BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. CFD/ATL/AO/DRK-AKS/EAD3-546/90-2014]

UNDER SECTION 15 I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5(1) OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995

In respect of:

Apollo Tyres Ltd.

7 Institutional Area
Sector - 32
Gurgaon - 122001

FACTS IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') received complaints wherein it was alleged that shares of Apollo Tyres Ltd. (hereinafter referred to as '**noticee / ATL**') were bought back by the noticee and its Promoters in contravention of Section 77A of the Companies Act, 1956 and SEBI (Buy Back of Securities) Regulations, 1998 (hereinafter referred to as '**SEBI Buy Back Regulations**').

APPOINTMENT OF ADJUDICATING OFFICER

2. I was appointed as the Adjudicating Officer under Section 15 I of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**'), read with Rule 3 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Adjudication Rules'**) to inquire into and adjudge under Section 15 HB of the SEBI Act the violation of SEBI Buy Back Regulations

alleged to have been committed by the noticee in the year 2003 and the same was communicated vide proceedings of the Whole Time Member appointing Adjudicating Officer dated 24.12.2013.

SHOW CAUSE NOTICE, HEARING AND REPLY

3. Show Cause Notice No. A&E/EAD3/DRK-AKS/2741/2014 dated 24.01.2014 (herein after referred to as **'SCN'**) was served on the noticee in terms of the provisions of Rule 4 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 requiring the noticee to show cause as to why an inquiry should not be held against the noticee and why penalty, if any, should not be imposed on the noticee under Section 15 HB of the SEBI Act.

4. In the said SCN, it was alleged as follows:

- The directions given by the Hon'ble Supreme Court of India vide its order dated 23.08.2001 were ignored by the noticee. Further, it was alleged that the buy back should have been in compliance with the provisions of Section 77A of the Companies Act, 1956. Section 77A (2) (f) of the Companies Act, 1956 unequivocally states that the buy back of the shares or other specified securities listed on any recognised Stock Exchange has to be in accordance with the Regulations made by SEBI in this behalf. Hence, it was alleged that noticee has failed to comply with / completely circumvented / ignored the provisions of the SEBI Buy Back Regulations.
- The noticee has failed to submit the Board resolution dated 24.04.2003 authorising the buy back with SEBI as per Regulation 5A of the SEBI Buy Back Regulations.
- The noticee had issued a public notice on 13.05.2003 and thus it was alleged that noticee has exceeded the time limit specified under Regulation 19 (7) of the SEBI Buy Back Regulation. In addition, it was alleged that the public notice issued by the noticee did not contain the pre and post shareholding pattern, as specified under Regulation 19 (7) of the SEBI Buy Back Regulation.

5. The noticee vide its letter dated 12.02.2014 requested for extension of time by 2 weeks to submit a reply to the SCN as concerned officials of the noticee who were conversant with the allegations raised in the SCN were pre-occupied with statutory board meetings of the noticee. Vide our letter dated 17.02.2014 noticee was granted time till 28.02.2014 to submit a reply to the SCN.

6. Noticee vide its letter dated 26.02.2014 replied to the SCN as follows:

- The present Notice having been issued in January 2014 after a lapse of nearly 11 years from the transactions / actions sought to be impugned and is therefore completely vitiated under law and the notice accordingly ought to be withdrawn & / or discharged on this ground alone. It is settled law that such gross delay in the initiation of proceedings has been considered to be a violation of the principles of natural justice and has also been considered to defeat the very purpose of the proceedings. Further, there is no reason or justification or explanation for the said delay.
- This Hon'ble Board may be pleased to observe that in terms of the said Orders dated 30.04.2003 and 02.05.2003 passed by the Hon'ble Special Court read with the Hon'ble Supreme Court's order dated 23.08.2001, that the sale of shares was to be by the Custodian and the buyback of shares by Apollo was to be in the following terms:-
  a) From a single person i.e. the Custodian
  b) At a price and in the manner as approved by the Special Court i.e. ₹ 90/- per share
- Thus the method and manner of purchase/buyback of shares by the Company was strictly in terms of Orders passed by the Hon'ble Special Court and the Hon'ble Supreme Court of India.
- In view of the afore stated peculiar circumstances and the direction of the Hon'ble Supreme Court vide its order dated 23.08.2001 that "…the company to buyback under Section 77A of the Companies Act", the Company sought legal advice with regard to its obligations to comply with the said provisions, particularly since Section 77A of the Companies Act and SEBI's said Buy-Back Regulations never contemplated such a situation and "Scheme" settled by the Hon'ble Courts.

  "On the contrary, ATL is buying back the shares from the Custodian by virtue of an order of the Supreme Court dated 23.08.2001. That order is "law" by virtue of Article 141 of the Constitution of India. In my view, it is the Supreme Court which permitted ATL, to buyback the securities from the Custodian, Pursuant to this

order, the Special Court has directed the Custodian to sell certain securities to ATL. It is called “buyback” because the Supreme Court has referred to the method as “buyback” and has also referred to Section 77A of the Companies Act, 1956. No doubt the Supreme Court has directed that ATL should have an opportunity to buyback the shares “by complying with the provisions of Section 77A of the Companies Act, 1956”. In my view, the direction to comply with Section 77A has to be read in a reasonable and meaningful manner, and so reading of the direction, I am of the opinion that what the direction means is that ATL should comply with such of those provisions of section 77A as is feasible and practical to comply.”

- In so far as compliance with the regulations framed by this Hon’ble Board i.e. the SEBI (Buyback of Securities) Regulations, 1998 are concerned, the opinion received by the Company was as under:

  “For the reasons stated by me earlier, neither Chapter III nor Chapter IV of the said Regulations are applicable, In so far as Chapter II is concerned, Regulation 4 is not attracted. Nor is this a case where a special resolution in a general meeting is required and therefore Regulation 5 is not attracted. So far as the General Obligations contained in Chapter V are concerned, ATL is in a position to satisfy many of the obligations. E.g. ATL is in a position to comply with the obligations in Regulation 19(1),(b),(c),(e) etc."

- Voluntary compliance undertaken by Apollo makes it abundantly clear that Apollo made all effort possible to comply with the applicable provisions in so far as it was feasible and practical, and there was no intention or motive to avoid any compliances. The actions of Apollo in making the requisite disclosures to the Registrar of Companies, stock exchanges and to this Hon’ble Board make it evident that Apollo had no intention or motive to gain any advantage and / or cause any harm / loss to the public and Apollo adhered to the highest standards of transparency and public disclosure to the extent it was possible and applicable.

- Vide its judgment dated 08.11.2011, the Hon’ble Supreme Court allowed the Appeal partly by remitting the matter to the Special Court for taking necessary steps to conduct a fresh sale of the said 4.95% shares in terms of the norms as approved by the Hon’ble Supreme Court vide its Order dated 23.08.2001 and directed that the amounts paid by the promoters of the Company for purchase of the said shares be refunded to them along with simple interest. Therefore, the buy-back by Apollo was not in any manner disturbed or interfered with by the Hon’ble Supreme Court, despite the objections and contentions of the said Appellants, including the same allegations which were purported to be raised in

the “complaint” to SEBI. It is alleged at paragraph 7 of the Notice under reply that the “Hon’ble Supreme Court of India in its order dated 08.11.2011 had observed that the directions given by the Hon’ble Supreme Court of India vide its order dated 23.08.2001 were ignored by you”. This statement is contrary to the judgment rendered by the Hon’ble Supreme Court and ought to be dropped from the Notice under reply.

- At the outset, it is reiterated that the sale of the Subject Shares was conducted in terms of and in exercise of powers under the Special Court Act, under the aegis of the office of the Custodian with the sale being recommended by a committee of experts i.e. Disposal Committee and finally approved by the Special Court presided over by a sitting judge of the Hon’ble High Court of Bombay.

- The properties of the notified parties, which stood attached and were to be dealt with by the Custodian as per the directions of and under the exclusive jurisdiction of the Special Court and any issues concerning these properties are to be raised before and dealt with by the Special Court:

- The subject shares having been sold in terms of and in exercise of powers under the Special Court Act and in terms of the approval given by the Special Court (presided over by a sitting judge of the Hon’ble High Court of Bombay); the jurisdiction of any other court / tribunal / authority (save and except the Hon’ble Supreme Court of India) is barred in terms of Section 9A and Section 13 of the Special Court Act;

- It is submitted that the jurisdiction of this Hon’ble Board is barred in terms of the Special Court Act being the special law, whereas and the SEBI Act and regulations framed there under, are the general law, In view of the statutory scheme of the Special Court Act and the overriding effect it has over other laws; the SEBI Act and regulations framed there under have no application to the sale of the Subject Shares and / or any purported violation with regard to their buy back by Apollo.

- It is clear from a bare perusal of the SEBI Buy Back Regulations as also the decision of the Hon’ble Securities Appellate Tribunal in *D-Link (India) Ltd.* Vs *SEBI* that the applicability of Section 77A as also the Buy Back Regulations is to regulate a situation where the Company is on its own buying back shares from its existing shareholders. In fact, Regulation 4(2) of the SEBI Buy Back Regulations expressly states that “A company shall not buy-back its specified securities from any person through negotiated deals, whether on or of the stock exchange or through spot transactions or through any private arrangement”. Thus, ex facie, the SEBI Buy Back Regulations cannot apply to the said sale / buy-back of shares vide the said Court settled “scheme” pursuant to powers under the

Special Court Act, since the purchase of shares by Apollo thereunder was from one person (i.e. the Custodian), through a negotiated deal (i.e. the price for buy back was negotiated by & before the Special Court as aforesaid.) Therefore, it cannot be alleged that Apollo violated any provisions of the Buy Back Regulations, since the same cannot apply at all to the present case. Further, even the requirement to comply with Section 77A of the Companies Act, could be only in respect of such of its provisions as could apply to such a situation, and Apollo in fact duly complied with the same as aforesaid.

- Therefore, in view of the above it is submitted that since the buy back of subject shares was done in a peculiar manner under strict scrutiny of the Special Court; the applicability of the SEBI Buy Back Regulations has to be viewed in this context, Since the buy back of shares by Apollo was not from its existing shareholders, the compliance requirements of the SEBI Buy Back Regulations do not apply strictly to the facts of the present case and to the extent it was practical and feasible Apollo complied with the applicable provisions as explained hereinabove.

- It is evident from a bare perusal of the resolution dated 24.04.2003 that neither the amount of shares to be bought back nor the price at which the said shares are to be bought back were approved by the board of directors. Hence, it cannot be alleged that the said resolution "authorized" the buy back of shares ultimately bought by Apollo i.e.; 36.90 lakh shares at ₹ 90/- per share. The background facts setout above make it clear that the price of the shares bought back by Apollo were pursuant to a negotiation during the course of a hearing in open Court before the Hon'ble Special Court on 30.04.2003 and hence did not find any mention in the resolution dated 24.04.2003.

- In fact, the buy back of the subject shares was actually approved by the board of Apollo on 09.05.2003 on which the Board passed the resolution. The said resolution dated 09.05.2003 actually "authorized" the buy back of the subject shares as contemplated in regulation 5A of the Buy Back Regulations. It is further submitted that the resolution dated 09.05.2003 was admittedly submitted to this Hon'ble Board under cover of a letter dated 10.05.2003; i.e. ; 1 day after the resolution dated 09.05.2003 was passed by the Board of Apollo, thereby duly complying with the requirements of Regulation 5A of the Buy Back Regulations. A copy of the letter dated 10.05.2003 has been submitted to this Hon'ble Board vide our letter dated 28.12.2012.

- It is submitted that the full payment for the purchase of the subject shares was directed by the Hon'ble Special Court vide its order dated 02.05.2003 to be made within 15 days commencing from 02.05.2003. Thus, in terms of the direction of

the Special Court, Apollo had upto 17 May 2003 to make the payment and thereby “complete the buy back”.

- Further, in terms of Section 77A of the Companies Act any company buying back its own shares is prohibited from holding the said shares and is mandatorily required to extinguish the said shares physically, Therefore, after full payment, Apollo wrote to CDSL on 12.05.2003 to extinguish the 36.90 lakh shares bought back by Apollo, A similar letter was addressed to NSDL on 12.05.2003.
- On 15.05.2003 CDSL wrote to Apollo confirming the reduction in share capital of Apollo in view of extinguishment of shares. A similar letter was received from NSDL on 23.05.2003.
- Pursuant to the buy back of shares and their extinguishment and in compliance of Section 77A(7) of the Companies Act, Apollo updated its ‘Register of Securities Bought Back’ as required to be maintained in terms of Section 77A(9) of the Companies Act.
- As is clear from the facts set out above, the buy back process was only completed once the share capital of Apollo was reduced and the ‘Register of Securities Bought Back’ was updated on 15.05.2003. Admittedly, the public notice required to be issued in terms of Regulation 19(7) of the Buy Back Regulations was issued on 13.05.2003; i.e. 2 days prior to the actual completion of the buy back and hence it cannot be alleged that Apollo exceeded the time limit specified under Regulation 19(7) of the Buy Back Regulation.
- In this regard it is submitted that however, the information containing the pre and post buy back shareholding pattern was in fact available in the public domain and was duly updated by Apollo post the buyback of shares.

7. As requested by the noticee, vide personal hearing notice dated 05.03.2014, the noticee was granted an opportunity of hearing on 20.03.2014 at 11:00 am at SEBI Bhavan, Mumbai. In response to the same, the noticee vide its letter dated 18.03.2014 authorised Shri P.N. Mody, Senior Advocate, Shri Manu Nair, Advocate, Shri Ranjit Bhonsale, Advocate, Shri Anuj Berry, Advocate, Shri P.N. Wahal, Head (Leagal & Secretarial) and Company Secretary and Shri Harish Bahadur, Head (Corporate Investments) as its authorised reprsentatives (herein after referred to as '**ARs**') to appear on its behalf for the scheduled hearing.

8. At the time of hearing the ARs denied the allegations made in the SCN and reiterated the submissions made in its reply dated 26/02/2014.The ARs

submitted chronology of events in the matter. The buyback of shares was a negotiated transaction and was under the Scheme settled by the Hon'ble Special Court as approved by Hon'ble Supreme Court. Therefore the buyback of shares does not fit the scheme of SEBI Buy Back Regulations. Further the noticee had gone ahead with the buyback after obtaining legal opinion and complying with general obligations contained in Chapter 5 of SEBI Buy Back Regulation, so far as it was feasible and practical. The ARs submitted that Regulation 5A of SEBI Buy Back Regulations is not applicable as on 24/04/2003, the board resolution only authorised company's representatives to appear before the Hon'ble Special Court. "Completion" of Buyback at the earliest can be deemed to be only on 15.05.2003 being the date of reduction of capital as confirmed by CDSL (on 15.5.2003) and therefore the noticee has not exceeded the time limit as specified in Regulation 19(7) of Buy Back Regulations. The ARs submitted that pre and post shareholding patterns was available in public domain. The ARs have undertaken to submit the following within 2 weeks from the date of hearing :

- Instances/Case laws showing Controlling Block of shares sold in other matters through buyback method without complying with SEBI Buy Back Regulations as in the present matter.
- All the correspondence with SEBI, Mumbai and SEBI, SRO, Chennai from 2003 till the time of filing of complaint by Ms. Jyoti H. Mehta.
    - Promoters/management personnel of the noticee in the years 2003 and 2014.
    - Number and percentage of shares bought under the buyback method by Promoters /Promoter companies/ Management.

9. Noticees in their additional submissions dated 03.04.2014 submitted as follows:

- Upon an inquiry made with the office of the Custodian appointed under the Trial of Offences relating to Transactions in Securities Act, 1992, noticee respectfully submitted that there are no other instances where a company bought back a controlling block of shares pursuant to the scheme for disposal of shares dated 17.08.2000 and as modified by the Hon'ble Supreme Court of India vide its order dated 23.08.2001.

- Noticee submitted its correspondence with SEBI, Mumbai and SEBI, SRO, Chennai till the time of filing of complaint by Ms. Jyoti H. Mehta.
- Noticee also submitted Promoters/management personnel of the noticee in the years 2003 and 2014.
- The break up of shares bought by the Promoter companies in 2003 is as follows:
  i. Constructive Finance Pvt. Ltd. : 8,98,850 shares of ₹ 10 each (2.47%)
  ii. Sunrays Properties & Investment Co. Pvt. Ltd. : 9,00,000 shares of ₹ 10 each (2.48%)

CONSIDERATION OF EVIDENCE AND FINDINGS

10. I have taken into consideration the facts and circumstances of the case and the material made available on record.

Jurisdiction of SEBI

11. Before proceeding on the merits of the case it is pertinent to decide the preliminary issue raised by the noticee regarding SEBI's jurisdiction in the current matter. It has been submitted by the noticee that since the subject shares having been sold in terms of and in exercise of powers under the Special Court Act and in terms of the approval given by the Hon'ble Special Court, the jurisdiction of any other court / tribunal / authority (save and except the Hon'ble Supreme Court of India) is barred in terms of Section 9A and Section 13 of the Special Court Act.

12. The issue can be examined from two perspectives.

The First Perspective

13. The Hon'ble Special Court vide its order dated 17.08.2000 approved the scheme propounded by the Custodian for sale of Controlling Block of shares. The said Order of the Special Court was challenged by both the notified parties and the noticee. By Order dated 23.08.2001, the Hon'ble Supreme Court of India while

approving the basic structure of the scheme and the directions given by the Hon'ble Special Court for disposal of shares, disposed of the appeal with the following modifications and directions in so far the sale of controlling block of shares was concerned:

> *"..If the Court thinks that it is best to adopt the norms laid down by it for sale of controlling block of shares (the 3rd method) then when highest offer is received and the Management of the Company is given an option to buy those shares at that price, then if the Management so desires the Court should give the Company an opportunity to buy back the shares at the highest price offered by complying with the provisions of Section 77A of the Companies Act. In other words, on the receipt of the offer for sale of the controlling block, the Court will give an opportunity, if it chooses to consider the offer, to the Management to buy or to the Company to buy back under Section 77A of the Companies Act. No other change in the Scheme as formulated by the Special Court is called for..."*

14. From the above order it can be seen that provisions of Section 77A of the Companies Act, 1956 had to be complied with which inter alia provides that buy back of shares listed on any recognised stock exchange has to be in accordance with the regulations made by SEBI in this behalf. Thus, if the provisions of SEBI Buy Back Regulations have to be complied with then SEBI automatically assumes jurisdiction in the matter to oversee the implementation of its regulation.

The Second Perspective

15. Reference can be made to the Hon'ble Supreme Court of India's decision in the matter of *Sahara India Real Estate Corporation Ltd. & Others* Vs. *SEBI* decided on 31.08.2012 wherein the Hon'ble Court has dealt with the powers and functions of SEBI and has observed as follows:

> *".. SEBI Act is a special law, a complete code in itself containing elaborate provisions to protect interests of the investors. Section 32 of the Act says that the provisions of that Act shall be in addition to and not in derogation of the provisions of any other law...*

... The Securities and Exchange Board of India (SEBI) was established in 1988 by way of a Government resolution to promote orderly and healthy growth of the securities market and for investors' protection. On account of tremendous growth of the capital market characterized particularly by increasing participation of the public, to sustain confidence in the capital market it was considered essential to ensure investors' protection. Accordingly, it was decided to vest SEBI with statutory powers, so as to enable it to deal effectively with all matters relating to the capital market..

..The first step would be to venture an understanding of section 11 of the SEBI Act, so as to grasp the effect and reach thereof. Sub-section (1) of section 11 of the SEBI Act casts an obligation on the SEBI, to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market, "by such measures as it thinks fit". It is, therefore, apparent that the measures to be adopted by the SEBI in carrying out its obligations are couched in open-ended terms, having no pre-arranged limits. In other words the extent of the nature and the manner of measures which can be adopted by the SEBI for giving effect to the functions assigned to the SEBI, have been left to the discretion and wisdom of the SEBI..

..From a collective perusal of sections 11, 11A, 11B and 11C of the SEBI Act, the conclusions drawn by the SAT, that on the subject of regulating the securities market and protecting interest of investors in securities, the SEBI Act is a stand alone enactment, and the SEBI's powers thereunder are not fettered by any other law including the Companies Act, is fully justified.."

16. Further, the Hon'ble Securities Appellate Tribunal in the matter of *Parsoli Corporation Ltd. and others* Vs. *Securities and Exchange Board of India*, decided on 12.08.2011 had observed as follows:

"..SEBI being a statutory body established under Section 3 of the SEBI Act and Section 11 thereof enjoins a duty on it to protect the interests of investors in securities and to promote the development of and to regulate the securities market. Parliament in its wisdom has left it to SEBI to take such measures as it thinks necessary to carry out these duties. The powers of SEBI in this regard are, indeed, very wide and it can do anything and take any action / step in order to perform its functions / duties. Howsoever wide the powers be, every action of SEBI has to be judged on the twin tests of investor protection and development

and regulation of the securities market. In other words, SEBI may be free to do anything but whatever it does has to be for the protection of the interests of investors or for the development and regulation of the securities market. It has the freedom to play only within these parameters.."

17. Further, SEBI Act is also a special Act dealing with specific subject, which has to be read in harmony with the provisions of the Special Court Act. The contention advanced on behalf of the noticee will have to be examined in a manner, that the objectives and purpose of both the Acts, is not lost. Therefore, as the concerned matter apart from concerning the interests of the company which is a listed company also involves the interests of shareholders of ATL and to protect their interests SEBI will have jurisdiction in the matter.

Applicability of SEBI Buy Back Regulations

18. The next issue in the matter is that whether the provisions of SEBI Buy Back Regulations were complied with. As discussed earlier, the Hon'ble Supreme Court of India vide its order dated 23.08.2001 had modified the order of the Hon'ble Special Court regarding the sale of controlling block of shares and had directed that provisions of Section 77A of the Companies Act, 1956 had to be complied with. Section 77A (2)(f) of the Companies Act, 1956 states that no company whose shares are listed on any recognised stock exchange shall purchase its own shares unless the buy back is in accordance with SEBI Buy Back Regulations. Thus, provisions of SEBI Buy Back Regulations have to necessarily be complied with in the present matter as per the order of Hon'ble Supreme Court.

19. Noticee's contention that SEBI Buy Back Regulations cannot apply to the said buy-back of shares since the purchase of shares by the noticee was from one person (i.e. the Custodian), through a negotiated deal i.e. the price for buy back was negotiated by and before the Hon'ble Special Court, does not hold good. If the buyback was so unique as contended by the noticee, then it would have been appropriate for the noticee to get a clarification from the Hon'ble Supreme Court

of India itself regarding the extent of applicability of Section 77A of the Companies Act, 1956.

20. Further, Regulation 3 of the SEBI Buy Back Regulations provides for the applicability of the Regulations and states that the said Regulation is applicable to buy back of equity shares of a company listed on a stock exchange. Regulation 4 of SEBI Buy Back Regulations which deals with method of buy back of shares has to be read harmoniously with Regulation 26 of SEBI Buy Back Regulations which gives the Board the power to remove difficulties in the interpretation or application of the provisions of the SEBI Buy Back Regulations. In other words, if any purported unique scenario like in the present matter as contended by the noticee, the noticee could have very well approached the concerned regulator i.e. SEBI under Regulation 26 of SEBI Buy Back Regulations regarding the applicability of SEBI Buy Back Regulations in the instant matter.

21. Noticee's other contention that the Hon'ble Supreme Court of India vide its subsequent Order dated 08.11.2011 did not disturb or interfered with the noticee's buy back in any manner despite the objections and contentions of the said notified parties, including the same allegations which were purported to be raised in the “complaint” to SEBI is also not sound. It is observed from para 23 of the Hon'ble Supreme Court's Order dated 08.11.2011 that the Hon'ble Supreme Court has observed as follows *"..We also feel that the Special Court overlooked the norms laid down by it in its order dated 17th August 2000; ignored the afore-extracted directions by this Court contained in order dated 23rd August 2001 and glossed over the procedural irregularities committed by the Custodian.."* Further at paras 30 and 31, the Hon'ble Supreme Court observed as follows *"..However, since we have come to the conclusion that the Special Court has exercised its discretion in complete disregard to its own scheme and `terms and conditions' approved by it for sale of shares and above all that the impugned order was passed in violation of the principles of natural justice, we think that the facts in hand call for our interference, to correct the wrong committed by the Special*

Court. For the view we have taken above, we deem it unnecessary to deal with the other contentions urged on behalf of the parties on the merits of the impugned order.."

22. Thus, from the above it can be seen that directions given by the Hon'ble Supreme Court vide its order dated 23.08.2001 was ignored by the noticee while implementing the buy back of shares and the Hon'ble Supreme Court did not deal with the last contention of the notified parties which stated that the buy back effected by the noticee was in complete violation of Section 77A of the Companies Act, 1956 as well as SEBI Buy Back Regulations. The Hon'ble Supreme Court at para 31 of the said order dated 08.11.2011 observed that: *".. For the view we have taken above, we deem it unnecessary to deal with the other contentions urged on behalf of the parties on the merits of the impugned order.."*

23. The Hon'ble Supreme Court at paras 32 and 33 of the said order dated 08.11.2011 observed that *".. This brings us to the question of relief. In view of our finding that the decision of the Special Court is vitiated on the afore-stated grounds, it must follow as a necessary consequence that in the normal course, the impugned order must be struck down in its entirety. However, bearing in mind the fact that the sale of 54,88,850 shares was approved and all procedural modalities are stated to have been carried out in the year 2003, we are inclined to agree with Mr. Vellapally and Dr. Singhvi that at this stage, when 36.90 lakh shares of Apollo are claimed to have been extinguished, the relief sought for by the appellants to rescind the entire sale of 54,88,850 shares will be impracticable and fraught with grave difficulties. In our opinion, therefore, the relief in this appeal should be confined to 4.95% of the shares, subject matter of interim order, dated 29th May, 2003, extracted above. In the result, we allow the appeal partly; set aside the impugned order to the extent indicated above and remit the case to the Special Court for taking necessary steps to recover the said 4.95% shares from Apollo or its management, as the case may be, and put*

them to fresh sale strictly in terms of the aforenoted norms as approved by this Court vide order dated 23rd August, 2001.."

24. From the above it can be seen that when it came to the question of relief and not the submission of the notified entities, the Hon'ble Supreme Court observed that it is not practical to grant the relief as sought by the notified entities in view of the extinguishment of shares. The Hon'ble Supreme Court also made the observation on the submission of the noticee that all the procedural formalities were stated to have been carried out before the extinguishment of shares. However, in the current proceedings based on the available records it has been established that the noticee had failed to comply with SEBI Buy Back Regulations.

25. Based on the aforesaid discussions and findings, it can be concluded that the noticee has failed to comply with SEBI Buy Back Regulations as directed by Hon'ble Supreme Court vide its order dated 23.08.2001.

26. The said violation attracts penalty under Section15HB of the SEBI Act. The text of Section 15HB is as follows:

SEBI Act, 1992
Penalty for contravention where no separate penalty has been provided.

15HB. Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees.

Board Resolution

27. The next issue in the matter is that the noticee failed to submit the Board resolution dated 24.04.2003 authorising the buy back with SEBI as per Regulation 5A of the SEBI Buy Back Regulations. Noticee's submission that subject shares was actually approved by the Board of noticee on 09.05.2003 does not hold good as the Board resolution dated 24.04.2003 had already

authorised Directors and Company Officials to buy back the shares. The said resolution was very specific in nature and stated as follows:

"*..RESOLVED THAT* the Company do buy-back shares, when option to purchase is given to the Company, belonging to Harshad Mehta Group, as per details of the bid dated 27th March, 2003 called by the Custodian upto and including 10% of the share capital plus free reserves of the Company at such price as may be negotiated and agreed upon before the Special Court for the purpose of buy back.."

...

RESOLVED FURTHER THAT Shri Onkar S Kanwar, Chairman & Managing Director, Shri Neeraj Kanwar, Chief Operating Officer & Whole Time Director, Shri U.S. Oberoi, Chief (Proj. & Corporate Affairs) & Whole Time Director, Shri P.N. Wahal, Head (Sectt.) & Company Secretary and Shri Harish Bahadur, Head (Accounts & Taxation) be and are hereby severally authorised to take all necessary actions as may be required in respect of the above."

28. Further, a plain reading of the text of Regulation 5A of the SEBI Buy Back Regulations makes it clear that only resolution giving authorisation has to be filed, the details of buy back may or may not necessarily accompany the authorisation. As submitted by the noticee, the Board resolution was filed on 10.05.2003, hence the noticee has failed to comply with Regulation 5A of the SEBI Buy Back Regulations. The text of Regulation 5A is as follows:

SEBI Buy Back Regulation

Board resolution

5A. A company, authorized by a resolution passed by the Board of Directors at its meeting to buy back its shares or other specified securities under first proviso to clause (b) of sub-section (2) of section 77A of the Companies Act, 1956, as inserted by the Companies (Amendment) Act, 2001, shall file a copy of the resolution, with the Board

and the stock exchanges, where the shares or other specified securities of the company are listed, within two working days of the date of the passing of the resolution.

29. The said non compliance attracts penalty under Section 15HB of the SEBI Act. The text of Section 15HB has already been provided earlier.

Public Notice

30. The next allegation against the noticee is that the noticee failed to issue a public notice within the time limit specified under Regulation 19 (7) of the SEBI Buy Back Regulations. Noticee submitted that completion of buy back at the earliest can be deemed to be only on 15.05.2003, being the date of reduction of capital as confirmed by CDSL. It is seen from the available records that the company has submitted Form 4C to the Registrar of Companies on 12.05.2003 stating that shares were extinguished on 09.05.2003 and the public notice was also signed on 09.05.2003 by the noticee's company secretary. Thus, the noticee was aware of the extinguishment of shares and was supposed to make a public advertisement within 2 days of 09.05.2003 but the public notice was issued on 13.05.2003, hence the noticee has failed to comply with Regulation 19 (7) of the SEBI Buy Back Regulations. Further, it is observed that in the said public notice, noticee had failed to disclose the pre and post shareholding pattern, as specified under Regulation 19 (7) (v) of the SEBI Buy Back Regulation. Noticee's submission that the information containing the pre and post buy back shareholding pattern was in fact available in the public domain is not valid as requirement specifically mentioned in Regulation 19 (7) (v) of the SEBI Buy Back Regulations was not met in the public advertisement. Hence the noticee has failed to comply with Regulation 19 (7) (v) of the SEBI Buy Back Regulations. The text of the said Regulation is hereunder:

SEBI Buy Back Regulation

Obligations of the company

19 (7) The company shall within two days of the completion of buy-back issue a public advertisement in a national daily, inter alia, disclosing:

(v) the consequent changes in the capital structure and the shareholding pattern after and before the buy-back.

31. The said non compliance attracts penalty under Section 15HB of the SEBI Act. The text of Section 15HB has already been provided earlier.

32. In this regard, the provisions of Section 15J of the SEBI Act and Rule 5 of the Rules require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely;

a. the amount of disproportionate gain or unfair advantage wherever quantifiable, made as a result of the default
b. the amount of loss caused to an investor or group of investors as a result of the default
c. the repetitive nature of the default

33. It is observed from the records that any gain or unfair advantage accrued to the noticee as a result of noticee's actions has not been quantified. Further, there is no material is made available on record to assess the disproportionate gain or unfair advantage and amount of loss caused to an investor or group of investors as a result of noticee's violation.

34. In view of the abovementioned conclusion and after considering the factors under Section 15J of the SEBI Act, I hereby impose a penalty of ₹ 1,00,00,000/- (Rupees One Crore only) on the noticee under Section 15HB of the Securities and Exchange Board of India Act, 1992 for failure to comply with SEBI Buy Back Regulations, a penalty of ₹ 2,00,000/- (Rupees Two Lakh only) for failure to comply with Regulation 5A of SEBI Buy Back Regulations and ₹ 1,00,000/- (Rupees One Lakh only) for failure to comply with Regulation 19 (7) of SEBI Buy Back Regulations which is appropriate in the facts and circumstances of the case.

ORDER

35. In exercise of the powers conferred under Section 15 I of the Securities and Exchange Board of India Act, 1992, and Rule 5 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, I hereby impose a consolidated penalty of ₹ 1,03,00,000/- (Rupees One Crore Three Lakh only) on Apollo Tyres Ltd. in terms of the provisions of Section 15HB of the Securities and Exchange Board of India Act 1992 for the failure to comply with SEBI (Buy Back of Securities) Regulations, 1998 and failure to comply with Regulations 5A and 19(7) of SEBI (Buy Back of Securities) Regulations, 1998. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the violations committed by the noticee.

36. The penalty shall be paid by way of Demand Draft drawn in favour of "SEBI – Penalties Remittable to Government of India" payable at Mumbai within 45 days of receipt of this order. The said demand draft shall be forwarded to Chief General Manager- CFD, Securities and Exchange Board of India, Plot No. C4-A, 'G' Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

37. In terms of the provisions of Rule 6 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 1995, copies of this order are being sent to Apollo Tyres Ltd. having office at 7 Institutional Area, Sector - 32, Gurgaon - 122001 and also to the Securities and Exchange Board of India, Mumbai.

Place: Mumbai

Date: July 09, 2014

D. RAVI KUMAR
CHIEF GENERAL MANAGER &
ADJUDICATING OFFICER