of the Section 111A of the Companies Act, 1956:

"Rectification of Register on transfer:

(1) In this section, unless the context otherwise requires, "company" means a company other than a company referred to in sub-section (14) of section 111 of this Act.

(2) Subject to the provisions of this section, the shares or debentures and any interest therein of a company shall be freely transferable:

Provided that if a company without sufficient cause refuses to register transfer of shares within two months from the date on which the instrument of transfer or the intimation of transfer, as the case may be, is delivered to the company, the transferee may appeal to the Company Law Board and it shall direct such company to register the transfer of shares

(3) The Company Law Board may, on an application made by a depository, company, participant or investor or the Securities and Exchange Board of India, if the transfer of shares or debentures is in contravention of any of the provisions of the Securities and Exchange Board of India Act, 1992 (15 of 1992), or regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), or any other law for the time being in force, within two months from the date of transfer of any shares or debentures held by a depository or from the date on which the instrument of transfer or the intimation of the transmission was delivered to the company, as the case may be, after such inquiry as it thinks fit, direct any depository or company to rectify its register or records.

(4) The Company Law Board while acting under sub-section (3), may at its discretion make such interim order as to suspend the voting rights before making or completing such enquiry.

(5) The provisions of this section shall not restrict the right of a holder of shares or debentures, to transfer such shares or debentures and any person acquiring such shares or debentures shall be entitled to voting rights unless the voting rights have been suspended by an order of the Company Law Board. "

In context of the above quoted section, referring to sub-section (3) and (4), the company could file a company petition for the rectification of the register of transfer in the matter of transfer of shares or debentures which are in contravention of the Companies Act or SEBI ACT or any other law which are in force for time being, subject to the amendment from time to time.

In the month of August 2004:

As per the record of BENPOS dated August 13, 2014, Respondent was holding 6.38% of stake in Petitioner company, after which, the intimation was given to the Respondent about the petition been filed against them under Section 111A. On bringing to their notice, Respondent company transferred shares to other respondent who were the family member, in order to reduce their shareholding below 5%. This transfer was sham and bogus, and that it was made just to come out from the ambit of the compliance under the Regulation 13(1) and 13(3).

The disclosure for the above mentioned transferred was not complete in accordance with the Regulation 7(1) of the Takeover Code. On hearing both the parties, the then CLB on August 27, 2004 passed an order directing to freeze the voting rights of R-1 in respect of the shares acquired in excess of 5%, which was based on the statement as of July 9, 2004 which stand at 0.933%. CLB granted the permission to the Petitioner company to file the supplementary affidavits, to throw the light on the continuous violation by the Respondent.

Supplementary affidavit dated June 19, 2006:

Petitioner filed the supplementary affidavit stating further violation by the Respondent in acquiring shares of the Company. Respondent along with person acting in concert continued to acquire shares from the open market, amount to their holding in the company as 10% in September 2004, 11% in March 2005 and 13% in January 2006. The said acquisition of shares was made without any or adequate declaration about the acquisition of shares, which was in violation of Regulation 13(1) and 13(3) of Takeover Code.

Supplementary affidavit dated February 28, 2013:

The continual affidavit was filed to bring to the notice, about the continuous malafide intention of the Respondent in acquisition of shares of the company in violation under Takeover Regulations 1997 and 2011; Insider Trading Regulations, 1992.

Supplementary affidavit dated April 9, 2015:

In addition to the allegation that was pointed out against the Respondent, the petitioner also brought the following facts on records:

- Respondent continued to take undue advantage of the pending matter before CLB, by acquiring the shares without making any declaration under Takeover Code and Insider Trading Regulation.
- The disclosures made by the Respondent on two occasions, does not contain the details about the fact that 0.933% of the voting rights are frozen by the then CLB.
- The Respondent company had suppressed the fact that Pure Industrial Gases Private Limited ("PIGPL") were holding 16200 Equity shares of Petitioner company forming 0.20%, which is the family company of the Respondent. Consolidate holding of shares of Respondent company along with the shares of PIGPL triggered the open offer as per Regulation 10 of the Takeover Code, the same was not complied with.

Reply from the Respondent:

Learned counsel of Respondent replied that at no point of time, there was any intention of the Respondent to default in Insider Trading Regulation and that the allegation on Respondent (R-1 to R-6) shall stand invalid and void. As far as R-1 is concerned, the shareholding only exceeded 5% on June 2, 2004. In fact, R-1 made all the necessary disclosures for exceeding shareholding above 5% and 10% dated January 20, 2004 and August 20, 2004 under Regulation 7 of Takeover Code.

In addition to their reply, Learned Counsel stated that at no given point of time, there was any intention to suppress the information and for non-compliance under Insider Trading Regulation and that it was inadvertent and bonafide. The Respondent company ascertained the disclosure under Regulation 13 of Insider Trading Regulation could not be made within 4 days and that the company took immediate steps to rectify their mistake by forwarding the disclosure dated August 24, 2004 to Petitioner company and copy of same been forwarded to SEBI.

Further, Respondent Company also correct their steps by reducing the shareholding below 5% by transferring its shares. The disclosure pertaining to the same has been filed with SEBI dated August 24, 2004.

Respondent also kept their point stating that Petitioner company cannot seek the prevention by restricting the Respondent to exercise their rights as shareholder of the Petitioner Company, and that the respondent also alleged that it is the malafide intention of the Petitioner management, as they are deliberately attempting to restrict the respondent to exercise their rights to cast the vote on the resolution in the general meeting.

Further, adding to the reply that, the company petition is required to be filed within period of 2 months from the date of default under Section 111A of the Companies Act, 1956 and the Petitioner company is beyond the limitation in filing the petition. The Respondent Company exceeded their limits of 5% holding on June 2, 2004 and that the company has filed the petition after 2 months.

Respondent Company also raised the query on the definition "*person*" and "*person acting in concert*" in ambit of the both the regulation of SEBI, where the definition of "*person acting in concert*" is nowhere defined under Insider Trading Regulation, then is it required to give the disclosure for collective holding of all the Respondent under Insider trading regulation and that it is referred as "*person*" and not "*person acting in concert*", so is it mandatory for the respondent to file the such disclosure which requires to give the details of the collective shareholding of all the respondent under Insider Trading regulation. Referring to above difference in the definition as referred under both the regulation, individuals never exceeded their shareholding above 5%, hence it was not mandatory for them to give such disclosure under Insider Trading Regulation.

Order passed by Hon'ble NCLT:

NCLT concluded that there is a default in complying with the Takeover Code and Insider Trading Regulation. The Petitioner came to know about the facts of the Respondent exceeding the shareholding more than 5% only as on June 4, 2004 and that the Petition has been filed on July 19, 2004 which is well within 2 months. Regulation 13 of Insider Trading Regulation defines "person" and the Respondent company along with other respondent individual will exercise the control of the management jointly. In context of control of the management of the Petitioner company, all the respondent should be jointly liable to make the declaration under Regulation 13.

Further, the said petition was filed under Section 111A of the Companies Act, 1956 for the non-compliance of the SEBI Regulation, where the said section empowers the company to apply for rectification of such non-compliance. In the above case, SEBI has the power to impose fine and penalty but Section 111A empowers the then CLB to direct the parties so that the mischief is undone.

The declaration submitted by the Respondent at later date shall be barred from exercising their rights and that the company is directed to buy back the shares that the Respondents holds in excess of 5%. The Respondents are directed to handover the share certificates and share transfer deed within 30 days of the said order and that the Company has to pay the buyback price at the value of shares as on date when the petition was filed or at the market value, whichever is higher.

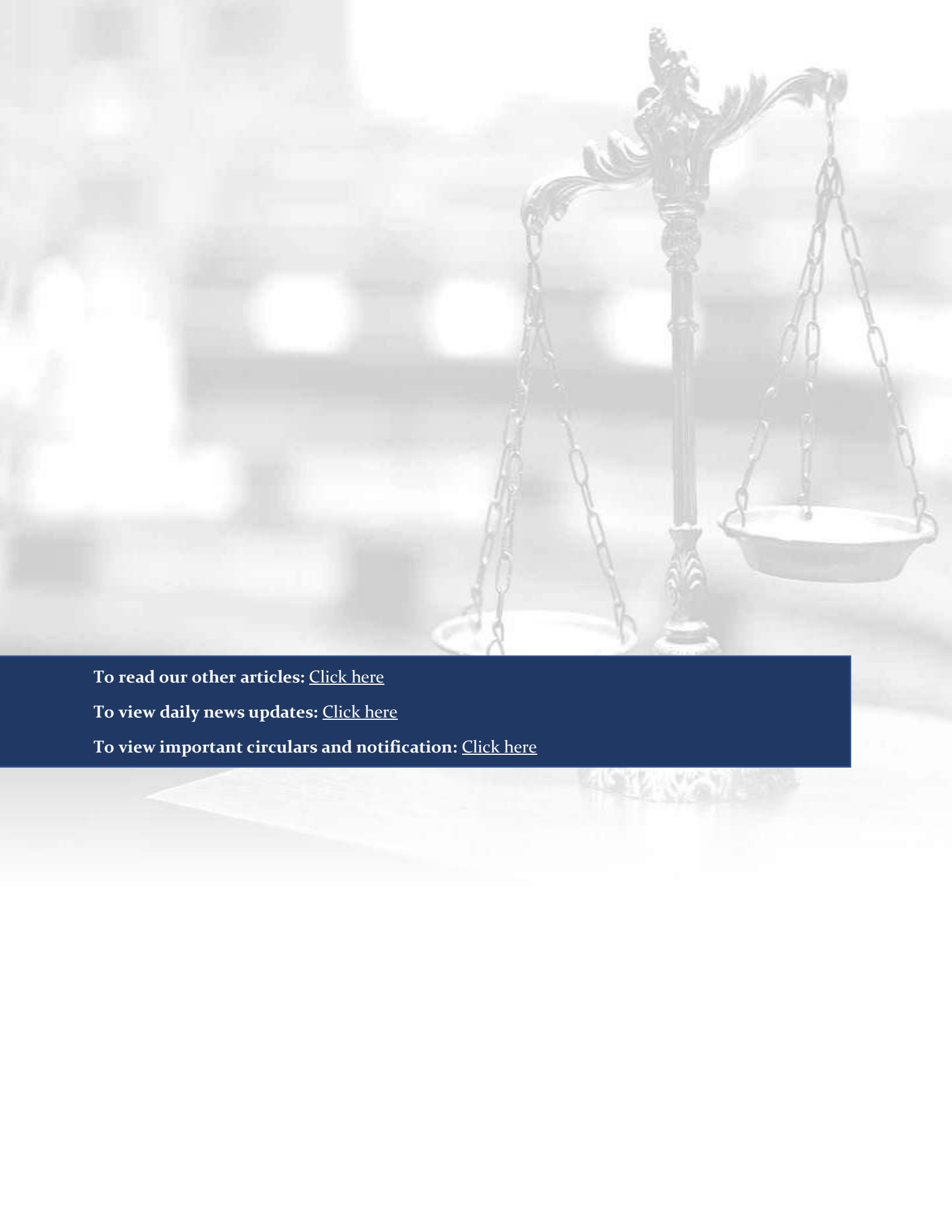
Further, the order passed by NCLT shall not preclude the jurisdiction of SEBI as the power conferred by SEBI and NCLT are different in nature and that both are different jurisdictional fields. Hence, the said order passed by NCLT will not disturb the adjudicating powers of the SEBI in the said matter for the non-compliance of SEBI Regulation and that SEBI can take its individual stand in the said matter.

Our Take:

As we can see that NCLT has not imposed any penalty on either of the parties, rather that it has instructed for buyback of shares, which is one of the landmark judgement any Tribunal or Court has directed. Since SEBI can impose the fines and penalty according to the SEBI Regulations and as powered conferred by the law.

NCLT has provided the all-round justice to both the parties along with the opportunity to keep your point and based on that, giving the essential justification, which is most essential way for it to function. Hence, it would be more interesting to see that upcoming direction by NCLT in other matters where the justice would be frontier for the Indian Judicial body.

In the given case, the intention of the respondents was malafide where by not making adequate disclosure, it had tried to suppress the relevant information with the Company and also intended to take the major stake in the company to take the control of the management and to approve the deal once which was rejected by the promoter group of the petitioner company. Undue advantages lied here is to bring in our own people in the management and to take the maximum decision-making authority with self so that they can run their own business by using the facilities of the Petitioner company.



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