BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER No.: ORDER/SS/SK/2019-20/7405-7406]

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

In respect of:

1. YES Capital (India) Pvt. Ltd. **2. Morgan Credits Pvt. Ltd.**	**15th Floor, Tower 2, Wing A,** **One Indiabulls Centre, Lower Parel,** **Senapati Bapat Marg,** **Elphinstone Road,** **Mumbai – 400013.**

In the matter of YES Bank Ltd.

1. YES Bank Ltd. ('YBL') is a listed entity having its shares listed on BSE Ltd. ('BSE') and National Stock Exchange of India Ltd. ('NSE'). Securities and Exchange Board of India ("SEBI") observed that :-

   a) YES Capital (India) Pvt. Ltd. (hereinafter referred to as 'YCIPL' or **'**Noticee No. 1'), a promoter entity of YBL, had raised ₹ 630 Crore from Franklin Templeton Mutual Fund through unlisted Zero Coupon Non-Convertible Debentures ('ZCNCD') on September 2017. As a part of said transaction, YCIPL acceded to a condition that it will maintain a cover ratio of 3.3 X ('X' being number of times) till 12 months and 3X thereafter.

   b) Morgan Credits Pvt. Ltd. (hereinafter referred to as 'MCPL' or **'**Noticee No. 2'), another promoter entity of YBL, had also raised ₹ 950 Crore from Reliance Mutual Fund through unlisted ZCNCD on April 2018 and as a part of said transaction, MCPL acceded to a condition that it will always maintain a cap on the borrowing cap at 0.5 X.

   c) As per the share holding pattern of YBL filed with the stock exchanges as on March 31, 2019, YCIPL and MCPL, respectively held 3.27% and 3.03% shares in YBL.

2. Based on the above observations, SEBI examined whether the conditions of maintaining a 'Cover ratio' / 'Borrowing cap' as part of borrowings by the promoters of YBL (i.e. YCIPL and MCPL) can be construed as a form of '*encumbrance*' on shares of YBL.

3. In response to a query by SEBI in this regard, YBL, vide its e-mail dated March 06, 2019, had *inter-alia* stated that it is not privy to aforesaid transactions entered into by its promoter entities i.e. YCIPL and MCPL and it has not received any disclosure from both YCIPL and MCPL about any *encumbrance* on their shareholding in YBL in terms of Regulation 31 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to 'SAST Regulations'). Further, BSE vide email dated February 26, 2019 and NSE vide email dated February 27, 2019 had *inter alia* stated that no disclosures under SAST Regulations have been made to them with respect to the aforesaid transactions. Vide email dated March 05, 2019, YCIPL made submissions to SEBI with respect to the transactions undertaken by both the aforesaid promoter entities of YBL. Subsequently, when SEBI sought copies of the relevant agreements, both the promoter entities submitted the relevant Debenture Trust Deeds entered into by them with the Debenture Trustee as under:

   a) Debenture Trust Deed dated September 21, 2018 entered into between YCIPL and its debenture trustee- Milestone Trusteeship Services Private Ltd. ('MTSPL') with regard to the raising of ₹ 630 crore by YCIPL.

   b) With regard to the raising of ₹ 950 cr. crore by MCPL-

      i. Debenture Trust Deed dated May 17, 2018 between MCPL and its debenture trustee-MTSPL.

      ii. Amended Debenture Trust Deed dated November 14, 2018 between MCPL, as the borrowing company and MTSPL, as the debenture trustee and Mr. Rana Kapoor, as the guarantor.

4. On a perusal of the aforesaid Debenture Trust Deeds, submissions of the YBL and YCIPL and extant legal framework, SEBI observed the following:

   a) SAST Regulations require a promoter to disclose *encumbrance* of its shares and the term *'encumbrance'* is to be widely interpreted under the SAST Regulations so as to include a *pledge*, *lien* or *any such transaction*, by whatever name called. Further, through the FAQs, it has also been clarified by SEBI that non-disposal undertakings are also included in such disclosure. It is of significance that it is an inclusive explanation and not an exhaustive one. Thus, any transaction that has the characteristics of an *encumbrance*, by whatever name called, is to be treated as '*encumbrance'* and should be disclosed under regulation 31 of the SAST Regulations.

b) YCIPL is obligated to maintain a cover ratio of 3.3X (cover of equity shares of YBL over borrowing) till 12 months and 3 X thereafter and MCPL is obligated to maintain ratio of 0.5X (borrowing over the value of the shares of YBL) i.e. a borrowing cap of 0.5X. In case of a breach of the cover, they are obligated to cause a transfer to itself of such number of listed shares or purchase such additional listed shares so as to maintain the required cover. If the same is not cured within the specified period, then it would be treated as an event of default.

c) Requiring a company to maintain a certain asset cover essentially restricts the company from disposing of those shares (without triggering a default of the underlying debt). While the agreement does not directly restrict the ability of the company to dispose of the said shares, requiring such an asset cover indirectly has the same effect.

d) YCIPL and MCPL have structured the transaction in such a way that though there is no explicit clause on non-disposal of shares, it indirectly has the same effect. The agreement also restrains the ability of YCIPL and MCPL to freely sell / purchase its shares in YBL.

e) The nature of the transaction being *'encumbrance'* of shares of YBL is also enhanced by certain conditions in the aforesaid Trust Deeds such as:

   i) YCIPL shall not create any *encumbrance* on any its assets including shares of YBL unless it creates a security/ pledge in favour of the debenture trustee.

   ii) In case of any superior borrowing being availed by YCIPL, then it has to create a first ranking exclusive pledge on the share so as to ensure the security cover is higher of:- (a) security cover applicable to the relevant superior borrowing and (b) two times the then outstanding amounts in relation to the NCDs.

   iii) MCPL has to pledge such number of shares so as to maintain redemption cover ratio of 1.75X in case of default/ breach of ratio/ other certain special conditions.

   iv) The aforesaid conditions restrict *encumbrance* of shares of YBL to another party without intimation to the debenture trustee, ROFR, pledge and other conditions as specified in the Trust Deed. The Trust Deeds have clauses on pledging of shares of YBL in case of default on the borrowing by the promoter, breach of the ratio and in certain other cases as well as restricting *encumbrance* of shares of YBL by the promoter to another party without intimation to the debenture trustee. As clarified in the FAQs, non- disposal undertakings include '*not encumbering shares to another party without the prior approval of the party with whom the shares have been encumbered*'.

f) Therefore, in view of the aforesaid facts, it has been observed by SEBI that the aforesaid transactions are in the nature of '*encumbrance'* on the underlying shares of YBL

g) In situations where pledge of YBL's shares would be invoked, its shareholders ought to have been informed about the aforesaid transactions.

5. In view of the above, it is has been alleged that by not making requisite disclosures of the aforesaid encumbrances on shares of YBL to the stock exchanges and YBL, YCIPL and MCPL have violated the provisions of Regulations 31(1) read with 31(3) and Regulation 28(3) of the SAST Regulations. These provisions of the SAST Regulations are reproduced hereunder:

SAST Regulations

Disclosure-related provisions.

28. (3) For the purposes of this Chapter, the term "encumbrance" shall include a pledge, lien or any such transaction, by whatever name called.

Disclosure of encumbered shares.

31. (1) The promoter of every target company shall disclose details of shares in such target company encumbered by him or by persons acting in concert with him in such form as may be specified.

(3) The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within seven working days from the creation or invocation or release of encumbrance, as the case may be to,—

(a) every stock exchange where the shares of the target company are listed; and

(b) the target company at its registered office.

6. Vide a *communication-order* dated May 24, 2019, the competent authority in SEBI appointed the undersigned as Adjudicating Officer under Section 15-I of the SEBI Act and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as 'the SEBI Adjudication Rules') to inquire into and adjudge the alleged violations by both the Noticees under Section 15A (b) of the SEBI Act.

7. Accordingly, a notice to show cause no. EAD-2/SS-SKS/OW/13746/1/2019 and EAD-2/SS-SKS/OW/13748/1/2019 dated May 28, 2019 (hereinafter referred to as 'the SCN') was issued to Noticee No. 1 and Noticee No.2, respectively, calling upon them to show cause as to why an inquiry should not be held against them in terms of rule 4 of the Adjudication Rules and penalty be not imposed under Section 15A (b) of the SEBI Act for the aforesaid alleged violations. The SCN was

duly served upon the Noticee No. 1 and Noticee No.2 (hereinafter collectively referred to as 'the Noticees').

8. In response to the SCN, the Noticees filed a common reply vide letter dated June 21, 2019. After considering the same in terms of Rule 4(3) of the Adjudication Rules, the Noticees were granted an opportunity of personal hearing on August 13, 2019. After seeking short adjournment, the Noticees availed the opportunity of personal hearing on August 20, 2019 when Mr. Kumar Desai, Advocate, appeared on behalf of the Noticees and made oral submissions on the lines of the common written reply dated June 21, 2019. Vide letter dated August 30, 2019, the Noticees submitted their additional written submissions. Subsequently, vide letter dated October 16, 2019 received on record on October 21, 2019, the Noticees submitted additional submissions with regard to material developments pertaining to the issue of NCDs by them. Subsequently, vide e-mail dated November 12, 2019, the Noticees informed that they have filed application for settlement of instant proceedings by way of a settlement order and requested to hold these proceedings till disposal of such application by SEBI.

9. In the meantime, on February 11, 2020, the Noticees informed that Mr. Rana Kapoor who was issued another SCN dated December 06, 2019 had filed a settlement application with SEBI to amicably settle proceedings commenced by the said SCN dated December 06, 2019 and that vide e-mail dated February 04, 2020, they have requested SEBI to tag their settlement applications together with settlement application of Mr. Rana Kapoor. The Noticees further requested to keep the final order in the instant proceedings in abeyance until the disposal of their settlement application by SEBI.

10. On March 17, 2020, Settlement Division of SEBI informed that the application for settlement received from the Noticees was returned back due to expiry of time stipulated under SEBI (Settlement Proceedings) Regulations, 2018. I note that the instant proceedings can now be proceeded with and the SCN issued to the Noticees can be independently disposed of. I, accordingly, deem it fit to continue with and conclude the instant proceedings initiated against the Noticees vide the SCN issued to them.

11. I note that the Noticees have *inter-alia* made the following submissions in their aforesaid replies:

    a) The SCN is vitiated by an inordinate delay in the issuance thereof. The NCDs of YCIPL were issued in September 2017 whereas the NCDs of MCPL were issued in May 2018. The holders of such NCDs being SEBI registered mutual funds, namely Reliance Mutual Fund and Franklin Templeton, subscribed to such NCDs with the knowledge and expectation that the same were

unsecured. Further, it is pertinent to note that CARE, a SEBI registered credit rating agency had duly rated the issue of NCDs of YCIPL and MCPL considering the 'unsecured' nature of the borrowings with 'no encumbrance on shares'. Thus, for SEBI to allege that the aforesaid NCDs were in fact secured as is alleged in the SCN at such delayed stage and mid-tenure will cause grave prejudice to both the Noticees and NCD holders. Therefore, the SCN is vitiated by delay and ought to be quashed and set aside on such ground alone.

b) The Debenture Trust Deeds were entered into by the Noticees with their respective Debenture Trustee whereby parties to the said trust deeds contemplated the nature of the issuance of the NCDs to be unsecured and without any underlying encumbrances. Thus, neither did the Debenture Trust Deed of YCIPL nor the Debenture Trust Deed of MCPL contain any clauses amounting to an encumbrance on the shares of YBL held by either of them. It is pertinent to note that in the SCN itself, such fact is recognised in paragraph 5 (c) and 5 (d),wherein the following has been stated -

"...the agreement does not directly restrict the ability of the company to dispose of the said shares....."

"...there is no explicit clause on non-disposal of shares."

c) SEBI has itself interpreted Regulation 28 (3) of the SAST Regulations which lays down the scope of the term *'encumbrances'* for the purposes of Regulation 31 thereof in the FAQs issued by it. In FAQ 70 of SEBI has provided a guiding principle for the determination of what are the encumbrances required to be disclosed under Regulation 31 of the SAST Regulations. As per SEBI's interpretation, only those encumbrances which entail a risk of the shares held by promoters being appropriated or sold by a third party, directly or indirectly, are required to be disclosed to the stock exchanges in terms of SAST Regulations.

d) In the instant case, the SCN does not even allege that the clauses contained in the Debenture Trust Deeds entails any risk of the shares of YBL held by them being appropriated or sold by a third party directly or indirectly. Thus, the SCN is contrary to the interpretation of the SAST Regulations given by SEBI itself.

e) In light of the fact that the contracting parties contemplated the clauses contained in the aforesaid Debenture Trust Deeds to not amount to an '*encumbrance'* over the shares of the YBL held by them, it is not permissible for SEBI to read into such clauses in any manner and claim that the same have the indirect effect of restricting their ability to dispose of shares of YBL held by them respectively, as such act would amount to reading into the Debenture Trust Deeds

of YCIPL and MCPL something that is not contained therein and further, something that the contracting parties thereto never intended. Thus, SEBI cannot interpret the aforesaid Debenture Trust Deeds in a manner diagonally opposite to the plain reading thereof, as such plain reading reflects the intent and purposes of the parties to the said Debenture Trust Deeds. SEBI cannot, by its own interpretation of the clauses, seek to create new agreements different from the agreement arrived at by the contracting parties who are the best judges of what they had agreed upon.

f) The Noticees placed reliance on the decision of the Hon'ble Supreme Court in *Nabha Power Ltd. v. Punjab State Power Corporation Limited, (2018) l1 SCC 508* wherein it was held that

"49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock test of giving 'business efficacy' to the transaction, as must have been intended at all events by both business parties. The development of law saw the Jive condition test' for an implied condition to be read into the contract including the 'business efficacy' test. It also sought to incorporate 'The Officious Bystander Test' [Shirlaw vs. Southern Foundries (supra)]. This test has been set out in B.P. Refinery (Westernport) Proprietary Limited vs. The President Councillors and Ratepayers of the Shire of Hastings (supra) requiring the requisite conditions to be satisfied: {1} reasonable and equitable; {2} necessary to give business efficacy to the contract,• (3} it goes without saying, i.e., The Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. vs. West Bromwich Building Society (supra) and Attorney General of Belize and Ors. vs. Belize Telecom Ltd. and Anr. (supra). Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regards to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract should not do violence to another part of the contract....

....72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have

not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

g) The phrase "*any such transaction*" is not defined in the Regulation 28 (3) of the SAST Regulations and is a general phrase appearing after two specific terms being *'pledge'* and *'lien'*. Thus, the meaning to be given to such term can only mean any other expression similar to the aforesaid and having the same characteristics as pledge and lien. Though the term *'any such transaction'* being present in Regulation 28 (3) of the SAST Regulations makes the definition of '*encumbrance'* an inclusive definition for the purposes of disclosure under Regulation 31 of the SAST Regulations, it is a settled position of law that when a general phrase follows specific words/phrases, the general phrase has to draw meaning from the terms preceding it. Thus, the interpretation to be given to the phrase *'any such transaction'*, must necessarily be restricted in light of the terms preceding it, being *'pledge'* and *'lien'*.

h) It is submitted that *ejusdem generis* is a principle of construction, meaning thereby when general words in a statutory text are preceded by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of restricted words. This is a principle which arises *"from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context."* It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication. The Hon'ble Supreme Court has defined the said canon in *Maharashtra University of Health Sciences and Ors. v. Satchikitsa Prasarak Mandal and Ors.(2010) 3 SCC 786* as -

"The Latin expression "ejusdem generis" which means "of the same kind or nature" is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context." It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication."

Thus, the phrase 'any such transaction' appearing after the words 'lien' and 'pledge' ought to be interpreted using the said canon of construction and thus, would mean any encumbrance similar to or having the same characteristics as lien or pledge.

i) The words *'lien'* and *'pledge'* are contained in Sections 170, 171and 172 of the Indian Contract Act, 1872 ("Indian Contract Act") and are a part of chapter IX, under the heading of *'Bailment'*. *'Bailment'* is defined in Section 148 of the Indian Contract Act as-

"148. 'Bailment', 'bailor' and 'bailee' defined.-A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'."

j) Further, the Indian Contracts Act defines *'pledge'* in section 172 as "*the bailment of goods as security for payment of a debt or performance of a promise*". For a valid *pledge*, there must be-

(a) a contract in relation to certain identified goods whereby this object is to be delivered to the pledgee as security,

(b) actual delivery of possession of the identified goods in pursuance of the contract.

k) The primary purpose of a *'pledge'* is to put the goods pledged in the power of the pawnee to reimburse himself for the money advanced, when on becoming due it remains unpaid, by selling the goods after serving the pawner with a due notice. The pawnee at no time becomes the owner of the goods pledged. He has only a right to retain the goods until his claim for the money advanced thereon has been satisfied, with a power to sell the goods pledged, after due notice in case of default by the pawner. It is only a special property in the goods pledged, which is acquired by the pawnee leaving the general property intact with the pawner.

l) The word *'lien'* originally means "*right to retain*". However, *'lien'* is now variously described and used under different contexts such as '*contractual lien*', *'equitable lien'*, *'specific lien'*, *'general lien'*, *'partners lien'*, etc. Courts have often considered the general definition of the term *'lien'* as contained in Halsbury's Laws of England which states that, "*In its primary or legal sense "lien" means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims are satisfied....A legal lien differs from a mortgage and a pledge in being an unassignable personal right which subsists only so long as possession of the goods subsists...".* Generally, in the case of a *'lien'*, there is no transfer of interest or power of sale or disposition of the goods, but the person exercising the lien has the right to retain the subject matter of the lien until repayment is made.

m) In the case of a *'pledge'* and a *'lien'*, - (a) The title to the goods remains with the original owner of the goods. (b) The power of the original owner to sell or dispose the goods is restricted; (c) Possession of the goods in question are not with the original owner of the goods but are held

/ retained by the opposite party (in the depository system, instead of the shares being transferred to the account of the opposite party, the same is marked as pledged/hypothecated as per provisions of the Depositories Act, 1996). However, the power to sell the goods pledged to recover dues is transferred to the opposite party in the case of a *'pledge'* while, in the case of a *'lien'*, the power to sell or dispose the goods is not transferred to the opposite party.

n) Thus, by applying the rule of "*ejusdem generis*", these common factors that are intrinsic to the concepts of *'pledge'* and *'lien'* must be considered while determining what transactions fall under the ambit of the phrase *'any such transactions'* appearing in Regulation 28 (3) of the SAST Regulations and in turn fall within the ambit of the term 'encumbrance' for the purposes of Regulation 31of the SAST Regulations. In the instant case, since none of the clauses/obligations in the Debenture Trust Deeds of YCIPL and MCPL entail any of the common factors intrinsic to the concepts of *'pledge'* and *'lien'*, the said transaction will not amount to an *'encumbrance'* as defined under Regulation 28 (3) of the SAST Regulations, and consequently, there was no obligation to make any disclosures under Regulation 31 thereof.

o) In relation to YCIPL, the obligations/clauses alleged to be in the nature of an '*encumbrance'* in the SCN primarily pertain to the Cover Ratio, and obligations in case of default thereof. The borrowing limits as per the Debenture Trust Deed of YCIPL is defined for the purposes of laying down, in essence, that debt availed by YCIPL ought to be kept under check.

p) In order to avoid over-leveraging, lenders, as per prudent risk management practice customary to transactions of similar nature, generally stipulate caps on the overall borrowing capacity of the borrower at any point of time. Accordingly, the Debenture Trust Deed of YCIPL contains the condition of cover ratio on YCIPL. The reason for introduction of the concept of a 'Cover Ratio' in the Debenture Trust Deed was to ensure financial prudence and that it did not indiscriminately increase its debt to the detriment of the NCD holders.

q) The 'Cover Ratio', is used in clause 22.3 of the YCIPL's Debenture Trust Deed which sets out that until the final redemption date, YCIPL is required to maintain at all times a 'Cover Ratio' of 3.3X for the first 12 months from the allotment date and 3X thereafter till the final settlement of the NCDs. In other words, YCIPL must ensure that the following must not exceed 3.3 times (for 12 months) and 3.3 times (thereafter):

"The ratio of the market value of listed shares of the Company held by Yes Capital to the total Issue Amount adjusted for partial redemption plus accrued redemption premium any other external debt less Promoter Sub Debt less Designated Amount".

r) In case the Cover Ratio is breached, then as per the said clause, Yes Capital shall within 14 working days therefrom undertake either of the following:

(i) transfer / buy such additional shares of YBL such that the Cover Ratio is restored or
(ii) raise funds by way of equity or promoter sub debt and deposit the proceeds in the designated account or buy additional shares of YBL such that the Cover Ratio is restored; or
(iii) redeem such number of NCDs such that the Cover Ratio is maintained.

s) The Cover Ratio under the Debenture Trust Deed of YCIPL is not linked to any percentage holding of shares YBL, but to the market value of the shares of YBL held by YCIPL. Thus, there is no restriction on any transfer /disposal of the shares in question and it cannot be said that requiring an asset cover indirectly has the effect of restricting the ability of YCIPL to dispose of shares of YBL held by it. Further, in case of any breach of the Cover Ratio, YCIPL may redeem NCDs to restore such ratio as well.

t) Similarly, in relation to MCPL, the obligations/clauses alleged to be in the nature of an encumbrance in the SCN primarily pertain to a borrowing cap of 0.5X, and obligations in case of default thereof. The borrowing limits as per the Debenture Trust Deed of MCPL is defined for the purposes of laying down, in essence, that debt availed by MCPL ought to be kept under check.

u) In order to avoid over-leveraging, lenders, as per prudent risk management practice customary to transactions of similar nature, generally stipulate caps on the overall borrowing capacity of the borrower at any point of time. Accordingly, the Debenture Trust Deed of MCPL contains the condition of borrowing cap on MCPL. The reason for introduction of the concept of a 'Borrowing Cap' in the Debenture Trust Deed was to ensure financial prudence and that it did not indiscriminately increase its debt to the detriment of the NCD holders.

v) The 'borrowing cap of 0.5X, is used in clause 22.5 of the Debenture Trust Deed of MCPL which sets out that until the final redemption date, MCPL is required to maintain at all times an 'Outstanding Ratio' below or equal to the borrowing cap, i.e. 0.5X. In other words, MCPL must ensure that the following must not exceed 50% of the market value of the shares of YBL held by it:

"The total Issue Amount plus any other external debt less Promoter Sub Debt less Cash & Cash Equivalent plus accrued Redemption Premium divided by the Market Value of the shares of the Company held by Morgan Credits."

w) The Borrowing Cap under the Debenture Trust Deed of MCPL is not linked to any percentage holding of shares of YBL but to the market value of the shares of YBL held by MCPL. Thus, there is no restriction on any transfer /disposal of the shares in question and it cannot be said that requiring an asset cover indirectly has the effect of restricting the ability of MCPL to dispose of shares of YBL held by it. Further, it is pertinent to note that under clause 24.3 of Debenture Trust Deed of MCPL itself, MCPL has been given an option to sell the shares of YBL held by it with or without consent of the debenture holders. Such factum clearly displays that the mere existence of the Borrowing Cap does not in any way indirectly have the effect of restricting any sale of shares by MCPL.

x) In case the outstanding ratio exceeds 50% of the market value of the shares of YBL held by MCPL, then as per the said clause, MCPL shall within 14 working days from the day the outstanding ratio goes above the Borrowing Cap undertake either of the following:

(i) transfer / buy such additional shares of YBL such that the outstanding ratio is restored below the Borrowing Cap; or
(ii) raise funds by way of equity or promoter sub debt and use the proceeds to create Cash & Cash Equivalents or buy additional shares of YBL such that outstanding ratio is brought below the Borrowing Cap; or
(iii) redeem such number of NCDs such that the Borrowing Cap is maintained.

y) In light of the above, it is clear that-

(i) The shares of YBL held by YCIPL and MCPL, respectively, will continue to be held by them.
(ii) There is no restriction on YCIPL or MCPL's right to sell / dispose the shares of YBL held by them.
(iii) The possession of YBL's shares held by YCIPL and MCPL have not been transferred to any third party in any manner;
(iv) YCIPL and MCPL's right to sell the YBL's shares have not been transferred to any third party in any manner;
(v) No third party has been granted a right to the proceeds of sale of YBL's shares held by YCIPL and MCPL.

z) In light thereof, it is denied that YCIPL and MCPL structured the transaction in such a way that though there is no explicit clause on non-disposal of shares, it indirectly has the same effect. Further, it is denied that the Debenture Trust Deed of YCIPL and MCPL restrains their ability to freely sell/purchase the shares of YBL. Apart from making a bald allegation, no particulars or clauses have been enumerated in the SCN to such effect. Further, the factors laid down hereinabove for the purpose of determination of *'any such transaction'* using the rule of *ejusdem generis* is not satiated by such clauses as well, bringing the same outside the purview of the term *'encumbrance'* requiring disclosure under Regulation 31 of the SAST Regulations.

aa) YCIPL is enabled under its Debenture Trust Deed to encumber its assets, including shares of YBL held by it to raise further debt. However, for the purposes of the same, YCIPL is required to create a first ranking exclusive pledge of shares of YBL in favour of the Debenture Trustee, in order to create a security cover with regards to the NCDs. As per the definition clause of the Yes Capital Debenture Trust Deed, the 'Security Cover' is defined as the ratio between the value of the shares of YBL so pledged with the Debenture Trustee to the value outstanding for the NCDs. As per clause 23.3 of the Debenture Trust Deed, YCIPL has to ensure that the Security Cover is the higher of the security cover applicable to the further debt being raised and two times the outstanding amounts in relation to the NCDs. It is a protective measure, upon YCIPL seeking to raise further debt, in order to secure the amount outstanding to the NCD holders at the relevant point of time when such debt is sought to be raised. Upon such event happening, as per clause 23.3.3, relevant disclosures are required to be made under the SAST Regulations and the Securities and Exchange Board of India (Listing obligations and Disclosure Requirements) Regulations, 2015 ("Listing Regulations").

bb) It is submitted that such obligation does not give the character of encumbrance of the shares to the transaction. Further, it is pertinent to note that in case YCIPL chooses to raise further debt, it may encumber shares of YBL held by it for such purposes without seeking prior permission from the Debenture Trustee or the NCD holders. The only condition mandated by the Debenture Trust Deed is that certain other shares of YBL will also have to be pledged in favour of the Debenture Trustee as elucidated upon hereinabove. However, such pledge and Security Cover is also linked to the market value of the shares of YBL and not to any percentage threshold.

cc) In relation to YCIPL, that in case such debt is being raised, a Right of First Refusal is available to the NCD holders to subscribe to such debt. However, the existence of the same in the Debenture Trust Deed by no means 'enhances' that transaction amounted to an encumbrance

of YBL's shares held by it as alleged in the SCN. In relation to MCPL, the fact that it is required to pledge shares to maintain a redemption cover ratio of 1.75X in case of default/breach of ratio/other special conditions does not in any manner 'enhance' the transaction being an encumbrance.

dd) The Required Redemption Cover Ratio is the ratio of the market value of the shares of YBL held by MCPL to the Outstanding Amounts less Cash and Cash Equivalent. The Required Redemption Cover, means such number of shares of YBL to be pledged in favour of the Debenture Trustee so as to maintain the Required Redemption Cover Ratio of 1.75X. It is submitted that such cover is required to be maintained only under certain circumstances wherein MCPL fails to perform its obligations under the Debenture Trust Deed within specified timelines as a safety measure (apart from others) for the benefit of the debenture holders. For example, in terms of clause 6.1.3 of the MCPL's Debenture Trust Deed, in case it fails to perform its obligations contained in clause 6.1.2. thereof, being the obligation to deposit redemption amounts in the designated account 30 days prior to the final redemption date for the purpose of its NCDs, it has to create a pledge on such number of shares such that the Redemption Cover is maintained. The existence of such requirement in no way indicates that the transactions entered into are in the nature of encumbrance.

ee) In case of creation of such pledge, due disclosures as per the SAST Regulations is obligated to be made in terms of the MCPL's Debenture Trust Deed. For example, clause 6.13. states that in the event such pledge is created, MCPL and/or the Guarantor shall and shall cause the Company i.e. YBL to make all necessary disclosures in relation to such pledge in accordance with the SAST Regulations and the Listing Regulations as may be applicable. Further, the said clause also sets out that the Debenture Trustee shall also make all disclosures required to be made by it under the SAST Regulations and the Listing Regulations.

ff) SEBI has further interpreted the meaning of the term *'encumbrance'* in its FAQs and stated that Non-Disposal Undertakings involving listed shares are *'encumbrances'* requiring disclosure thereof under Regulation 31 of the SAST Regulations. SEBI, in FAQ 72 has stated-

"72. Whether furnishing of a Non Disposal Undertaking {NDU) by promoters to the lenders would be covered under disclosures of "Encumbered shares" by promoters of the Target Company?

Yes, all types of NDUs by promoters will be covered under the scope of disclosures of "Encumbrances" under the Regulations. These NDUs may, inter-alia, include undertaking for:

(i) not encumbering shares to another party without the prior approval of the party with whom the shares have been encumbered;
(ii} non-disposal of shares beyond a certain threshold so as to retain control;
(iii) Non-disposal of shares entailing risk of appropriation or invocation by the party with whom the shares have been encumbered or for its benefit."

gg) The clauses on the basis of which the allegations have been levelled on the Noticees (or any other clauses in the Debenture Trust Deed) do not envisage any of the aforesaid undertakings. Further, the SCN itself quotes FAQ 72 and states that non-disposal undertakings include 'not encumbering shares to another party without the prior approval of the party with whom the shares have been encumbered', but fails to explain how the said undertaking is present in the Debenture Trust Deed of MCPL. The SCN merely states that clauses in the Debenture Trust Deed restricts encumbrance of shares of the Company by MCPL to another party without intimation to the Debenture Trustee. The SCN states that the clauses in the Debenture Trust Deed require an *'intimation'* and not a *'prior approval'* as stated under FAQ 72.

hh) It is pertinent to note that as per Clause 23.2 of its Debenture Trust Deed, YCIPL may encumber any shares in YBL belonging to it for the purposes of availing superior borrowing subject to it, *inter-alia*, intimating the Debenture Trustee of the same. In relation to MCPL, as per Clause 24.3 and 24.4 of its Debenture Trust Deed, in case MCPL proposes to encumber any shares in YBL belonging to it, it has to provide a prior written notice to the Debenture Trustee. As per the said clauses, if objection is received from majority of the NCD holders, MCPL will have the right but not the obligation to redeem all the NCDs. However, MCPL can still proceed to encumber shares of YBL. Thus, no *'prior approval'* is required by YCIPL or MCPL from either the Debenture Trustee or the NCD holders to encumber shares of YBL held by them under their respective Debenture Trust Deeds.

ii) The clauses in the SCN alleged to amount to encumbrance on shares of YBL held by YCIPL and MCPL do not envisage non-disposal of shares beyond any numerical threshold so as to retain control. It is pertinent to note, that in any event, YCIPL and MCPL holds only 3.27% and 3.03%, respectively of the total paid up share capital of YBL. Thus, the question of retaining control does not arise. Further, the Cover Ratio or Borrowing Cap does not entail any restriction on disposal of shares of YBL held by YCIPL and MCPL.

jj) As per the Debenture Trust Deed of YCIPL and MCPL, there exists no clause which requires non-disposal of shares entailing risk of appropriation or invocation by the Debenture Trustee or the NCD Holders. Therefore, the three undertakings enumerated in FAQ 72 are not present in their Debenture Trust Deeds.

kk) Without prejudice to the above, it is pertinent to note that SEBI has in Regulation 28 (3) which set out that the term "*encumbrance*" shall include a pledge, lien or any such transaction, by whatever name called", by means of the FAQs. FAQ 70 set out the following-

"70.Whether promoters are required to disclose details of arrangements which place encumbrances on shares like lock-in stipulations, non-disposal undertaking, right of first refusal etc?

As per Regulation 28 (3) [of the Takeover Regulations] the term "encumbrance" shall include a pledge, lien or any such transaction, by whatever name called. "The promoters have to understand the nature of encumbrance and those encumbrances which entail a risk of the shares held by promoters being appropriated or sold by a third party, directly or indirectly are required to be disclosed to the stock exchanges in terms of the Takeover Regulations, 2011."

ll) Thus, only those encumbrances which entail a risk of the shares held by promoters being appropriated or sold by a third party, directly or indirectly, are required to be disclosed to the stock exchanges under Regulation 31(1) of the SAST Regulations. There is no risk of shares of YBL held by YCIPL and MCPL being appropriated or sold by a third party either directly or indirectly. Thus, even in the event that the clauses in their respective Debenture Trust Deeds are held to amount to encumbrances of shares of YBL held by them, the same is not an 'encumbrance' that ought to have been disclosed under Regulation 31 of the SAST Regulations.

mm) Further, given the FAQ 70 promulgated by SEBI which put forth a guiding principle for the determination of *encumbrances* by promoters that needed to be disclosed under the scheme of the SAST Regulations, there exists confusion in the markets pertaining to the kind of *encumbrances* that need to be disclosed by promoters. SEBI, has, in all its wisdom stated that those *encumbrances* which entail a risk of the shares held by promoters being appropriated or sold by a third party, directly or indirectly, are required to be disclosed to the stock exchanges in terms of the SAST Regulations. Thus, as in the instant case, there was no such threat of appropriation or sale of the shares of YBL held by either YCIPL or MCPL by a third party, the same in no event could be said to be an *encumbrance* that needed disclosure.

nn) The clauses in the Debenture Trust Deed of the Noticees do not amount to *'encumbrance'* as defined in Regulation 28 (3) of the SAST Regulations is further strengthened and justified by the fact that SEBI itself vide a press release bearing reference number- 16/2019 dated June 27, 2019, stated that the SEBI Board in its meeting dated June 27, 2019 has decided that the term

'encumbrance' as defined in the SAST Regulations would henceforth be expanded. The Press Release states that-

"III Disclosure of Encumbrances

The Board has approved the following proposals:

1. The term "encumbrance" as defined in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 shall henceforth include, -
i) any restriction on the free and marketable title to shares, by whatever name called, whether executed directly or indirectly;
ii)pledge, lien, negative lien, non-disposal undertaking;
iii)any covenant, transaction, condition or arrangement in the nature of encumbrance, by whatever name called, whether executed directly or indirectly."

Thus, the Press Release itself states that it has been decided by SEBI that the term *'encumbrance'* in terms of the SAST Regulations would only *'henceforth'* include the categories of actions mentioned therein.

oo) Prior to any amendments of the SAST Regulations are undertaken in terms of the Press Release, none of the actions contained in the Press Release was included in the term *'encumbrance'* in terms of the SAST Regulations. In light thereof, under the applicable law in force at the relevant time, no disclosure was required to be made by the Noticees under Regulation 31 of the SAST Regulations. Further, upon such amendments being made by SEBI to the SAST Regulations, the Noticees after studying the import thereof, will make appropriate disclosures if required at such stage.

pp) Section 12 of the Depositories Act, 1996, provides for the manner of creation and making of pledge and hypothecation of securities in the depository system. Thus, hypothecation, being an encumbrance specifically included by the legislature in the Depositories Act, and being a sub-specie of pledge, may be considered to come under the ambit of 'any such transaction' under Regulation 28(3) of the SAST Regulations by virtue of coming within the ambit of 'any such transaction'. However, the Depositories Act, the principal regulation governing the creation of encumbrances in the depository system does not recognize the creation of an NDU or requires any disclosure in this regard.

qq) SEBI cannot seek to amend an enactment passed by the parliament in its wisdom vide an FAQ which has no binding force, and require disclosure of NDUs which allegedly include the clauses of the kind contained in the Debenture Trust Deeds of the Noticees. In this regard, it is pertinent to note the decision of the Hon'ble Supreme Court in *State of Uttar Pradesh vs. Saraya Industries Ltd & Ors (2006 11 SCC 129)* wherein it was held that-

"The legislative field in regard to levy of excise duty is covered by Entry 51, List II of the Seventh Schedule of the Constitution of India. It may be true that the resoirt to regulatory measures can be taken by the State, but the same must be done in the manner laid down under the Act. A provision which confers powers upon a statutory authority in terms whereof a penalty is to be imposed, damages are to be paid for non payment of excise duty, in our opinion, must be done through a valid subordinate legislation and not by way of issuance of a circular letter."

rr) Pursuant to the filing of the Reply, the parties to the MCPL's Debenture Trust Deed in July 2019, have renegotiated the agreement and in pursuance thereof, shares of YBL have been pledged by MCPL and security has been created in favour of the debenture holders. Thus, the unsecured debt, has now been converted to a secured one. Disclosure of such pledge has been made in accordance with Regulation 31 of the SAST Regulations on July 22, 2019 within the stipulated timeline of two days.

ss) CARE, which upon reviewing all relevant documents, had duly rated the issue of the YCIPL NCDs and MCPL NCDs considering the 'unsecured' nature of the borrowings with "*no encumbrance on shares*", has since revised its ratings for the Morgan Credits NCDs to 'secured'. Such factum makes it obvious that until such date the NCDs were unsecured. In light of these circumstances, it cannot be said that the clauses in the Debenture Trust Deeds amount to an *'encumbrance'* of the shares of YBL held by the Noticees requiring disclosure under Regulation 31 of the SAST Regulations.

tt) Subsequent to the above, YCIPL has repaid the entire sums due under such NCDs to the debenture holders as on October 3, 2019. In light thereof, no further liability exists on YCIPL under the Debenture Trust Deed including any cover ratio requirements. Moreover, YCIPL was holding 7,56,25,000 shares of YBL which is now reduced to 2,04,25,000 shares post divestment on 26 & 27 September, 2019.

uu) In terms of an Amended and Restated Debenture Trust Deed dated November 14, 2018, MCPL no longer holds any shares in YBL pursuant to divestment of its entire holding therein between September 18, 2019 and September 20, 2019. In light thereof, no obligation in the form of any borrowing cap which existed as per the MCPL Debenture Trust Deed currently subsists against it. The shareholding pattern of YBL for the Quarter ended June 30, 2019 and September 30, 2019 is provided evincing the factum of such divestment.

12. It is noted that the settlement applications filed by the Noticees have been rejected and communicated to them and that the Noticees have been given reasonable and sufficient opportunities to defend their case. Accordingly, I am of the view that the matter can now be concluded. I have carefully considered the allegations as levelled against the Noticee, the reply/submissions of the Noticees and the relevant material available on record.

13. The Noticees have raised a technical objection that the SCN is vitiated on account of an inordinate delay in the issuance thereof. In this regard, it is noted that the issuance of ZCNCDs of YCIPL and MCPL in question pertain to September 2017 and May 2018, respectively. It is noted from record that SEBI started its inquiry and examination in March 2019 and the instant adjudication proceedings were approved by competent authority in SEBI on May 22, 2019 and the same was communicated to undersigned on May 24, 2019. The SCN in the matter was issued on May 28, 2019. Thus, there is no delay at all, either in approval of action or commencement of these proceedings by issuance of the SCN, as sought to be contended by the Noticees. In fact, after commencement of instant proceedings and conclusion of hearings the Noticees chose to file additional submission dated August 30, 2019 and October 16, 2019 (received on record on October 21, 2019). They subsequently informed on November 06, 2019 and on February 11, 2020 about filing of settlement applications twice after delay and further prolonged the disposal of the instant proceedings until disposal of their settlement applications. Such repeated attempts of filing settlement applications after conclusion of hearing in these proceedings show dilatory tactics on the part of Noticees themselves. I, therefore, reject these contentions of the Noticees.

14. The Noticees have also contended that the borrowings raised by them by way of issuance of ZCNCDs is of 'unsecured' nature with 'no encumbrance on shares' and hence, disclosure is not required to be made under Regulation 31 of the SAST Regulations. It is pertinent to note that under regulation 31 of the SAST Regulations, the promoter of every target company is obligated to disclose details of shares in such target company encumbered by him or by persons acting in concert with him. The obligation is related to any "*encumbrance*" on shares of the held by such promoters in the target company. If any direct or indirect "*encumbrance*" is created on shares of the promoters the obligation under Regulation 31 is triggered. It is not material whether the instrument in question, that created "*encumbrance*" on promoters' shares, were secure or unsecured. A NCD is an instrument that does not have security on the assets of the issuing company. However, it does not mean that NCD issuance cannot have covenants to protect return of debt with agreed interest. The NCDs can also have covenants providing for cover thereon in the nature of lien or other protection. If the covenants for issuance of NCDs convey that the right of the NCD holders or debenture trustee restrict the rights of promoters on their shares including restriction on the

transfer of shares such covenants would create "*encumbrance*" on the promoters' shares and would consequently trigger their disclosure obligation under Regulation 31 of the SAST Regulations.

15. The Noticees have sought to raise another such contention that in view of provisions of section 12 of the Depositories Act, 1996, only hypothecation, being an '*encumbrance'* specifically included by the legislature in the Depositories Act, and being a sub-specie of pledge, may be considered to come under the ambit of *'any such transaction'* under Regulation 28(3) of the SAST Regulations and that the Depositories Act, the principal regulation governing the creation of *encumbrances* in the depository system does not recognize the creation of an NDU or requires any disclosure. In this regard, I am of the view that the Depositories Act predominantly deals with electronic book entry of the securities held by any person. Section 12 of the Depositories Act enables pledge or hypothecation of securities held in dematerialized form with a depository and provides for entry of pledge or hypothecation on such securities in records of the depository. It further declares that such book entry in records of the depository is evidence of such pledge or hypothecation. This provision *per se* does not limit the nature and kind of *'encumbrance'* on securities to pledge or hypothecation as *sub- specie* of pledge as sought to be contended. In a dynamic market, in relation to fund raising by way debt securities, numerous covenants other than pledge or hypothecation are possible. Such covenants, if they restrict the right of holders of securities, will all operate as '*encumbrance'* on securities though may not be recorded as entry in records of the depositories. Examples of such encumbrances could be NDUs, lien and other covenants as clarified by SEBI from time to time within the inclusive explanatory clause contained in Regulation 28(3) of the SAST Regulations. Such covenants can be evidenced by way of documents such as agreements/ trust deed, etc. I, therefore, do not agree with such contentions of the Noticees. I do not agree with such contentions for another reason that the provisions of section 12 of the Depositories Act are subject to the Regulations made by SEBI and bye laws of the depositories. This apart, in terms of section 28 of the Depositories Act , the provisions of the said Act are in addition to and not in derogation of any other law for the time being in force relation to holding and transfer of securities. SEBI Act and SAST Regulations also deal with matters relating to transfer and holding of securities as incidence of acquisition and sale of securities and matters related to disclosures in that regard. The Depositors Act and Regulations made thereunder are in addition to and supplemental to the provisions of SEBI Act and SAST Regulations and they all aim at investor protection. I am, therefore, of the view that the inclusivity of regulation 28(3) cannot be read down to limit the '*encumbrances'* to pledge or hypothecation listed in section 12 of the Depositories Act as sought to contended by the Noticees.

16. Having dealt with technical objections of the Noticees, I note that, the facts leading to allegations and charges have not been disputed by the Noticees. It is also undisputed fact that the Noticees have not made any disclosures to YBL and the stock exchanges as alleged rather they have contended that the transactions in question were not covered within the scope of expression "a *pledge*, *lien* or *any such transaction*, *by whatever name called"* as explained in regulation 28(3) of the SAST Regulations and hence were not required to be disclosed under the provisions of Regulations 31(1) read with 31(3) of the SAST Regulations. Thus, the next question that need to be determined in this case is whether the condition of maintaining 'Cover Ratio' / 'Borrowing Cap' as part of borrowings by the Noticees in issuance of unlisted ZCNCDs by them can be construed as an '*encumbrance'* on the shares of YBL held by them and the same would attract disclosure obligations of the Noticees in terms of Regulations 31(1) read with 31(3) of the SAST Regulations. In order to deal with the submissions of the Noticees on merits with regard to this issue, I deem it necessary to refer to and examine the scope and ambit of the provisions of the Regulations 31(1) and 31(3) in light of explanatory provision contained in Regulation 28(3) of the SAST Regulations. It is noted that Regulation 31 (1) creates a mandatory obligation on the promoter of every listed company to disclose the details of shares of listed company held and encumbered by him or persons acting in concert with him in the specified form. In terms regulation 31 (3), such disclosure should be made within seven working days from the creation of the encumbrance to every stock exchanges where the shares of the company are listed and also to the company at its registered office. Regulation 28 (3) provides that for the purpose of this obligation, the term "*encumbrance*" shall include "*a pledge, lien or any such transaction, by whatever name called."*

17. According to the Noticees, by applying the rule of "*ejusdem generis*", these common factors that are intrinsic to the concepts of *'pledge'* and *'lien'* must be considered while determining what transactions fall under the ambit of the phrase *'any such transactions'* appearing in Regulation 28 (3) of the SAST Regulations and in turn fall within the ambit of the term *'encumbrance'* for the purposes of Regulation 31 of the SAST Regulations. Hence, the alleged conditions of maintaining 'Cover ratio' / 'Borrowing Cap' as part of borrowings by the Noticees were not required to be disclosed under the provisions of Regulations 31(1) read with 31(3) of the SAST Regulations.

18. It is pertinent to mention that the Latin term '*ejusdem generis*" means 'of the same kind'. This rule is used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. The principle *ejusdem generis* in other words means words of a similar class. However, it is settled position that while interpreting a welfare legislation such as the SAST Regulations have to be interpreted for furtherance of its purpose and not to frustrate it as held by

Hon'ble Supreme Court in *SEBI Vs Ajay Agarwal* vide its judgment and order dated February 25, 2010 as under: -

"41. It is a well -known canon of construction that when Court is called upon to interpret provisions of a social welfare legislation the paramount duty of the Court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it.

19. Further, a beneficial statute has to be construed in its correct perspective so as to fructify the legislative intent and provision in the statute granting incentives for promoting growth and development should be construed liberally, so that real object of such enactment is not frustrated - *Bajaj Tempo Ltd.* v. *CIT AIR 1992 SC 1622.* Therefore, the interpretation of socio-economic legislation such as the SAST Regulations, which are also aimed investor protection, should not be narrow but should be in the perspective favouring the securities market and investors having regard to '*teleological purpose and protective intendment'* of the legislation. In *State of Bombay v. Ali Gulshan [1955 AIR 810, 1955 SCR (2) 867],* the Hon'ble Supreme Court held that the rule must be confined within narrow limits, and general or comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment. Further, in the case of *Lilavati Bai v. Bombay State [957 AIR 521, 1957 SCR 721],* the Hon'ble Supreme Court held that while applying the rule of *ejusdem generis* a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning.

20. It is also settled position that the principle of *ejusdem generis* is not a universal application. If the particular words exhaust the whole genus, the general word following these particular words is construed as embracing a larger genus. If the context of legislation rules out the applicability of this rule, it has no part to play in the interpretation of general words. The basis of the principle of *ejusdem generis* is that if the legislature intended general words to be used in unrestricted sense, it would not have bothered to use particular words at all. Under Regulation 28(3) of SAST Regulations which is any way an inclusive provision to take into its ambit all kinds of restrictions on transferability of shares, the words, "*by whatever name called"* assume much significance when seen in light of inclusivity of the provision. These words are intended to include all encumbrances and restrictions and not to limit the applicability of the obligations only with regard to pledge, lien or other similar transactions. If the intent of regulation was to limit the scope of '*encumbrance*' to pledge, lien and similar transactions only, then the words "*by whatever name called"* would not be necessary in regulation 28(3).

21. In this regard, it is relevant to mention that under the disclosure based regulatory regime, the disclosure obligations particularly those of the promoters of the listed companies have fairly critical and an important component of the legal regime not only limited to the purpose to ensure that the target company is not taken by surprise and that price discovery in the market for shares of the target company takes place in an informed manner but also to ensure best corporate governance in the target company and to enable the stock exchanges and regulators to monitor such transactions of the promoters. In this context it is pertinent to note that the obligation under Rogation 31 of the SAST Regulations have genesis of such obligations of promoters under Takeover Regulations of 1997. While considering review of such obligations under Takeover Regulations of 1997. Justice P.N. Bhagwati Committee in its Report of 2002 recognised that disclosures should be ensured whenever shares were acquired by way of pledge by persons at the point of time when the pledge was created.

22. While applying the disclosure obligations with regard to *encumbrances* so as to achieve the objective of disclosures, it is also important to keep in mind the mischief which regulation 31 read with regulation 28 (3) of the SAST Regulations purport to remedy. The genesis of the obligation to disclose "*encumbrances*" arose in 2009 after the Satyam scandal where promoters' shares were pledged to financial institutional unbeknownst to the remaining shareholders. In its meeting held on January 21, 2009, SEBI Board decided the requirements for *"event based"* as well as *"periodic disclosures"* of unencumbered and encumbered holdings of promoters in addition to disclosure with regard to creation / invocation / release of pledge of shares. Such encumbrance as contemplated for mandatory disclosure under Takeover Regulations, 1997 were not limited to the pledge like transactions only. The Takeover Regulations Advisory Committee of 2010, on whose recommendation the SAST Regulations of 2011 were made by the Board, also recommended to continue these obligations and reemphasized that the promoters should disclose their acquisition as well as encumbrance by whatever name called on periodic as well as transaction specific basis to the Stock Exchange and the target company.

23. Regulation 28 (3) is an inclusive provision to explain the term "*encumbrance*" and encompasses all kinds of encumbrances including pledge or lien, by whatever name called. When seen in the aforesaid objective and purpose of such disclosures, such obligation cannot be interpreted to limit the obligation to pledge or lien or an '*encumbrance'* having only the nature of pledge or lien. The word '*encumbrance'* has not been defined as a term but has been explained under Regulation 28 (3) by way of an inclusive explanation so as to include within its ambit all kinds of encumbrances. The word '*encumbrance'* in its common generic sense means a burden, obstruction, or impediment on property that makes it less marketable / transferrable. It is any right or interest that exists in

someone other than the owner of the property / asset and that restricts or impairs the transfer of the property / asset. It may include an easement, a lien, a pledge, a mortgage, or accrued and unpaid taxes, etc. I am, therefore, not inclined to agree with contentions of the Noticees in this regard.

24. SEBI had also clarified through FAQ (70) that – "…*those encumbrances which entail a risk of the shares held by promoters being appropriated or sold by a third party, directly or indirectly are required to be disclosed to the stock exchanges in terms of the Takeover Regulations, 2011."* As clarified in FAQ (72), Non-Disposal Undertakings involving listed shares are also included in *'encumbrances'* requiring disclosure thereof under Regulation 31 of the SAST Regulations. The FAQ (72) further lays down inclusive undertakings that are to be treated as "*encumbrance*" for the purpose of disclosure under Regulation 31. The said FAQ declares that all types of Non-Disposal Undertakings by promoters will be covered under the scope of disclosures of "*encumbrances*" under the SAST Regulations. These Non-Disposal Undertakings may, *inter-alia*, include undertaking for:

> *(i) not encumbering shares to another party without the prior approval of the party with whom the shares have been encumbered;*
> *(ii) non-disposal of shares beyond a certain threshold so as to retain control;*
> *(iii) Non-disposal of shares entailing risk of appropriation or invocation by the party with whom the shares have been encumbered or for its benefit.*

25. By way of aforesaid FAQs, SEBI has, by way of clarification, clearly spelt out the intent of Regulation 28(3) to cover all types of encumbrances and not limit its scope to pledge or lien or only the transactions of the like nature. Thus, in my view, not only the '*encumbrances'* which entail a risk of the promoters' shares being appropriated or sold by a third party, directly or indirectly but all kinds of undertaking including those which encumbers, obstructs or restricts the right of promoters on the shares held by them should be disclosed to the stock exchanges under Regulation 31(1) of the SAST Regulations. I, therefore, do not agree with submissions of the Noticees in this regard.

26. The Noticees have further contended that the clauses in their Debenture Trust Deed do not amount to *'encumbrance'* as defined in Regulation 28 (3) of the SAST Regulations due to the fact that by a Press Release dated June 27, 2019 it has been declared that the SEBI Board has, in its meeting of the same date, decided that the term *'encumbrance'* as defined in the SAST Regulations would '*henceforth'* be expanded to *inter-alia* cover *"any covenant, transaction, condition or arrangement in the nature of encumbrance, by whatever name called, whether executed directly or indirectly".* Hence, no disclosure was required to be made by the Noticees under Regulation 31 of the SAST Regulations under the applicable law in force at the relevant time prior to this decision of the SEBI Board. In this regard, it is pertinent to mention that SEBI had noticed instances where private limited companies

(controlled by the promoter(s) of a listed company) issue NCDs backed by the promoter(s) either in the form of pledge of securities (including shares) of a group company or through other forms of encumbrances such as covenants, NDUs, etc. which are very complex in nature. SEBI always held that the intention of the SAST Regulations is to cover all types of encumbrances by whatever name called. In this back ground, the Primary Markets Advisory Committee of SEBI in its meeting held on May 16, 2019, recommended that the scope of '*encumbrance'* may be further clarified in the SAST Regulations in order to retain the inclusive nature of the definition of '*encumbrance'*. SEBI, based on the recommendation of Primary Markets Advisory Committee, decided to clarify the scope of *encumbrance* under regulation 28(3) of the SAST Regulations and make it more specific for the purpose of disclosure requirements. Such decision was clearly by way clarification of an existing obligation as can be seen from the agenda note placed before the SEBI Board for taking such decision, as available on SEBI website. In terms of the decision of the SEBIO Board, the clarification was issued by incorporating FAQ (80) on September 03, 2019. Since this FAQ more explicitly spelt out and listed several inclusive transactions the earlier clarifications by way of FAQ 70 and 72 were omitted on September 03, 2019. Hence, the word "*henceforth*" used in in SEBI press release is not binding upon SEBI being surplus to the actual decision of the Board as is evident in agenda note.

27. Thus, it is clear that the disclosure obligations with regard to all restrictions on rights with regard to shares held by promoters existed since inception of obligations in regulatory regime in January 2009 and continued in regulation 31 of the SAST Regulation and aforesaid clarification by FAQ 80 does not mean that such requirement was not applicable prior to such clarification. By this clarification, SEBI has reaffirmed that Regulation 28(3) to cover all types of encumbrances including to cover instances where private limited companies (controlled by the promoter(s) of a listed company) issue NCDs backed by the promoter(s) either in the form of pledge of securities (including shares) of a group company or through other forms of '*encumbrances'* such as covenants, NDUs, etc. The FAQs issued by SEBI from time to time are in the nature of clarification to the provisions of Regulation 28(3) and are not in contradiction thereof. I, therefore, do not agree with contentions of the Noticees in this regard also.

28. It is noted that as per clause 22.3 of the YCIPL's Debenture Trust Deed, YCIPL is obligated to maintain a cover ratio of 3.3X (cover of equity shares of YBL over borrowing) till 12 months and 3 X thereafter. As per clause 22.3.1 of its Debenture Trust Deed, YCIPL is obligated to maintain the cover ratio at all times until final redemption date. As per clause 6.4 of the Debenture Trust Deed, if YCIPL fails to restore the cover ratio within 14 business days, such failure would be treated as an event of default with no further cure period available to YCIPL and all outstanding amounts

in relation to NCDs shall become immediately payable. In case if the cover ratio is breached, clause 22.3.2 *inter alia* provides YCIPL an obligation to cause a transfer to itself of such number of listed shares or purchase such additional listed shares so as to maintain the required cover. The Noticees contended that in case of any breach of the cover ratio, YCIPL may redeem NCDs to restore such ratio as well. From this options provided in clause 22.3.2 of the Debenture Trust Deed of YCIPL, it is noted that exercising such option is subject to consultation and agreement of the NCD holders. Thus, it is clear that such option cannot be exercised at its own free will but only with the approval / consent of the NCD holders. It is further noted that as per clause 22.3.3 of YCIPL's Debenture Trust Deed, upon a fall in the required cover ratio, the Debenture Trustee shall notify the company of a fall in the required cover and shall at all times have the obligation to test the maintenance of the required cover on daily basis irrespective of whether he necessary action was required to be undertaken by the company on the preceding day and the required cover has not been restored yet.

29. In clause 22.4, it is also mentioned that the company shall not avail any *'financial indebtedness'* without the prior consent of the Debenture Trustee acting for and on behalf of all the NCD holders. Further, in terms of Clause 23.1 of YCIPL's Debenture Trust Deed, if it was to avail superior borrowing it had to create security in favour of the Debenture Trustee by way of pledge of its shares of YBL. Otherwise, such borrowing would automatically would result in event of default. Further, under clause 23.2 of YCIPL's Debenture Trust Deed, if superior borrowing is proposed to be availed by it, it shall:

    a) inform the Debenture Trustee of the same atleast 15 days prior to the date on which superior borrowing is sought to be availed.
    b) provide Right of First Refusal ('ROFR') to the NCD holders to lend the amount of proposed superior borrowing. Such ROFR would entail further encumbrance on the shares of YBL held by YCIPL so as to maintain the cover ratio as aforesaid.

30. From clause 23.3.1 of YCIPL's Debenture Trust Deed, it is noted that YCIPL is enabled to encumber its assets including shares of YBL held by it to raise further debt. For the said purpose, YCIPL is required to create a first ranking exclusive pledge of shares of YBL in favour of the Debenture Trustee in order to create a security cover. In case of any superior borrowing being availed by YCIPL, then it has to create a first ranking exclusive pledge on the share so as to ensure the security cover is higher of:- (a) security cover applicable to the relevant superior borrowing and (b) two times the then outstanding amounts in relation to the NCDs.

31. Similarly, as per clause 22.5 of the MCPL's Debenture Trust Deed, MCPL is obligated to maintain ratio of 0.5X (borrowing over the value of the shares of YBL) i.e. a borrowing cap of 0.5X. As per clause 1.1.117, Required Redemption Cover means such number of shares of YBL to be pledged in favour of the Debenture Trustee so as to maintain the Required Redemption Cover Ratio of 1.75X. It is noted that MCPL has to pledge such number of shares in favour of Debenture Trustee so as to maintain redemption cover ratio of 1.75X and failure to create and perfect security within two business days shall result into an event of default and no further cure period available to MCPL and all the outstanding amounts in relation to the debentures shall become immediately payable. As per clause 24.3 of its Debenture Trust Deed, in the event MCPL proposes to sell or dispose or encumber the shares of YBL, it shall provide a written notice to the Debenture Trustee within 30 days prior to such disposal event. Upon receipt of the disposal notice, the Debenture Trustee shall notify the debenture holders. Any consent from the majority debenture holders shall be considered to be given if they convey their written consent within 7 days from the date of receipt of disposal notice from the Debenture Trustee. Upon receipt of such consent, MCPL may go ahead with the proposed disposal event without any further consent. However, it is noted that in the event the majority debenture holders do not give their consent and communicate their objection within 7 days from the date of receipt of disposal notice, it would be deemed as an objection from the majority debenture holders to the disposal event. It is also noted that the decision of the majority debenture holders of non-acceptance of the disposal notice shall be binding on both the MCPL and the Debenture Trustee. These facts establish that 'prior approval' or 'acceptance' is required by MCPL from the majority debenture holders for such disposal event. These facts satisfies the condition as mentioned in FAQ (72) on non- disposal undertakings which include '*not encumbering shares to another party without the prior approval of the party*….' I am, therefore, of the view that the Debenture Trust Deed of MCPL directly restrict the ability of MCPL to dispose the shares of YBL in the absence of acceptance / approval from the majority debenture holders.

32. In my view, the condition to maintain 'cover ratio' or 'borrowing cap' at all times directly or indirectly as stipulated under terms and conditions of respective Debenture Trust Deeds of YCIPL and MCPL restrict their ability to dispose of the shares of YBL held by them , respectively. This restriction in my view is covered within the scope and ambit of "*encumbrance*" under regulation 28(3). In my view, the nature of such transaction being *'encumbrance'* of shares of YBL is enhanced by the aforesaid additional conditions in the respective Debenture Trust Deeds of the Noticees.

33. The Noticees have claimed that the 'cover ratio' or 'borrowing cap' under their respective Debenture Trust Deeds is not linked to any percentage holding of shares of YBL, but to the market

value of the shares of YBL held by them. Admittedly, the 'cover ratio' is always linked to the shares of YBL held by the Noticees whether it is percentage holding or market value. It is pertinent to note that the SCN does not envisage non-disposal of shares beyond any numerical threshold so as to retain control.

34. In view of the findings recorded in the preceding paragraphs, I conclude that transactions carried out by the Noticees by way of raising funds through unlisted ZCNCD with the conditions of maintaining a 'Cover ratio' / 'Borrowing Cap' as part of borrowings is construed as a form of '*encumbrance'* on the underlying shares of YBL held by the Noticees and that by not making requisite disclosures of the said *encumbrances* on shares of YBL held by them to the stock exchanges and YBL, the Noticees have violated the provisions of Regulation 31(1) read with 31(3) and Regulation 28(3) of the SAST Regulations . The breach in the facts and circumstances as found hereinabove, in my view deserves imposition of monetary penalty upon the Noticees under section 15A (b) of the SEBI Act which provides as following:-

SEBI Act

Penalty for failure to furnish information, return, etc.

15A. *If any person, who is required under this Act or any rules or regulations made thereunder,-*

(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees;

35. For the purpose of adjudication of quantum of penalty it is relevant to mention that under section 15I of the SEBI Act imposition of penalty is linked to the subjective satisfaction of the Adjudicating Officer. Further, while adjudging the quantum of penalty the adjudicating officer has discretion and such discretion should be exercised having due regard to the factors specified in section 15J. The factors stipulated in Section 15J of the SEBI Act, which reads as following:-

15J - Factors to be taken into account by the adjudicating officer

While adjudging quantum of penalty under section 15-I, 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 investor/s as a result of the default;

(c) the repetitive nature of the default.

Explanation-

For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E,clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.

36. It is noted that from the material available on record, any quantifiable gain or unfair advantage accrued to the Noticees or the extent of loss suffered by the investors as a result of the default in this case cannot be computed. It is also a settled position that the factors under section 15J are not exhaustive but are inclusive.

37. The provisions of Regulation 31(1) read with 31(3) of the SAST Regulations are meant to ensure timely disclosures of the details of the creation or invocation or release of encumbered shares as such disclosures also enable the stock exchanges and regulators to monitor such material event. Such disclosures also bring about transparency and enable the investors in the scrip to take an informed investment or disinvestment decision. All stakeholders, including minority shareholders should be aware of the detailed reasons for encumbering of shares by the promoters, particularly for situations where promoters are holding a significant stake and have encumbered their shares. Such encumbrances on promoters' shares are prone to deleterious consequences in case of defaults. Any information asymmetry with regard to such transactions as in this case would defeat the purpose of disclosures. Hon'ble SAT in the matter of *Coimbatore Flavors & Fragrances Ltd. vs SEBI (Appeal No. 209 of 2014 order dated August 11, 2014),* has also held that "*Undoubtedly, the purpose of these disclosures is to bring about more transparency in the affairs of the companies. True and timely disclosures by a company or its promoters are very essential from two angles. Firstly; investors can take a more informed decision to invest or not to invest in a particular scrip secondly; the Regulator can properly monitor the transactions in the capital market to effectively regulate the same."* Further in the matter of *Appeal No. 66 of 2003 -Milan Mahendra Securities Pvt. Ltd. vs. SEBI*–the Hon'ble SAT, vide its order dated April 15, 2005 held that, *"the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market."*

38. Further, in these facts and circumstances of this case, the quantum of penalty has to be adjudged also taking into account the conduct of the Noticees as found in this case and the principle of proportionality. The failure as found in this case, had clearly defeated the purposes of the Regulations i.e. investor protection and ensuring market integrity. Considering the role and responsibility of the Noticees in these regards and obligations cast upon them under the SAST

Regulations, in my view, the default is grave and the gravity of this matter cannot be ignored. Therefore, no lenient view should be taken in this matter and the case deserves imposition of monetary penalty proportionate to the default as found in this case.

39. The Noticees have submitted that pursuant to the filing of the reply, the parties to the MCPL's Debenture Trust Deed in July 2019, have renegotiated the agreement and in pursuance thereof, shares of YBL have been pledged by MCPL and security has been created in favour of the debenture holders and the unsecured debt has been converted to a secured one. Accordingly, disclosure of such pledge has been made in accordance with Regulation 31 of the SAST Regulations on July 22, 2019. The Noticees further submitted that YCIPL has repaid the entire sums due under such NCDs to the debenture holders as on October 3, 2019 and thus, no further liability exists on YCIPL under the Debenture Trust Deed including any cover ratio requirements and that MCPL no longer holds any shares in YBL pursuant to divestment of its entire holding therein between September 18, 2019 and September 20, 2019 and hence, no obligation in the form of any borrowing cap which existed as per the MCPL Debenture Trust Deed currently subsists against it. In this regard, it is pertinent to mention that the instant adjudication proceedings initiated for violation of not making requisite disclosures of encumbrance under Regulations 31 of the SAST Regulations at the relevant time. Any post SCN corrective measures taken cannot absolve them of their obligations prevailing at the relevant time. It is pertinent to mention here that the default in question by the Noticees (YCIPL and MCPL) pertain to September 2017 and April / May 2018, respectively.

40. The post compliance, if any, as claimed is after more than a year. Such delayed compliance cannot be an excuse to avoid the statutory obligations and liabilities. In terms of section 15A (b) of the SEBI Act, the minimum penalty is one lakh rupees and which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees. Considering the nature and magnitude of default and its impact as aforesaid, this case is not the one where the prescribed minimum penalty should be imposed. If one were to calculate the penalty of rupees one lakh for each day of default, the case would reach to the maximum penalty of one crore rupees. However, taking into account the *post facto* compliance and other peculiar factors of this case, the case does not deserve imposition of this maximum penalty either.

41. Therefore, having regard to the factors listed in section 15J and the guidelines issued by Hon'ble Supreme Court of India in *SEBI Vs Bhavesh Pabari Civil Appeal No(S).11311 of 2013* vide judgement dated February 28, 2019, and considering the peculiar facts and circumstances of the case, I, in exercise of the powers conferred upon me under section 15I of the SEBI Act read with rule 5 of the Adjudication Rules, hereby impose a monetary penalty of total ₹ 50,00,000/- (Rupees Fifty

Lakh Only) on each of the Noticees separately under section 15A (b) of the SEBI Act for their respective violations. In my view, the said penalties is commensurate with the violations committed by the respective Noticees as found in this case.

42. The respective Noticees shall remit / pay the aforesaid amount of penalty imposed upon them separately within 45 days from April 15, 2020, either of the way of demand draft in favour of "*SEBI - Penalties Remittable to Government of India*", payable at Mumbai, or by following the path at SEBI website www.sebi.gov.in, ENFORCEMENT > Orders > Orders of AO > PAY NOW; OR by using the web link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html. In case of any difficulties in payment of penalties, the Noticees may contact the support at portalhelp@sebi.gov.in.

43. The Demand Draft or details and confirmation of e-payment made in the format as given in table below shall be sent to *"The Division Chief, EFD-DRA-III, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C- 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051"* and also to e-mail id :- tad@sebi.gov.in.

1	Case Name	
2	Name of the 'Payer/Noticee'	
3	Date of Payment	
4	Amount Paid	
5	Transaction No.	
6	Bank Details in which payment is made	
7	Payment is made for - (like penalties along with order details)	

44. In the event of failure to pay the aforesaid amount of penalty by the Noticees within 45 days from April 15, 2020, recovery proceedings may be initiated under section 28A of the SEBI Act, 1992 for realization of the said amount of penalty along with interest thereon, *inter alia,* by attachment and sale of movable and immovable properties of the respective Noticees.

45. In terms of Rule 6 of the Adjudication Rules, copies of this order are sent to the Noticees and also to SEBI.

Date: March 31, 2020
Place: Mumbai

Santosh Shukla
Adjudicating Officer