THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 64 of 2006

Date of decision : 15.11.2007

1. Phiroze Sethna Private Limited,
2. Jost's Engineering Company Limited,
3. Mr. Burjor Hormusji Reporter,
4. Mrs. Aloo Burjor Reporter. …… Appellants

Versus

Adjudicating Officer,
Securities and Exchange Board of India …… Respondent

Mr. Gaurav Joshi Advocate with Mr. J.J. Bhatt Advocate for the Appellants.
Mr. Cherag Balsara Advocate with Mr. Anant Upadhyay Advocate for the Respondent.

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

Per : Arun Bhargava, Member

Whether the provisions of Regulation 11(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 have been violated on the acquisition of 16000 shares of Kerry Jost Engineering Limited, the target company, by Phiroze Sethna Pvt. Ltd. acting in concert with Jost's Engineering Company Limited, Mr. Burjor H. Reporter and his wife Mrs. Aloo Reporter, making them jointly and severally liable for payment of penalty under section 15-H (ii) of the Securities and Exchange Board of India Act, 1992 is the issue before us in this appeal.

2. Appellant no.1 is Phiroze Sethna Pvt. Ltd. (for short, PSPL), a family owned private company promoted by Mr. Burjor H. Reporter, his wife Mrs. Aloo Reporter and their daughter Mrs. Parviz J. Batliwala. These three promoters are the only shareholders of PSPL which was **incorporated in 1975.**

Appellant no.2-Jost's Engineering Company Limited (for short, Jost) is a public limited-listed company. Mr. Burjor H. Reporter is its chairman and together with other

members of his family hold majority stake in it. Admittedly, Jost is under the management of the Reporter family.

Appellants no.3 and 4 are the aforesaid Mr. Burjor H. Reporter and Mrs. Aloo Reporter.

3. Kerry Jost Engineering Limited (for short, KJEL), the target company, was **incorporated in 1962**. Its paid up capital of Rs.20 lacs comprises of 2 lac fully paid up equity shares of Rs.10 each. KJEL is listed on the Bombay Stock Exchange (for short, BSE) for the last several years. KJEL stopped its business of manufacturing of machine tools, dryers etc. from the year 1999 and incurred losses thereafter. Shares of KJEL were thinly traded. Admittedly, Jost, Mr. B.H. Reporter, Mrs. Aloo Reporter, Mrs. Parviz Batliwala and her two children with the other promoters were holding 1,33,440 shares for the last several years.

Mrs. Batliwala and her two children (for short, Batliwalas) owned 16000 shares of KJEL. They were in need of funds. Mrs. Batliwala approached her parents to buy the shares of KJEL as it was difficult for her to find a buyer for the thinly traded shares of KJEL. Mr. and Mrs. Reporter agreed to purchase the shares of Batliwalas in the name of their family owned company PSPL at a price of Rs.64.25 per share, being the last quoted price on 20.4.1998 on the BSE. Thus, PSPL acquired 16000 shares constituting 8% of the total paid up capital of KJEL on 12.12.2002 from Batliwalas. **Prior to this acquisition of 16000 shares, PSPL did not own any share of KJEL.** After this transaction, the Batliwalas ceased to be the shareholders of KJEL.

4. The charge against the appellants is that the said acquisition of 16000 shares by PSPL was in violation of Regulation 11(1) of the Securities and Exchange Board of India (Substantial Acquisition and Takeover) Regulations, 1997 (for short, the Takeover Regulations) because no public announcement, as mandated was made.

Before we consider the facts and the contentions of both the parties, it is necessary to discuss the relevant provisions of the Takeover Regulations. First we shall examine the

definitions of the terms ‘acquirer’ and ‘persons acting in concert’ given in clauses (b) and (c) of Sub-Regulation (1) of Regulation 2 of the Takeover Regulations :

> “Definitions.
> 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;
> …….
> (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)……..” (emphasis supplied)

5. These definitions have been examined by this Tribunal in the case of Modipon Ltd. vs. SEBI & ors. (2001) 33 SCL 85, 107. The relevant discussion in paragraphs 31 & 33 of the judgment is reproduced hereunder :

> “31. Shri Doctor had stated that since the provisions of regulation 2(1)(e)(2) defining person acting in concert being a deeming provision, must be read in conjunction of regulation 2(1)(e)(i) which states that persons acting in concert comprises of 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 company or control over the target company. A fortiori, persons who are deemed to be acting in concert must together have some intention or interest in the acquisition of shares of target company. A seller of shares of the target company cannot therefore be a person acting or deemed to be acting in concert with

> the acquirer for acquisition of shares. In the present case the appellant's concern is not to acquire the shares but to sell its existing share holding in MRL in pursuance of the public offer. **The legal position stated by Shri Doctor is correct.** It is absurd to hold that the seller of shares also can be considered as a person acting in concert with the acquirers, whose sole aim is to acquire shares.
> 32……..
> 33. It may be noted that the promoter as such need not be an acquirer automatically. Any person, and shareholder including the promoter will become an acquirer or a person acting in concert with the acquirer, only if he falls within the definition of these expressions provided in regulation 2(b) and 2(e). **It is the conduct of the party that decides the identity**. A dormant promoter or a promoter simpliciter who neither acquires nor agrees to acquire shares or voting rights or control over the target company is not an acquirer and his shareholding in the target company cannot be considered as the shareholding of the acquirer warranting exclusion from the public shareholding. Similarly, if the characteristics of a person acting in concert stated in the definition are found missing in the case of a person, it may not be proper to consider him as a person acting in concert with the acquirer." (emphasis supplied)

The Bombay High Court in the case of K.K. Modi vs. SAT (2002) 35 SCL 230, 247 has also clarified as to when a person can be said to be acting as person acting in concert. The relevant observations in the judgment are as under :

> "As the Tribunal has rightly pointed out, there is no hard and fast rule that a promoter must always be deemed to be an acquirer or a person acting in concert with the acquirer. On the facts, it may be held that a promoter shares the common objective or purpose of substantial acquisition of shares with the acquirer. It may well be that he may not share the said common objective or purpose. If he does, he shall be deemed to be a person acting in concert with the acquirer but if he does not, he cannot be deemed to be an acquirer merely because he happens to be a promoter. Regulation 2(1)(e)(2) also makes this clear. The persons named therein are deemed to be persons acting in concert with other persons in the same category, unless the contrary is established. It, therefore, follows that even though there is a presumption that the persons described therein may be deemed to be persons acting in concert with the acquirer, the presumption is rebuttable, and therefore, in each case, the facts have to be examined **to reach a conclusion as to whether a person is or is not acting in concert with the acquirer** for the purpose of substantial acquisition of shares or voting rights or gaining control over the target company. He may do so by an express agreement or understanding, and the agreement or understanding may be proved by evidence on record. Similarly, he may co-operate with the acquirer directly or indirectly. **What is important is that it must be shown that he is acting in concert with the acquirer**. A company may have several promoters, but only one of them may

> decide to increase his shareholding in the company by substantial acquisition of shares or voting rights in the company. The mere fact that one of the promoters of the company wishes to do so, is no reason to hold that the other promoters also necessarily share his objective or purpose. The other promoters may, in fact, be opposed to the acquirer acquiring further shares in the target company, and if they fail to prevent the acquirer from doing so, they may be inclined to dispose of the shares held by them. In such a situation, it cannot be said that the other promoters share the common objective or purpose of the acquirer. " (emphasis supplied)

6. We have examined the provisions defining the terms 'acquirer' and 'persons acting in concert' and the law on the subject. An 'acquirer' is a person who, directly or indirectly, acquires or agrees to acquire **shares** or **voting rights** or **control** of the target company by himself or with any person acting in concert. The term 'acquirer' covers not only completed acquisition but also agreement to acquire. Persons acting in concert are those who co-operate in different ways with the acquirer so that he achieves his objective of acquiring **shares** or **voting rights** or **control** of the target company. The facts of each case determine whether a person is or is not acting in concert with the acquirer. Their actions are the determining factor. It must be shown that they are acting in concert with the acquirer.

7. The appellants have been jointly and severally penalized for the violation of Regulation 11(1) of the Takeover Regulations under section 15-H (ii) of the Securities and Exchange Board of India Act, 1992 (for short, the Act). Regulation 11(1) reads as under :

> **"Consolidation of shares -**
> 11.(1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than 75 per cent of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5 per cent of the voting rights, in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.
> (2)……..……..."

The provisions of Regulation 11(1) have been considered and explained by the Hon'ble Supreme Court in the case of Swedish Match AB vs. SEBI (2004) 54 SCL 549. The

relevant discussion on the facts and the law is given in paragraphs 53, 54 and 55 of the judgment which read as under :

> "53. Swedish Match Singapore agreed to acquire majority shareholding in Haravon and Seed subsequent to 17th December, 1997 wherefor the public offer was made. SMS comprising of Haravon and Seed had 28.28 per cent and 10.33 per cent whereas Jatia Group comprising of AVP and Plash had 5 per cent and 15 per cent respectively whereas public / others had 41.39 per cent shares. In concert with each other the two Groups acquired shares from public. On or about 25th August, 1999 by acquiring preferential shares the Swedish Match Group obtained 52.11 per cent and Jatia Group obtained 24.11 per cent as a result whereof in Wimco the shares held by public/others came down to 23.78 per cent. Both Swedish Group and Jatia Group were exercising the joint control. By reason of Jatia Group obtaining out of the joint control by transfer of shares in favour of Swedish Match Singapore, a subsidiary of Swedish Match AB (a part of Swedish Match Group) obtained 74 per cent of shares whereas shares i.e. Haravon – 46.18 per cent, Seed – 5.93 per cent and SMS – 21.89 per cent. Thus, the extent of shares of Jatia Group came down to 2.22 per cent. Jatia Group sold their shares to public as a result whereof shares of public became 23.78 per cent. S.M.S. is a subsidiary of the Singapore Match Group. The Swedish Match is the holding company being the owner of the 100 per cent shares of SMS. **It stands categorically admitted by the Appellants herein that acquisition of shares from Jatia Group in favour of SMS was done by the Swedish company as a group and not as an individual company.** Factually, therefore, it is not correct to contend although in its notice dated 28-1-2002. SEBI had given indication thereof, that SMS had acquired 21.89 per cent shares of its own. Even if SMS had done so, Regulation 10 would apply as no public announcement was made therefor.
>
> SMS was a part of the Swedish Match Group and they acquired 21.89 per cent shares from Jatia Group. On or about 25th August, 1999, indisputably, Swedish Group and Jatia Group acted in concert with each other. By reason of acquisition made in September, 2000, **Swedish Group,** as acquirer, together with Jatia Group, had acquired more than 15 per cent but less than 75 per cent of shares. Any of those acquirers whether Swedish Match Group or Jatia Group, therefore was prohibited from acquiring by itself any additional share entitling it to exercise more than 5 per cent of the voting rights. Regulation 11 does not brook any other interpretation. If additional shares are acquired entitling an acquirer to exercise more than 5 per cent of the voting rights, the statutory embargo to the effect that the acquirer (in this case Swedish Match Group) must make a public announcement to acquire shares in accordance with the Regulation comes into operation.
>
> **54. The words "additional shares" are not terms of art. It speaks of acquisition of shares in addition to what it had got.** Such acquisition of additional shares may be either from public or from a person with whom at one point of time the acquirer had acted in

> concert. If such a meaning is not assigned, the disjunctive clauses contained in the expressions "either by himself or through or with person acting in concert with him", may not carry a true and effective meaning.
>
> 55. The pre-conditions attracting Regulation 11 are : **(i) that an acquirer had acquired shares in concert with another,** (ii) such acquisition was more than 15 per cent but less than 50 per cent of the shares or voting rights in a company; **(iii) in the event, the acquirer intends to acquire such additional shares** or voting rights which would allow him to exercise more than 5 per cent of the voting rights within a period of 12 months, public announcement is required to be made therefor; **(iv) such acquisition of additional shares contemplates three different situations, i.e., the acquisition may be by acquirer himself or through or with the person acting in concert with the person whom they had acquired shares earlier in concert with each other."** (emphasis supplied)

8. It is clear from a perusal of Regulation 11(1) and the above judgment of the Supreme Court in the case of Swedish Match that for this clause to be triggered :

(a) the acquirer should have made acquisition of shares or voting rights in the target company during earlier financial years to the extent of more than 15% but less than 75%;

(b) the acquisition of additional shares or voting rights that triggers Regulation 11(1) during the relevant financial year should provide the acquirer more than 5% of voting rights;

(c) the same acquirer should be involved, in the acquisitions of both the initial shares as well as additional shares; and

(d) such acquisitions should be either by the acquirer himself or with the persons acting in concert with him.

It is important that the identity of the acquirer and the persons acting in concert with him is clear to all. There should not be any ambiguity about the identity of such persons as they carry certain duties and obligations. In the case before the Supreme Court there was a categorical admission by the Swedish Match Group that the acquisition of shares was done as a group and, therefore, the entire Swedish Match group was an 'acquirer' for the acquisition of shares of the target company.

9. In the instant case, the Securities and Exchange Board of India (for short, the Board) found that after the acquisition of 8% shares of KJEL by PSPL from the Batliwalas, its collective shareholding with the persons acting in concert increased from 1,17,440 shares representing 58.72% to 1,33,440 shares representing 66.72% of the equity capital of KJEL and triggered Regulation 11 (1) of the Takeover Regulations. The Board appointed an adjudicating officer on 8.3.2005 under Rule 3 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995. The adjudicating officer on 18.5.2005 issued a notice, reproduced herein below for a better appreciation of the facts of the case.

"Securities and Exchange Board of India
Registered Post AD
A & E/GBR/40992/2005
May 18, 2005

M/s. Phiroze Sethna Private Limited,
1st Floor, Royal Insurance Building,
14, Jamshedji Tata Road,
Mumbai – 400 020

Sub : Notice under Rule 4 of SEBI (Procedure for holding inquiry and imposing penalties by Adjudicating Officer) Rules, 1995.

The undersigned has been appointed as the Adjudicating Officer, vide order dated March 8, 2005, to inquire into and adjudge under Section 15H(ii) of the SEBI Act, 1992, **your alleged** violation of Regulation 11(1) read with 14(1) of the SEBI (Substantial Acquisition of shares and Takeovers) Regulations,1997 (for brevity's sake hereinafter referred to as Takeover Regulations), in the matter of the acquisition of 16,000 shares representing 8% of the paid up capital of Kerry Jost Engineering Ltd. (hereinafter for brevity's sake referred to as KJEL) **by you** on December 12, 2002.

From the facts on record, it appears that you along with the **persons acting in concert** had acquired 16,000 shares, representing 8% of the paid up capital of KJEL on December 12, 2002 whereafter, **your collective shareholding** went up from 117440 shares representing 58.72% to 133440 shares representing 66.72% of the equity capital of KJEL i.e. thereby an increase of 8% of the equity capital of KJEL which is more than the creeping acquiring limit of 5% as prescribed under Regulation 11(1) of the Takeover Regulations.

Consequently, the aforesaid acquisition which is violative of the provisions

of Regulation 11(1) read with Regulation 14(1) of the Takeover Regulations, makes **you liable** under Section 15H(ii) of SEBI Act, 1992.

In view of the above, you are advised to show cause as to why an inquiry should not be held against you in terms of Rule 4 of SEBI (Procedure for holding inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 and why penalty should not be imposed on you under Sections 15H(ii) of the SEBI Act, 1992.

Your reply, if any, should reach the undersigned to the address mentioned below within 14 days from the date of receipt of this notice alongwith the copies of the documents, if any, that you may wish to rely upon in support of your contentions. You may also indicate therein whether you desire a personal hearing, failing which it shall be presumed that you have no submissions to make in which case, the matter shall be preceded on the basis of the material available on record.

SEBI,
4th Floor, Exchange Plaza, NSE Bldg.,
Bandra Kurla Complex, Bandra (E)
Mumbai – 400 051.

G. Babita Rayudu
Adjudicating Officer

Copy to : M/s. Jost Engineering Company Ltd.
Mr. Burjor Hormusji Reporter
Mrs. Aloo Burjor Reporter
Mrs. Roshan Noshir Cooper
Mr. Damodar Desai
Mr. Govind Desai
Mr. Gurunath Desai
Ms. Shaila Govind Desai
Mr. Govind Guru Desai
Mr. Jamshed N. Guzder
Ms. Shirin J. Guzder
Mr. Cyrus J. Guzder
Mr. Farokh J. Guzder
Mr. Jahangir J. Guzder
Mr. B. Medappa.
Ms. Kami B. Medappa”

10. A copy of the above show cause notice was sent to all the sixteen persons including appellants nos.2 to 4. The names of the persons acting in concert have not been mentioned in this notice. It is not clear from the notice as to whether the adjudicating officer treated all these sixteen persons, as persons acting in concert with PSPL. However, it is observed that their collective shareholdings in KJEL as on 12.12.2002 was 1,17,440 shares. With the

said 16000 shares acquired by PSPL, on that day, the total shareholdings of the noticee-PSPL and the said sixteen persons aggregate 133440 shares. These collective shareholdings have been referred to in the show cause notice to invoke the provisions of Regulation 11(1). It may be stated here itself that only Jost, Mr. Reporter and Mrs. Reporter (appellants nos. 2 to 4) have been treated as persons acting in concert with PSPL in the impugned order. Further, there is no discussion in the impugned order for not treating the remaining thirteen persons as persons acting in concert with PSPL.

11. We now examine the defence of the appellants against the show cause notice. In its reply to the show cause notice and in the subsequent proceedings before the adjudicating officer, PSPL claimed that the provisions of Regulation 11(1) were not attracted in its case because it did not hold any share of KJEL prior to 12.12.2002 and therefore, the purchase of 16000 shares from Batliwalas was not an acquisition of 'additional shares' as contemplated by the Regulation. It was the first and the only purchase by PSPL of KJEL shares. It was stated that the Batliwalas were in need of money and, therefore, sold the shares to the family company-PSPL, keeping the shareholdings of the promoters at the same level of 1,33,440 shares. It was argued that there was no consolidation of their holdings which alone could trigger the provisions of Regulation 11(1) in this case. The simple objective of PSPL for purchasing 16000 shares was to provide funds to Batliwalas and that these shares were not acquired in concert with any other person. Consequently, the requisite element of the common objective or purpose of acquisition of shares by the persons acting in concert in terms of Regulation 2(1)((e)(1) is missing in this case.

12. The adjudicating officer did not agree with the arguments of the appellants. She rejected their claim and levied a penalty of Rs.84,54,595 under section 15-H(ii) of the Act by her order dated 20.7.2005. The appellants filed an appeal against the penalty order before this Tribunal. During the course of the hearing, the Board desired to withdraw the penalty order dated 20.7.2005 and to proceed afresh with the show cause notice. The appeal was disposed of as infructuous by this Tribunal with liberty to the adjudicating

officer to proceed afresh in accordance with law. The appellants were heard again by the same adjudicating officer. She passed the impugned order on 17.3.2006, again levying a penalty of the same amount on the appellants. The adjudicating officer has, in the impugned order, dealt with several issues raised by the appellants before her. The relevant discussion on the issue of her considering PSPL as acquirer and other appellants as persons acting in concert is available in paragraphs 35, 36 and 43 of the impugned order. They are reproduced hereunder as these findings are relevant for our consideration :

> "35. It is thus apparent that by virtue of the definition of persons acting in concert, read in the context of the provisions above mentioned, Jost along with Mr and Mrs Reporter are deemed to be acting in concert and **shall be deemed to be acting in concert with** PSPL, in respect of the acquisition of the said 16,000 shares of KJEL, unless the contrary is established by them.
>
> 36. The appellants have however urged that the commonality of objective and community of interest that are the basic requirements of a person to act in concert with PSPL were missing in their case. The appellants have further contended that the promoters and person acting in concert are not one and the same and that they cannot form part of persons acting in concert, as they are being clearly identified as forming part of the promoter's category.
>
> 36. **Granted that it was PSPL undoubtedly, which singly acquired 8% shares of KJEL.** However in the light of the facts placed before me, which reveals that Jost, Mr. B H Reporter, Mrs. Aloo Reporter and PSPL were part of the same promoter group and their total holding in the share capital of KJEL was 64.58%, while on their own, they held a majority stake in Jost, it is clear that these entities had more than a commonality of purpose or objective i.e. of acquiring the shares of KJEL and hence acted in concert at that particular juncture.
> …….
> …….
> 43. The expression 'person acting in concert' defined in Regulation 2(1)(e) of the Takeover Regulations has been reproduced earlier as also the definition of the term "acquirer" under Regulation 2(1)(b) of the said Regulations. It is **established that PSPL is the acquirer of 8% of the share capital of KJEL. Considering that the intent and action of the person decides as to whether that particular person is acting in concert with the acquirer,** as also the relationship amongst these parties, it **can be safely concluded** that Jost, Mr. B H Reporter and his wife; Mrs. Aloo Reporter i.e. the entities forming part of the same group, acted in concert with PSPL with a common objective of acquiring the shares of KJEL. That is to say, PSPL directly and Jost, Mr. B H Reporter, his wife; Mrs. Aloo Reporter indirectly, acquired the shares of KJEL with a common objective."

13. To summarise, the adjudicating officer has treated PSPL as ‘acquirer’ because it acquired the said 16000 shares on 12.12.2002. Her decision in treating Jost, Mr.Reporter and Mrs. Reporter (appellants no. 2 to 4) as persons acting in concert with the PSPL (Appellant no.1) is based on the ground that :

(i) they are deemed to be acting in concert with PSPL in view of the provisions of Regulation 2(1)(e)(2) of the Takeover Regulations, unless the contrary is established by them;

(ii) the facts show that ‘these entities had more than a commonality of purpose or objective i.e. acquiring the shares of KJEL and hence acted in concert at that particular juncture’; and

(iii) apart from the intent and action of the persons, relationship among these parties can be considered to safely conclude that appellants no. 2 to 4, persons of the same group, acted in concert with PSPL.

14. We have heard the learned counsel of both the sides. At the outset, it may be observed that even during the hearing of this appeal, there was no unanimity amongst the parties about the identity of the ‘acquirer’ and those acting in concert with him. Mr. Balsara the learned counsel for the Board, relying upon the observations of the Bombay High Court, in para 8, in K.K. Modi’s case (supra) wherein the learned Judges had observed “But, since acquirer includes within its definition persons acting in concert with him, the question arises as to who are the persons acting in concert with him”, argued that all the four appellants were acquirers in this case. We cannot agree with the learned counsel. A perusal of this judgment clearly shows that the learned counsel is reading the above observations out of context to claim that all the four appellants were acquirers for the purposes of Regulation 11(1) in the case before us. The High Court has not laid down as a general proposition of law that an acquirer includes within its definition ‘person acting in concert’ for the purposes of Takeover Regulations. The definitions of the two terms ‘acquirer’ and ‘person acting in concert’ are separately given in the Takeover Regulations.

It is clear that they are different persons and not the same. Unless they are different persons, they cannot act in concert. Further, the High Court itself has treated them separately; its observations in the same judgment, reproduced in para 5 ante, proves the point. Be that as it may, the adjudicating officer has treated PSPL as acquirer of 16000 shares of KJEL in the show cause notice and the impugned order. We also, for the purposes of this appeal, treat it so.

15. We shall now deal with the arguments advanced by the appellants. It was claimed that PSPL had not acquired any share of KJEL prior to its acquisition of 16000 on 12.12.2002 and, therefore, there was no acquisition of additional shares as contemplated by Regulation 11(1). As seen above, the Supreme Court in the case of Swedish Match's case (supra) has laid down the four pre-conditions attracting Regulation 11. The first condition is that "an acquirer **had** acquired shares in concert with another". As PSPL had not acquired any share of KJEL earlier, the very first pre-condition, laid down by the Supreme Court is not satisfied in this case.

The fourth pre-condition as per the judgment of the Supreme Court is that the additional shares should be acquired by the acquirer himself or through or 'with the persons with whom they had acquired shares earlier in concert with each other.' **There is no discussion in the impugned order about the 'earlier' acquisition of shares by the appellants. It cannot be assumed that the earlier acquisitions of KJEL shares by the appellants nos. 2 to 4 were in concert with PSPL.** It is already on record that PSPL had not acquired any share of KJEL prior to 12.12.2002. Facts of this case interestingly show that some of the sixteen persons, who were provided with a copy of the show cause notice and whose collective shareholding with that of PSPL is referred to in the show cause notice, had acquired shares even before the appellant-PSPL was incorporated in 1975. The target company was incorporated in 1962. Its shares were acquired by Mr. Jamshed N. Gazder, Shirn J. Gazder, Cyrus J. Gazder, Farooq J. Gazder and Jahangir J. Gazder in 1971. Therefore, atleast the said Gazders had not acquired any share in KJEL acting in

concert with PSPL. The show cause notice is not correct to this extent. The dates of acquisition of shares by appellants nos. 2 to 4 are not on record. Therefore, it is not known whether they had also acquired shares in KJEL before 1975. Be that as it may, it is clear from record that:

(i) PSPL had not acquired any share of KJEL before 12.12.2002; and

(ii) no evidence is on record to show that the Appellants nos. 2 to 4 or any other person had acted in concert with the acquirer-PSPL when they acquired the shares of KJEL in earlier financial years.

It is, therefore, clear from the above discussion that even the fourth pre-condition attracting Regulation 11(1), as laid down by the Supreme Court in Swedish Match's case (supra), is also not satisfied in this case.

16. The order of the adjudicating officer holding that the appellants violated Regulation 11(1) on the acquisition of 16000 shares of KJEL on 12.12.2002 cannot be sustained as the pre-conditions for attracting Regulation 11, as laid down by the Supreme Court, are not satisfied in this case. The adjudicating officer has erred in this regard. Consequently, the impugned order levying the penalty of Rs.84,54,595 is set aside.

17. For the view that we have taken above, it is not necessary to deal with the other contentions raised by the appellants.

18. In the result, the appeal is allowed and the impugned order set aside with no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

15.11.2007