IN THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 132 of 2004

Date of decision : 1.11.2007

1. Alliance Capital Mutual Fund,
2. Alliance Capital Asset Management (India) Private Limited,
3. Alliance Capital Management L.P. …… Appellants

Versus

Securities and Exchange Board of India …… Respondent

Mr.Janak Dwarkadas Senior Advocate with Mr. Ravi Hegde, Ms. Darshika Kothari and Mr. Ankit Lohia Advocates for the Appellants.
Mr. Kumar Desai Advocate with Ms. Daya Gupta Advocate for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer

Whether the shares acquired by Alliance Capital Mutual Fund (for short the Fund) and the sub-accounts through the foreign institutional investor in different target companies could be clubbed together to determine whether the threshold limit of 5% prescribed by Regulation 7 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter called the Takeover Code) had been breached is the short question that arises for our consideration in this appeal filed under section 15T of the Securities and Exchange Board of India Act, 1992 (for short the Act). If the answer to this question is in the affirmative, then the Fund and the other acquirers were required to disclose their shareholdings to the target companies as and when they exceeded the 5% limit failing which they would be liable to imposition of penalty under section 15A of the Act. The adjudicating officer has found that the acquisitions of the Fund and those of the sub-accounts had to be clubbed and since their joint holding exceeded the 5% limit and the necessary disclosures were not made, he has, by his order dated May 12, 2004, imposed a monetary penalty of Rs.2,86,50,000 on

Appellants 2 and 3 which have been held liable to pay the same jointly and severally. It is this order which is now under challenge. The appellants contend that their acquisitions could not be clubbed and that their acquisitions in question were individually less than 5% and, therefore, the Takeover Code did not get triggered.

2. Alliance Capital Management L.P. USA (for short ACM) is a foreign institutional investor registered as such with the Securities and Exchange Board of India (hereinafter referred to as the Board). It is making investments in India in securities on behalf of its sub-accounts which are also registered with the Board. The sub-accounts are international entities and are institutional investors in the Indian securities market and have made investments in several Indian securities. It has a 100% subsidiary in USA called Alliance Capital Management Corporation, Delaware (USA) (for short ACMD). ACMD in turn has a 100% subsidiary in Mauritius under the name and style of Alliance Capital (Mauritius) (P) Ltd. (for short the Mauritius company). Mauritius company has a 75% subsidiary in India working under the name and style of Alliance Capital Asset Management (India) Pvt. Ltd., Mumbai (for short ACAML). ACMD has established the Fund which is registered with the Board as a mutual fund under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 (for short the MF Regulations). ACAML is the asset management company of the Fund which has been approved by the Board under the MF Regulations. ACAM Trust Company (P) Ltd. Mumbai (for short the trustee company) is the trustee which holds the properties of the Fund in trust for the benefit of the unit holders. The Fund is operating a number of schemes to which the unit holders have subscribed. The Fund through the trustee company is the first appellant before us and ACAML and ACM are Appellants nos. 2 and 3 respectively.

3. Regulation 7(1) of the Takeover Code as it stood at the relevant time provided that any acquirer who acquired shares which taken together with shares, if any, already held by him would entitle him to more than five per cent shares in a company, was required to disclose the aggregate of his shareholding in that company, to the company. That regulation reads as under :

> **"Acquisition of 5 per cent and more shares or voting rights of a company.**
> 7(1). Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent shares or voting rights in a company, in any manner whatsoever, shall disclose the aggregate of his shareholding or voting rights in that company, to the company."

4. Let us now notice the acquisitions of the Fund and those of the different sub-accounts of ACM in different target companies on the dates on which their joint holdings exceeded five per cent of the total share capital of the target company and for the non-disclosure of which the adjudicating officer has imposed the monetary penalty. It is common case of the parties that the holdings of the Fund and those of different sub-accounts on the dates mentioned against each for which penalty has been levied were as under :

Balaji Telefilms Ltd. (Target Company)

		Sub Accounts of ACM				
Date	**Fund**	**ILF***	**NTC***	**Total**	**% Holding**	
5-Aug-01	400000	112260		512260	4.97%	
6-Aug-01	400000	200000		600000	5.82%	Penalty has been levied for non-disclosure
.....	……	……..	…….	……	……..	
15-Aug-01	328000	122000		450000	4.37%	
16-Aug-01	440000	177000		617000	5.99%	Penalty has been levied for non-disclosure
…….	…….	……..	……...	……..	……	
29-Aug-01	290000	127000		417000	4.05%	
30-Aug-01	450000	187000		637000	6.18%	Penalty has been levied for non-disclosure
……..	…….	……	……..	……	……	
25-Sep-01	392960	100000		492960	4.78%	
26-Sept-01	392960	100000	47620	540580	5.25%	Penalty has been levied for non-disclosure

Mastek Ltd. (Target Company)

		Sub Accounts of ACM				
Date	**Fund**	**ILF ***	**ATF ***	**Total**	**% Holding**	
22-July-02	571000	125000	0	696000	4.98%	
23-Jul-02	599774	175000	0	774774	5.55%	Penalty has been levied for non-disclosure
……..	……	……	…….	……..	……	

Hinduja TMT Ltd. (Target Company)

		Sub Accounts of ACM						
Date	**Fund**	**ILF***	**AGI- DRM ***	**ATF***	**NTC***	**Total**	**% Holding**	
29-Apr-02	905541	341334	0	0	435572	1682447	4.73%	
30-Apr-02	1005541	341334	2307	0	435572	1784754	5.02%	Penalty has been levied for non-disclosure
15-May-02	865541	281334	25000	0	353072	1524947	4.29%	
16-May-02	1080541	281334	25000	60000	413072	1859947	5.23%	Penalty has been levied for non-disclosure
……..	……	……..	…….	…….	…….	……..	……	

Digital Globalsoft Ltd. (Target Company)

		Sub Accounts of ACM						
Date	**Fund**	**ILF***	**AGI-DRM ***	**ATF***	**NTC***	**Total**	**% Holding**	
1-Feb-01	939584	200000	0	0	0	1139584	3.48%	
2-Feb-01	1204584	300000	25000	125000	125000	1779584	5.44%	Penalty has been levied for non-disclosure
……..	…….	……	……	…….	……		…….	

United Phosphorous Ltd. (Target Company)

		Sub-Accounts of ACM			
Date	**Fund**	**ILF***	**Total**	**% Holding**	
11-Sep-02	831000	250000	1081000	4.24%	
12-Sep-02	1091736	250000	1341736	5.27%	Penalty has been levied for non-disclosure
……	……...	……	……..	……	
23-Oct-02	908278	350000	1258278	4.94%	
24-Oct-02	1156278	350000	1508278	5.92%	Penalty has been levied for non-disclosure

***** ILF = Indian Liberalization Fund,
NTC = The Northern Trust Company
ATF = Asia Technology Fund
AGI-DRM = ACM Global Investments - Developing Regional Markets Portfolio

There were other acquisitions as well but no penalty has been levied for those acquisitions and, therefore, we are not concerned with them. It is pertinent to mention that there were occasions when the holdings of the Fund and the sub-accounts had individually exceeded the 5% limit and whenever this happened, the necessary disclosures were made. From the aforesaid charts it would be clear that on August 5, 2001, the Fund was holding four lac shares of Balaji Telefilms Limited and Indian Liberalization Fund (ILF) – a sub-account of ACM was holding 112260 shares of the same company. Their total holding was 512260

shares which constituted 4.97% of the total share capital of the target company (Balaji Telefilms Limited). Their holding individually and collectively was less than 5%. It is also clear that on the next day i.e. August 6, 2001 ILF acquired some further shares of this company and its holding had swollen to two lac shares and together with the shares held by the Fund their joint holding came to six lac shares which constituted 5.82% of the total share capital of the target company. It will be seen that on August 6, 2001 the joint holding of the Fund and the sub-account exceeded the threshold limit of five per cent of the total share capital of the target company. Were they required to disclose their holdings to the target company is the question before us. The adjudicating officer in the impugned order has held that the holding of the Fund and ILF and other sub-accounts of ACM, if any, have to be clubbed together for determining whether the limit of five per cent referred to in Regulation 7 of the Takeover Code had been crossed and, since it did, and the Fund had failed to make the necessary disclosure for this acquisition, he has, by the impugned order, imposed the monetary penalty. Similarly, the joint holding of the Fund and the sub-account(s) in the target company had again crossed the threshold limit on August 16, 2001, August 30, 2001 and again on September 26, 2001 and since no disclosures were made when the threshold limit was breached, monetary penalty has been levied on Appellants 2 and 3. Identical is the position in the case of acquisitions by the Fund and the sub-accounts in the four other target companies as referred to in the charts above. In the case of those companies as well the joint holdings of the Fund and the sub-accounts crossed the threshold limit on the dates shown in the chart and since no disclosures were made when the limit had breached, monetary penalty has been levied. The case of the appellants is that the holdings of the Fund could not be clubbed with the sub-accounts in terms of Regulation 2(1)(e)(2) of the Takeover Code as they were not persons acting in concert and since the total holding of the Fund by itself was less than the threshold limit, the Takeover Code did not get triggered and the adjudicating officer was not justified in levying the penalty on account of non-disclosure under Regulation 7 for the days for which the penalty has been levied. From the rival contentions of the parties, the short question that we need to answer

is whether the holdings of the Fund could be clubbed with those of the sub-accounts. The adjudicating officer has clubbed the acquisitions by the Fund and the sub-accounts holding that they were persons acting in concert with each other in terms of Regulations 2(1)(e)(1) and 2(1)(e)(2)(i), (iv) & (v). If they were persons acting in concert, their holdings could be clubbed but not otherwise. We are, therefore, required to decide whether the Fund and the sub-accounts were persons acting in concert. The answer to this question depends upon the interpretation of the provisions of Regulations 2(1)(b) and 2(1)(e) of the Takeover Code which we will now refer to.

5. The word 'acquirer' has been defined in Regulation 2(1)(b) to mean any person who acquires shares in a target company either by himself or with any person acting in concert with him. The term "person acting in concert" is defined in Regulation 2(1)(e) and the same is reproduced hereunder for facility of reference.

> "2.(1) In these regulations, unless the context otherwise requires:-
> (a)…….
> (b) "acquirer means any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer;
> (c)…….
> (d) ……
> (e) "person acting in concert" comprises, -
>
> (1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company,
>
> (2) without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established:
>
> (i) a company, its holding company, or subsidiary or such company or company under the same management either individually or together with each other;
> (ii) a company with any of its directors, or any person entrusted with the management of the funds of the company;
> (iii) directors of companies referred to in sub-clause (i) of clause

(2) and their associates;

(iv) mutual fund with sponsor or trustee or asset management company;

(v) foreign institutional investors with sub-account(s);

(vi) merchant bankers with their client(s) as acquirer;

(vii) portfolio managers with their client(s) as acquirer;

(viii) venture capital funds with sponsors;

(ix) banks with financial advisers, stock brokers of the acquirer, or any company which is a holding company, subsidiary or relative of the acquirer :

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

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

Note : For the purposes of this clause "associate" means,-

(a) any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and

(b) family trusts and Hindu undivided families;"

……...

……

Clause (1) of Regulation 2(1)(e) makes it clear that person acting in concert comprises persons who for a common objective or purpose of substantial acquisitions of shares or voting rights or gaining control over the target company pursuant to an agreement or understanding which may be formal or informal, directly or indirectly co-operate by acquiring the shares in the target company. In other words, persons who co-operate with each other with a common objective of acquiring substantial number of shares in a target company are persons acting in concert with each other. They may be persons wholly unrelated to each other. What is important is that they should have a common objective and that objective should be to acquire a substantial stake or control in the target company. Persons may acquire shares in a company with the object of making an investment to earn profits or they may acquire shares to have a substantial stake or control in that company. If

the object is not to acquire a substantial stake or control, they would not be persons acting in concert with each other. Shri. Kumar Desai learned counsel for the Board strenuously urged before us that the Fund and the sub-accounts had a common understanding and they acquired shares together and are covered by clause 2(1)(e)(1) of the Takeover Code and, therefore, they would be persons acting in concert. He pointed out that one Mr. Samir Arora was the chief investment officer of ACAML and was taking all the investment decisions on behalf of the Fund and also on behalf of the sub-accounts on whose behalf ACM was making investments in India. Let us now examine whether the Fund and the sub-accounts are covered by clause (1) of Regulation 2(1)(e). In our view, even though the Fund and the sub-accounts had a common objective, they are not covered by clause (1) of Regulation 2(1)(e) because their object was not to acquire a substantial stake or control in the target company. They were making investments to earn profits for the unit holders. The object of acquiring substantial stake or control in the target company is the most essential ingredient of clause (1) which, in the instant case, is missing. The adjudicating officer in para 5.13 of the impugned order has recorded a categoric finding that the investments made by the Fund along with the sub-accounts had a common objective of earning profits or extraordinary/super profits for the benefit of the unit holders. While rejecting the contention of the appellant that there was no common objective between the Fund and the sub-accounts, he observed as under :

> "…..
> The contention that there was no common objective/purpose between ACMF and the International entities is not acceptable in view of the findings as given in para 5.6 to 5.10. The manner in which the investment management functions of these entities have been managed and the shares of these 5 mid-cap companies acquired or transacted clearly shows that they had a common objective of earning profit or extra-ordinary/super profits from their investments in Indian securities.
>
> The finding shows that control exercised by Shri Samir Arora as Fund Manager over a large proportion of the floating stock of these mid-cap companies through the combined investments by the Mutual Fund and the FII/sub-accounts, were utilized to control the market liquidity in these scrips with low floating stocks and large promoters holdings. It cannot be lost sight that investment in equity in emerging market to earn profit was a common objective of such schemes of the fund."

A similar finding has also been recorded in para 5.10 of the impugned order. We are in agreement with this finding. A mutual fund is a form of collective investments that pools money from many investors and invests their money in stocks, bonds, short-term money market instruments and/or other securities. In a mutual fund, the fund manager trades the fund's underlying securities, realises capital gains or losses and collects the dividend or interest income which is then passed on to the individual investors. The avowed object of investments made by a mutual fund is to make profit, though it may not because if the investments are made in stocks, they are subject to the same ups and downs and risks as the stock market. In our view, a mutual fund never makes investments with the object of acquiring a substantial stake or control in a target company. On the other hand, it makes investments with the expectation of deriving a profit. In the case in hand, if the common objective was to make profits as found by the adjudicating officer, the Fund and the sub-accounts do not satisfy the essential requirement of clause (1) of Regulation 2(1)(e).

6. The next argument of Shri Kumar Desai learned counsel for the Board was that the Fund and the sub-accounts are persons deemed to be acting in concert under Regulation 2(1)(e)(2) of the Takeover Code as they are all under the same management. He relied upon clauses (i),(iv) and (v) of sub-regulation (2) in support of his contention. We will now examine whether the Fund and the sub-accounts could be deemed to be persons acting in concert with each other under clause (2) of Regulation (2)(1)(e) of the Takeover Code. This sub-regulation starts with the words "without prejudice to the generality of this definition" which definition is given in clause (1). These words mean that the provisions of sub-regulation (2) are "without prejudice" to the provisions of sub-regulation (1) and they do not have the effect of affecting the operation of sub-regulation (1). In other words, the provisions of sub-regulation (2) are in addition to what is said in sub-regulation (1) provided there is nothing inconsistent therewith. Having said this, sub-regulation (2) has put persons in ten different categories and the regulation provides that entities mentioned in the same category will be deemed to be persons acting in concert with each other unless

the contrary is established. The words “in the same category” are important and they make it clear that the deeming provision in sub-regulation (2) would apply only in respect of persons who are referred to in the same category. It follows that the deeming fiction shall not extend to entities across the different categories. To illustrate, a mutual fund referred to in category (iv) will not be deemed to be acting in concert with a foreign institutional investor mentioned in category (v). Similarly, a company referred to in category (i) will not be deemed to be acting in concert with a merchant banker or a venture capital fund referred to in categories (vi) and (viii) respectively. The adjudicating officer has held that the fund and the sub-accounts whose joint holdings exceeded the threshold limit of 5% fall under category (i), (iv) and (v) of sub-regulation (2) and, therefore, they are persons deemed to be acting in concert with each other. Let us test the validity of this finding. When we look at category (i) in sub-regulation (2) we find that it includes a company which would mean any company, its holding company or subsidiary or company under the same management either individually or together with each other. It does not include a mutual fund which being a trust is not a legal entity. In the case before us, the company would mean ACMD which is the sponsor of the Fund. In view of the persons mentioned in category (i) ACMD would be deemed to be acting in concert with ACM which is its holding company. It would also be deemed to be acting in concert with the Mauritius company which is its subsidiary. Again, ACMD would be deemed to be acting in concert with ACAML and also with the trustee company because all the three of them have a common management. In other words, ACM, ACMD, Mauritius company, ACAML and the trustee company will all be deemed to be acting in concert with each other in terms of clause (i) of Regulation 2(1)(e)(2). The question is have any of these companies acquired shares. The answer is in the negative in view of the charts showing the acquisitions by the Fund and the sub-accounts. Since none of these companies all of which figure in category (i) had acquired any shares, clause (i) of Regulation 2(1)(e)(2) is not attracted. Now coming to clause (iv). In this category, the entities mentioned are sponsor or trustee or asset management company and they will be deemed to be acting in concert with each

other. In the instant case, the Fund has acquired shares as mentioned in the charts above but its sponsor ACMD did not acquire any shares. Even the trustee company and ACAML- the asset management company have not acquired any shares. It is, thus, clear that out of the entities mentioned in clause (iv) only the Fund had acquired shares and when we consider its acquisitions, they by themselves are less than 5%. This being the position, clause (iv) did not get triggered. The only other clause relied upon by the adjudicating officer to come to the conclusion that the Fund and the sub-accounts were 'persons acting in concert' is clause (v). The only entities mentioned in this clause are the foreign institutional investor(s) and their sub-accounts. They will be deemed to be acting in concert with each other. A mutual fund is not mentioned in this category and, therefore, acquisitions made by it cannot be clubbed with those of a foreign institutional investor(s) and its sub-accounts. Let us apply this clause to the facts of the present case. The foreign institutional investor is ACM which did not acquire any share in its own name though it made investments on behalf of its sub-accounts. The holdings of the sub-accounts could be clubbed together as they will all be deemed to have acted in concert with each other in view of the deeming provision. When we look at their holdings in the charts referred to in the earlier part of the order, we find that their holdings together are less than 5% on the dates for which penalty has been levied. As already observed, the deeming fiction does not extend to the Fund which is not mentioned in this category and, therefore, it will not be deemed to be acting in concert with ACM and/or its sub-accounts. It necessarily follows that the holdings of the Fund could not be clubbed with those of the sub-accounts under clause (v). The adjudicating officer has overlooked the words "in the same category" appearing in sub-regulation (2) and has clubbed the acquisitions of the Fund and those of the sub-accounts which figure in different categories. In the result, it has to be held that the Fund and the sub-accounts were not acting in concert with each other and the finding recorded by the adjudicating officer cannot be sustained. In view of the observations made above, we have no hesitation in holding that clauses (i), (iv) & (v) of sub-regulation (2) of Regulation 2(i)(e) of the Takeover Code are not attracted to the facts of the present case. In

view of this finding, the answer to the question posed in the opening part of our order has to be in the negative and it is held that the shares acquired by the Fund could not be clubbed with those of the sub-accounts for the purposes of Regulation 7 of the Takeover Code.

7. There is yet another reason why the appellants should succeed. Regulation 18(8) of the MF Regulations provides that the trustees of a mutual fund shall ensure that the asset management company has been managing the mutual fund schemes independently of other activities and has taken adequate steps to ensure that the interests of investors of one scheme are not compromised with those of any other scheme or of other activities of the asset management company. Regulation 24 of these regulations imposes restrictions on the business activities of the asset management company and debars it from carrying on any business other than those specified therein. The compliance officer of ACAML (asset management company) informed the Board by his letter dated March 12, 2001 that the provisions of MF Regulations were being strictly adhered to and in view of the restrictions imposed by the aforesaid provisions neither the Fund nor ACAML were aware of the equity holdings of ACM and its sub-accounts. Consequently, their holdings were not considered by the Fund while computing the 5% limit for complying with the Takeover Code. The Board was requested to clarify whether this was in compliance with the Takeover Code. The assistant general manager of the Board sent a communication dated May 30, 2001 to ACAML informing the latter that its practice of excluding ACM and its sub-accounts for the purpose of ascertaining the 5% limit under the Takeover Code was in order. He informed Appellant no.2 as under:

> "This has reference to your letter dated March 12, 2001 seeking our clarification on the applicability of SEBI Takeover Code. Considering the circumstances mentioned in your letter it is clarified that your practice of excluding FFI/sub-accounts of your parent organization while aggregating the holding across all schemes with holdings of the Trustee Co and AMC for ascertaining the 5% limit under the Takeover Code is in order. However, please note that the Takeover Regulations should be complied with in letter and spirit. "

Since the appellants were informed that their practice of excluding the holdings of the sub-accounts while computing the 5% limit was in accordance with the Takeover Code, they did not include the same and consequently they did not make the disclosures under Regulation 7. Had they been informed then that their practice was not in accordance with the Takeover Code, they would have changed the same and after including the holdings of the sub-accounts would have made the necessary disclosures. Having sent the aforesaid communication, the Board was not justified in initiating the adjudication proceedings which culminated in the passing of the impugned order. In view of our findings recorded in this order, we are of the view that the Board was right in informing the appellants that their practice of excluding the holdings of sub-accounts while computing the 5% limit under Regulation 7 of the Takeover Code was in accordance with that Code.

For the reasons recorded above, the appeal is allowed and the impugned order dated May 12, 2004 set aside with no order as to the costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

1.11.2007
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