BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

In the matter of:

Appeal No.13/2002

Kishore Rajaram Chhabria — **Appellant**
Vs.
The Chairman
Securities & Exchange Board of India — **Respondent**

Appeal No. 14/2002

Madanlal Dwarkadas Chhabria — **Appellant**
Vs.
The Chairman
Securities & Exchange Board of India — **Respondent**

Appearance:

Mr. Kapil Sibal
Sr.Advocate
Mr. C.A Sundaram
Sr.Advocate
Mr. S. J. Kalhawala
Advocate
Mr.R.Krishnamurthi
Advocate
Mr. Sanjib Banerjee
Advocate
Mr. A. Deb
Advocate
Mr. Somasekhar Sundaresan — **For Appellants**
Advocate

Mr.Rohit Kapadia,
Sr.Advocate
Mr.Kumar Desai
Advocate
Ms Poonam A Bamba
Jt.Legal Adviser, SEBI`
Mr. Santosh Shukla
Asstt. Legal Adviser,
SEBI — **for Respondent**

19.2.2002 passed by the Respondent (the SEBI) holding that the Appellants had acquired shares in Herbertsons Ltd., (the Target Company) without complying with certain requirements under the listing agreement between the Target Company and the stock exchanges (the Listing Agreement) and certain provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (the 1994 Regulations)/Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations). By the impugned order the Appellant in appeal No.13/2002 (KRC) and the Appellant in appeal No.14/2002 (MDC) and "the persons acted in concert with them" were directed to:-

? Disinvest shares in the Target Company acquired in violation of the Listing Agreement and the 1994 Regulations (i.e. beyond the then existing threshhold limit of 10%) through an offer for sale to public in terms of an offer document, subject to the following:

(a) that for the purpose the Appellants appoint a registered merchant banker

(b) that the offer price shall be at the face value of the shares as on the date of the impugned order or the lowest price at which these shares were acquired, whichever is lower

(c) that the offer for sale shall be for a minimum number of shares so as to reduce the shareholding of KRC and MDC and persons acted in concert with them in the Target Company, to less than 10%

(c) that the offer document for the purpose shall be filed with

The acquisition of shares by the Appellants and persons stated to have acted in concert with them covered by the impugned order can be broadly grouped in relation to the period of acquisition as follows:

(1) acquisition prior to the notification of the 1994 Regulations

(2) acquisition after the notification of the 1994 Regulations and before the notification of the 1997 Regulations

(3) acquisition after the notification of the 1997 Regulations.

The Target Company is a public limited company. The company's core business is the manufacture of alchoholic beverages such as whisky, brandy, vodka etc. Its total paid up capital is Rs.9,52,23,230, comprising 95,22,323 equity shares, each with a face value of Rs.10/-. The shares are listed on National Stock Exchange, Bombay Stock Exchange, Delhi Stock Exchange, Bangalore Stock Exchange and Ahmedabad Stock Exchange. 'Chhabria group' and 'Mallya group' hold substantial quantum of shares in the Target Company.

Brief facts of the acquisition of shares covered in the impugned order are as follows:

(i) On 14.12.1993 six subsidiaries of Galan Finvest Private Ltd., (Galan) purchased 26% shares in the capital of the Target Company from companies stated to be belonging to Shri Vijay Mallya(Shri Mallya). Shri Mallya is stated to be the principal promoter of the Target Company. In addition to the purchase of the said shares, on

Galan subsidiaries in the paid up capital of the Target Company was 25,90,800 shares representing 27.21% of the paid up capital of the Target Company.

(ii) IMFA Hodings Pvt. Ltd., (IMFA) purchased 10,39,341 shares representing 10.91% of the paid up capital of the Target Companay during the period 27.10.1994 to 22.11.1995.

(iii) Mahameru Trading Company Pvt. Ltd., (Mahameru) purchased 4,73,100 shares representing 4.97% of the paid up capital of the Target Companay during the period 14.11.1995 to 28.10.1996.

(iv) Shirish Finance and Investment Pvt. Ltd., (Shirish) purchased 3,64,750 shares representing 3.83% of the paid up capital of the Target Company during the period 27.8.1996 to 13.2.1997.

In addition to the purchases referred to above, three small lots of shares of the Target Company were also purchased -- i.e. 0.56% by IMFA, 1.31% by Beethoven Traders Pvt. Ltd., and 0.27% by Darrel Traders Pvt. Ltd. These purchases were made during the currency of the 1997 Regulations. These three lots of shares purchased are not specifically stated in the show cause notice. As per the impugned order approximately 47.48% of the paid up capital of the Target Company were acquired by the Appellants during the period 1993-1997. The said 47.48% shares consisted of 27.21% acquired prior to the notification of the 1994 Regulations, 19.71% during the currency of the 1994 Regulations and 0.56% during the currency of the 1997 Regulations. Acquisition of 1.31% by Beethoven Traders and 0.27% by Darrel Traders seem to be not included in the total acquisition of shares, worked out by SEBI.

notification of the 1994 Regulations) was subject matter of a suit (Suit No.3910 of 1997- M. Sreenivasulu Reddy V Kishore R. Chhabria) in the Hon'ble Bombay High Court. In the said suit few shareholders of the Target Company (the Plaintiffs) had challenged the substantial acquisition of the Company's shares by certain entities including the Appellants (the Defendants) on the ground of the acquisition being in breach of the 1994 Regulations. Hon'ble Court (Single Judge) exercising its original jurisdiction by a common order in Notice of Motion No.3120 of 1997 and 3932 of 1998 in the suit [(2001) 34 SCL-1] made the notices of motion absolute in part inter alia holding that the Plaintiffs do have a prima facie right to maintain the suit to seek a declaration that the acquisition of the disputed shares is void being in breach of the 1994 Regulations, that the civil court does have jurisidiction to interpret the provisions of the statute and the 1994 Regulations, so as to lay down the correct interpretation and the frontiers of jurisdiction of the statutory authorities concerned. It was, however, held that the exercise of jurisdiction by the court should not be extended to an extent so as to infringe the jurisdiction of SEBI. That, prima facie a suit was maintainable in common law for rectification of the company's membership register. It was also held that the consequential decision on disinvestment, however, will have to be arrived after considering all aspects, including a hearing by SEBI in which case the actual order of disinvestment could be passed by SEBI or SEBI may pass any other order which it is etititled to pass, such as directing a post facto public announcement which will include the disputed shares. Against the said order the defendants filed appeals before the Division Bench of the Hon'ble High Court. The main issue raised for consideration in the said batch of appeals was whether the acquisition of the Target Company's shares by the defendants was not in breach of

Supreme Court and the appeals are stated to be pending. The Hon'ble Bombay High Court in its order had viewed that "…..since SEBI has issued notices for breach of SEBI Regulations of 1994, it may not be proper to us to suggest what orders it may pass. We leave it to the SEBI to pass such orders as it may deem fit and proper, and nothing said in this order should be construed as expressison of our opinion on the question as to whether, the defendants should be permitted to make a post facto public offer or not." SEBI adjudicated the show cause notice and passed the impugned order inter alia directing the Appellants and the persons acted in concert with them to disinvest the shares held by them in the Target Company acquired allegedly in violation of the provisions of the Listing Agreement/the provisions of the 1994 Regulations, at the price specified in the order.

The appeals were agrued at length by the Senior Counsel appearing for the parties. They have also filed written submissions The submissions having a bearing on the issues involved are summarised as follows:

Submissions on behalf of KRC

Shri Kapil Sibal, learned Senior Counsel appearing for KRC briefly stated the factual matrix of the case, and made the submissions as follows:

On 14.12.93 six subsidiary companies of Galan Finvest Pvt. Ltd. (Galan) purchased shares aggregating to 26% in the capital of the Target Company from the companies owned and controlled by Shri Mallya, that in addition, one of the Galan subsidiaries

shares acquired by the Galan subsidiaries were admittedly with funds made available by a company controlled by KRC. On the date of acquisition of these shares i.e. 14.12.1993, KRC and his family members owned 100% share capital of Galan, that MDC or his wife did not hold any share in Galan on 14.12.1993 as alleged by the Respondent. The acquisition of shares by the KRC-controlled Galan subsidiaries was known to the Target Company and its management as the shares were acquired from concerns controlled by Shri Mallya, the promoter of the Target Company. The acquisition of 26% shares was not the subject matter of the High Court proceedings in Suit No.3910 of 1997. The purchase of the said shares aggregating to 26% and the 75,000 FCDs was made prior to the 1994 Regulations coming into effect. Though the debentures were converted into shares after the notification of the 1994 Regulations, the acquisition of the debentures was made prior to the notification of the 1994 Regulations. The debentures were compulsorily convertible. SEBI's charge in respect of the 27.21% shares acquired by the Galan subsidiaries is that such acquisition was in violation of Clauses 40A & 40B of the Listing Agreement. The second lot of shares was acquired by IMFA between 27.10.1994 and 22.11.1995. A total of 10.91% shares in the Target Company was acquired by IMFA and lodged for registration on 7.12.95. On the same day, IMFA sent an intimation both to the Stock Exchange and to SEBI, claiming that in as much as IMFA did not hold any share in the Target Company at the time of lodgment of the 10.91% shares, the provisions of Regulation 10 of the 1994 Regulations were inapplicable. SEBI's challenge to the acquisition of 10.91% shares by IMFA is two-fold. First, that the acquisition of 10.91% shares in the Target Company was per se violative of the provisions of the 1994 Regulations as by such acquisition, the threshold limit under

as MDC is the uncle of KRC, was a director of some of the Galan subsidiaries, and further, inasmuch as MDC can be deemed to have acted in concert with IMFA or its directors in the acquisition of the said 10.91% shares, such acquisition was hit by the provisions of the 1994 Regulations as even the acquisition of a single share would have required a public announcement to be made under the said Regulations. The third lot of acquisition was made by Mahameru of 4.97% of the Target Company's equity shares from the market between 14.11.95 and 10.8.96. Again, the challenge by SEBI to such acquisition is on two grounds. First, that such acquisition could not have been made as the holding of the KRC/MDC combined by then exceeded 38% (and, thereby, well above the threshold limit). Second, that MDC actually funded such acquisition and in so doing, such acquisition was violative of the provisions of the 1994 Regulations as MDC acting in concert with IMFA had already crossed the threshold limit contemplated in the said Regulations. The fourth lot of shares, the acquisitions whereof has been challenged, is a bunch of 3.83% shares purchased by Shirish between 27.8.96 and 14.2.97. According to SEBI, such acquisition was also funded by MDC and such acquisition was violative of the 1994 Regulations for the same reasons as those made in respect of Mahameru. In addition to the four lots above, three other small lots of acquisitions have also been covered by the impugned order though such acquisitions were not the subject matter of the Show Cause Notice issued and on the basis of which the impugned order was passed. These small lots were acquired after the notificiation of the 1997 Regulations – 0.56% Shares acquired by IMFA, 1.31% shares acquired by Beethoven Traders Pvt. Ltd. (Beethoven) and 0.27% by Darrel Traders Pvt. Ltd. (Darrel)

entire paid up capital of Galan, that none of the six Galan subsidiaries which acquired the 27.21% shares was party to the Listing Agreement of which violation is complained of. The Listing Agreement is an agreement entered into by a company whose shares are quoted on a stock exchange with the relevant stock exchange, that the terms of such agreement cannot bind a person who is not a party to the agreement. Inasmuch as the 27.21% shares were acquired from concerns controlled by the promoters of the Target Company, the Target Company had knowledge thereof, that if at all, it was incumbent on the Target Company to discharge its obligations under the Listing Agreement by complying with whatever formalities that were required to be completed in terms of Clauses 40A and 40B pursuant to the said acquisition, that a party not privy to the Listing Agreement may not be visited with any penal consequence of non-compliance of the conditions of the Listing Agreement. For violation of any provision of the Listing Agreement, at the highest, only the provisions of the Securities Contracts (Regulations) Act, 1956 ("SCRA") would be applicable. Assuming that even a non-party to such listing agreement could be penalized, that Section 23(2) of the SCRA prescribes a fine of Rs.1,000/- payable on conviction by a magistrate in terms of the criminal process prescribed under the SCRA, that for the first time on 25.1.95, Section 23(2) prescribed such penalty, that the Listing Agreement itself was referred to in the SCRA for the first time, by an amendment to Section 21 made on 25.1.95. The acquisitions by the Galan subsidiaries made on 14.12.93 are not and cannot be covered by such amendments, which came into force much later i.e. on 25.1.95 Even after the aforesaid amendments, the Listing Agreement has not been made legally binding on any person other than the listed company, that Clauses 40A and 40B would apply to

be actionable only under the SCRA and not under the SEBI Act. The Securities Contract Regulation Rules which has statutory force, having been prescribed under the SCRA does not contain any provisions akin to clause 40A and 40B of the Listing Agreement. Even if SEBI exercised any powers as a delegatee of the Central Government under the SCRA, and even assuming that the alleged violation of the conditions of the Listing Agreement by a non party thereto can be taken cognizance of, the consequences of violation would be as provided under the SCRA. The SCRA does not authorize or empower the dis-investment of shares or any other measure as directed by the impugned order in respect of the said 27.21% shares. Therefore, the order of SEBI in respect of the said 27.21% is without jurisdiction and legal sanction.

With reference to acquisition of 10.91% shares of the Target Company by IMFA, it has been alleged in the Show Cause Notice dated 8.1.1999 that it "appears that Imfa purportedly borrowed funds from MDC to the tune of Rs.4.13 crores which is in turn used by IMFA to acquire 10,39,341 shares in HL (10.91%)…." It was further alleged that the shareholder and director of IMFA, namely Shri Ram Raheja was related to KRC and a Director of some of the companies controlled by KRC. At the time when the acquisition of 10.91% shares was made by IMFA, the principal shareholder of IMFA was Shri Ram Raheja. Shri Ram Raheja is not a relative of either KRC or MDC within the meaning of Section 6 of the Companies Act, 1956. IMFA was not part of the same management as any of the Galan Companies, nor is such an allegation leveled in the Show Cause Notice. IMFA did not have either a holding or a subsidiary company. The only basis for invoking the expression "acting

having acted in concert with the directors of the IMFA. The mere fact that MDC was a director of some of the Galan subsidiaries or even Galan at the time of acquisition of the said shares by IMFA or the fact that as on that date of acquisition, MDC held some shares in Galan, would not make either Galan or KRC to be acting in concert with either IMFA or its directors within the meaning of the Regulation 2(d) of the 1994 Regulations. The definition of "acting in concert" is relevant only for the purpose of acquisition and at the time of acquisition. A post acquisition "acting in concert" for holding shares and lending support to another holder cannot render the acquisition bad, that as a matter of fact, even "acting in concert" is permissible provided the provisions of Regulation 10 are complied with. The deeming provision contained in the inclusive definition of "person acting in concert" may raise a rebuttable presumption that by virtue of the position of one or more person vis-a-vis the acquirer (such person or persons were acting in concert with the acquirer). Even assuming that MDC funded the acquisition of the said 10.91% shares by IMFA , only MDC alone can be said to have acted in concert with IMFA or its directors or vice versa and no more. If persons who are said to have acted in concert with the acquirer do not fall within the inclusive definition of Regulation 2(d), it has to be established that such person acted in concert with the acquirer i.e. acquired shares for a common objective. Mere conjecture and surmise cannot replace the legal requirement of proof. In respect of the acquisition of the 10.91% shares by IMFA, there is no charge in the Show Cause Notice, far less any established ground, that any person other than MDC and the directors of IMFA acted in concert with IMFA in the matter of such acquisition, that KRC is not alleged to have made available any funds to IMFA for acquisition of the said shares,

have held any shares in the Target Company. However to the extend that in acquiring 10.91% shares, IMFA crossed the threshold limit of 10% without complying with the requirement of making a public offer, any consequence of such alleged breach would be equally applicable to the acquisition of 10.91% shares, whether MDC acted in concert or not. The position, however, would have been altered if KRC or Galan could be said to have acted in concert in the said acquisition as such an established charge would have vitiated the acquisition of a single share by IMFA without the public offer having been made, that there is no such charge in the Show Cause Notice, that even though, it is clearly demonstrated from the Show Cause Notice that the case that was made out by SEBI was one of MDC acting in concert with IMFA and or its directors, the impugned order has proceeded on the basis that the entirety of IMFA's acquisition was bad. It was not alleged in the Show Cause Notice dated 8.1.1999 that any part of IMFA's acquisition of 10.91% shares was funded by KRC or Galan. In the impugned order, it has been stated that a sum of Rs.1.31 crore was funded by KRC or the Galan Companies in the acquisition of the said 10.91% shares by IMFA. Firstly, such a factual basis is entirely erroneous as no mention was made in the Show Cause Notice. Secondly, it was submitted by the Learned Counsel who appeared on behalf of the SEBI, that the figure of Rs.1.31 crore appeared in the Division Bench Judgment of the Bombay High Court dated September 28, 2001. The relevant paragraphs of the Bombay High Court Judgment including paragraph 91, 92 thereof referred to by the learned Counsel as the basis of coming to a similar finding in the Impugned Order, merely record submissions made by Counsel appearing on behalf of the Respondent-Plaintiffs and that they are not findings by the Court. In any view of the matter, it was improper on the part of SEBI

it has been insinuated that such holding shows some link between Galan and the IMFA's acquisition of these shares. At the time of Galan's acquisition of the 26% shares and 75,000 debentures, MDC was not a shareholder of Galan. The Show Cause Notice of 8.1.1999 alleged in paragraph 1 thereof that at the time of acquisition of the 27.21% shares by Galan, MDC held 20% of the paid up capital of the Galan, that such erroneous fact was refuted by MDC in his reply to the Show Cause Notice and also by KRC. In the impugned order, it has been recorded that at the time of acquisition of the Target Company's shares by Galan, MDC did not hold any share in Galan. Notwithstanding such factual assertion and without dealing with it in any part of the impugned order, the impugned order proceeded to record that at the time that Galan subsidiaries acquired 27.21% shares, KRC controlled Galan to the extend of 80% (meaning, therefore, that MDC had 20%).

With reference to acquisiton of 4.97% by Mahameru and 3.83% by Shirish Finance it was submitted that:

The Respondent has made a similar charge in respect of such acquisitions as in the case of IMFA viz. that MDC has acted in concert for acquisition of shares in the Target Company having funded such acquisitions by giving loans to the directors or to the concerned companies directly. It was submitted that again, assuming though not admitting, that MDC acted in concert in respect of such acquisition, these acquisitions may be challenged only on the ground that these acquisitions were connected to IMFA's acquisition of 10.91% shares and therefore, could not have been made without a public offer being made, that there is no link alleged, far less

1994 Regulations. As in the case of IMFA, there is no charge by SEBI against either KRC or the Galan subsidiaries of having acted in concert either with Mahameru or Shirish in the matter of acquisition of the said shares. It is however, submitted that the acquisitions of such shares could not have been made the subject matter of either the Show Cause Notice or the impugned order inter alia inasmuch as nothing was done and no action was taken in respect of such acquisitions under the 1994 Regulations, prior to the Repeal of the said Regulations.

Referring to the provisions in the Regulation for creeping acquisitions, it was submitted that upon the 1997 Regulations coming into effect on 20.2.97, in accordance with the provisions thereof, MDC made declarations under Regulations 6(3) and Regulations 8(2) of the 1997 Regulations on 17.4.97. Due declarations were also made by Airedale and IMFA. By such declarations it was evident that Airedale, Beethoven, Darrel and IMFA were part of the same group. At the relevant point of time, the 1997 Regulations permitted creeping acquisitions upto 2% during any continuous period of 12 months in terms of Regulation 11 of the 1997 Regulations. The IMFA creeping acquisition of 0.56% was made between 27.2.97 and 1.8.97. The Beethoven purchase of 1.31% by way of creeping acquisition was made between 10.8.98 and 16.12.98. The Darrel purchase of 0.27% was made on 16.12.98. It is thus evident from the aforesaid dates that during no continuous period of 12 months did the creeping acquisition exceeded the then permissible limit of 2%, that the only requirement for a creeping acquisition to be permissible was the making of a declaration in terms of the 1997 Regulations, that once the declarations were made as aforesaid pursuant to the 1997 Regulations, the creeping acquisition could

affected, although there is no legal or factual basis for making any order in respect of such acquisitions.

With reference to the direction that KRC and MDC disinvest their share holding in the Target Company at "the face value of the shares on the date of this order or the lowest price at which these shares were acquired whichever is lower", it was submitted that such direction betrays non application of mind, apart from otherwise being contrary to the provisions of the Regulations and contrary to the consistent practice and precedent adopted by SEBI, that so far as the Appellants understand, this is the first case where disinvestment of shares has been ordered. A list of various other instances in which post facto offers have been permitted to be made, was produced and referred including a decision dated 6.8.2002 directing to make an open offer for alleged breach in 1999 in the case of acquisition of shares in Bausch and Lamb. It will appear from the such list that even on the date on which the impugned order was passed and subsequent thereto, orders have been passed requiring post facto compliance by making a public offer, that as to how an exception was made in this case and SEBI has not articulated what intelligible differentia has been used. The impugned order does not benefit the small investors which is the avowed purpose of the SEBI Act, 1992 and the Regulations framed thereunder. The impugned order does not benefit the Securities Market in any manner. SEBI has not demonstrated how the Impugned Order is in the interests of the securities market. At the time when the impugned order was passed, the shares of the Target Company were quoted at about Rs.40 per share and if the impugned directions were to be complied with, a block of 38% shares in the Target Company

small investors, it would also considerably reduce the market cap. The Impugned Order also amounts to a penalty of several crores. If 38% of such shares are required to be disinvested, it would result in a loss of several crores. Insofar as the impugned directions inflict pecuniary loss to the Appellant, the said Impugned Order is without jurisdiction. The maximum penalty permissible for breach of the SEBI takeover Regulations is a sum of Rs.5 lakh as provided in section 15H of the SEBI Act, 1992. It was submitted that by way of an order under a subordinate legislation (the takeover Regulations) a punitive measure of greater pecuniary value cannot be imposed.

It was submitted that the jurisdictional pre-condition for making an order under Regulation 44 of the 1997 Regulations was not complied with. The sustainability of an order under Regulation 44 would depend on whether such order is in the interest of the Securities market. In the instant case, the direction is clearly not in the interest of the Securities market, as such direction would really result in the market capitalization of the Target Company being reduced, the value of the shares in the hands of small investors dwindling, and only entrenched management in the Target Company benefiting. Primarily the takeover Regulations are aimed at protecting the rights of the small investors and to ensure that due declarations are made to the target company so that the management is not taken by surprise and, further, to ensure that in the course of substantial acquisition, there is no manipulation or distortion in the Securities market, that the protection to the small investors is ensured by making of the public announcement of offer to buy shares from the remaining shareholders whereby the small investors have a choice to either

directions that could be issued under Regulation 44 and even the penalties that may be imposed would take into consideration the extent of the breach of the Regulations. In the instant case, it is nobody's case that the Target Company or its management were taken by surprise. The 27.21% shares were, in fact, sold by the promoters of the Target Company to the Galan subsidiaries. The 10.91% shares were registered on 30.5.96 despite initial reservations and refusal on the ground that such registration would be in violation of 1994 Regulations. There is no charge of any market distortion or manipulation. In the instant case SEBI ought to have been concerned only to ensure that the small investors were protected, that the only conceivable order for the protection of small investors is by directing making of a public offer, which has been consistently done by SEBI before and even after the impugned order.

With reference to the suit filed in the Hon'ble Bombay High Court, referred to in the impugned order it was submitted that the Reddys, as Plaintiffs claiming to hold 4.45% of the paid up capital of the Company, instituted Suit No.3910 in the Hon'ble Bombay High Court in October, 1997 challenging the acquisition of the 10.91% shares by IMFA, the 4.97% shares by Mahameru, the 3.87% shares by Shirish, the 0.56% creeping acquisition by Imfa, the 1.31% shares creeping acquisition by Beethoven and the 0.27% creeping acquisition by Darrel. They prayed for declaration that such acquisitions were void and injunctions that no rights in respect of such shares be exercised by the respective acquirers. The defendants in the suit challenged the motives of the Plaintiffs inasmuch as the Reddys being close to Shri Mallya had been set up to file the suit since Mallya and the Target Company, could not challenge the acquisitions, having despite initial reservations registered the

Though the suit was filed in 1997 and the initial Interlocutory application moved therein contemporaneously, the Plaintiffs really pressed for interim orders upon a notice being issued on behalf of some of the defendants for removal of directors of the Board of Companies and for the appointment of directors supported by such defendants. Such interlocutory application was disposed off by the Court by directing the voting rights in respect of Imfa, Mahameru, Shrirish, Beethoven and Darrel shares to remain frozen, pending disposal of the suit. The prayer regarding the freezing of voting rights in respect of the 3,75,000 shares which had been allotted upon the conversion of the debentures purchased by the Galan subsidiaries was, however, rejected on the ground that such acquisition had been made on 14.12.93, prior to the 1994 Regulations coming into effect. The defendants preferred appeals from that part of the interlocutory order restraining the voting rights in respect of the aforesaid shares being exercised. No appeal was preferred by the plaintiffs in respect of 3,75,000 shares for which an order for freezing voting rights was refused. The Division Bench affirmed the Interlocutory Order passed by the Single Judge.

The Division Bench, however, made the following observations:-

a) At Paragraph 101:

> "On the basis of the facts on record as at present the conclusion appears to be inescapable that defendant Nos.1 and 11 were acting in concert with the companies under their control, viz. the defendant Nos.2 to 10 in the matter of

facie and only for the purpose of disposal of the Notices of Motion."

b) At paragraph 102:

"…In any event, this question need not detain us because the SEBI is not a party in the suit. That apart, we should not make any observation in this order which may even remotely touch upon the matters within the jurisdiction of SEBI. What appropriate order SEBI may pass in a case of this nature must be left to SEBI, and we, therefore, do not consider it appropriate to make any observations."

c) At paragraph 169:

"…. Mr. Nariman submitted that it may be that even before the issuance of the said letter, some enquiry may have been made. In the absence of SEBI, it is not possible to speculate as to what other steps were taken by SEBI. He submits that the matter on record at least establishes this fact that by June 9, 1995 SEBI had before it materials justifying an enquiry by it for breach of SEBI Regulations of 1994, and such an enquiry was initiated when the Regulations of the 1994 were in force and continued notwithstanding the repeal of the Regulations of 1994.

We find that there is material to support the submissions of Mr. Nariman. We express this view on the basis of material on record, and it may be possible for the parties to adduce

> what orders it may pass. We leave it to the SEBI to pass such orders as it may deem fit and proper, and nothing said in this order should be construed as expression of our opinion on the question as to whether, the defendants should be permitted to make a post-facto public offer or not.(emphasis supplied)

The Appellant submitted that the directions contained in the impugned order must only be sustained by the reasons contained in the impugned order itself. The reply by SEBI in the present proceedings to justify the impugned order or the directions contained therein which are contrary to the reasons set out in the order cannot be taken into account. Cited Mohinder Singh Gill V Chief Election Commissioner (AIR 1978 SC 851) for the proposition that quasi judicial orders have only to be supported by the reasons contained therein and the reasons cannot be subsequently introduced or added. The Appellant relied on the decisions of this Tribunal in Sterlite Industries V SEBI (2001 (34) SCL 485) and Mega Resources Ltd. V SEBI (2002 (36) SCL 569) for the propositions that Section 11B does not provide for any penalties and submitted that Regulation 44 of the 1997 Regulations is not penal in nature and, therefore, no penalty can be validly imposed either under Section 11B or under Regulation 44.

It was submitted that the impugned order has been passed without complying with the mandatory procedure as laid down in Chapter V of the 1994 Regulations, that no notice for appointing any Investigation Officer was issued to or received by the Appellants or by any of the companies which acquired the subject shares, that

step under Regulation 39 being taken, that such mandatory procedure cannot be dispensed with nor does SEBI have the authority to resort to Regulation 37 or Regulation 39 without first complying with the pre-conditions as set down in Regulations 33 to 37 of the 1994 Regulations. With reference to the ratio in the case of Rhodia SA V SEBI, (2001) 33 SCL 570) relied on by the Respondent it was stated that this Tribunal has taken a view that since the prescribed procedure for exemption from the Regulations was followed, strict compliance with Chapter V may not be fatal, that it was not a finding that Chapter V is a dispensable procedure.

It was further submitted that SEBI has no power either under the SEBI Act/ Regulations to by-pass/nullify/review/set aside the order/direction already passed by the Chairman qua the same subject matter. The orders/ directions of the Chairman, SEBI are binding on SEBI and all officers of SEBI. The issuance of the Show Cause Notice dated 8.1.1999 purports to review and amounts to setting aside all the orders/directions of the Chairman qua the same subject matter. MDC has based on such order/directions, acted on the same by addressing his letter dated 20.1.1999 to SEBI, expressing his willingness to make a public offer (without prejudice to his contentions that there is no violation). SEBI was therefore not entitled to nor has the power to issue the Show Cause Notice dated 8.1.1999 under the SEBI Act/Regulations in contravention of the earlier orders/ directions passed by Chairman, SEBI. In support of the Appellant's aforesaid contention, the following three Supreme Court decisions were cited:

(i) Assistant Transport Commissioner, Lucknow V Nand Singh (1979 (4) SCC 19)

must be deemed to have known the order. In a given case, the date of putting the order in communication under certain circumstances may be taken to be the date of the communication of the order or the date of the order but ordinarily and generally speaking, the order would be effective against the person affected by it only when it comes to his knowledge either directly or constructively, otherwise not."

(ii) Collector of Central Excise, Madras V M. M. Rubber and Co. (1992 (1) SCC 471)

Para 12 at Pg 477

"…… The date of such order or decision is a date on which the order or decisions was passed or made; that is to say when he ceased to have any authority to tear it off and draft a different order and when he ceased to have any locus paetentiae. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand……"

Para 13 Pg 477

"So far as the party who is affected by the order or decision for seeking his remedy against the same, he should be made aware of passing of such order. Therefore, courts have

affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decisions, either actual or constructive is thus an essential element which must be satisfied before the decision can be said to have been concluded and binding on him."

Para 18 Pg 479

"Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision, any period of limitation prescribed with reference to revoking such a remedy shall be read as commencing from the date of communication of the order. But if it is a limitation of a competent authority to make an order, the date of exercise of that power and in the case of an exercise of suo moto power over the subordinate authorities, orders, the date on which such power was exercised by making an order are the relevant dates for determining the limitation. The ratio of this distinction may also be founded on the principle that the Government is bound by the proceedings of its officers but persons affected are not concluded by the decision."

> "… … Thus considered the date of the award cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office; it must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. …. ….. The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. …. If the award is pronounced in the presence of the party whose rights are affected by it can be said to be made when pronounced … … … The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice, the expression "the date of the award" used for the proviso must mean the date when the award is either communicated to the party or is known to him either actually or constructively."

It was submitted that all the above citations/decisions were brushed aside by the Counsel of SEBI on the ground that all the said decisions pertain to the question of limitation and that the decision set out at item (iii) above pertains to an award which is only an offer, that whether or not these cases relate to limitation is not relevant for the instant case, that these authorities indeed support the case of the Appellant that the SEBI Chairman had not only passed his order but had also communicated the same to MDC's representative.

who pursuant to an agreement or understanding

acquire (shares) OR agree to acquire shares

for a common objective or purpose of substantial acquisition of shares and includes:

? (i)	? (ii)	? (iii)	? (iv)
i)a company ii)its holding company iii)subsidiaries of (i) and (ii) (iv) or companies under the same management either	i) a company with any of its directors of ii) any person entrusted with the management of the funds of the company.	i) Directors of companies referred to in clause (i); and (ii) his associates	Mutual funds, financial institutions merchant bankers, portfolio manager and any indirect company in which any person has an interest as director, fund manager, transfer or as a share holder having not less than 2% of the paid up capital of that company

Explanation

? **A**	? **B**
Any relative of that person under the meaning of section 6 of the Companies Act	The director or his relative whether individually or in aggregate holds more than 2% of the paid up equity capital of such company.

?

i.e. Section (6) relative of director of company referred to in (i)

i)a company
ii)its holding company
iii)subsidiaries of (I) and (ii)
(iv) or companies
under the same management either individually or all with each other

furtherance of a common objective or purpose viz. that of substantial acquisition of shares.

Such person who acquires or agree to acquire *includes* the various persons listed in sub-clause (i) to (iv) of Regulation 2(d) of the 1994 Regulations. It therefore follows that the inclusive portion of the definition of "person acting in concert" needs to meet the ingredients of the original part of the definition. The deeming provision contained in the inclusive definition of "persons acting in concert" may raise a rebuttable presumption that by virtue of the position of one or more persons such persons may be said to be acting in concert. Once, however, persons charged with acting in concert, do not fall within the inclusive definition, their mere positions, would not be the basis for establishing acting in concert. That is to say, a person as a shareholder or a person as a director may not be deemed to be in concert unless an active co-operation between that person and another is shown or established.

This aspect of co-operation was noticed by the Bhagwati Committee prior to the 1997 Regulations. The inclusive definition in 2(d) of the 1994 regulations was altered in the 1997 Regulations. A sub-clause was introduced to indicate which persons would be deemed to have acted in concert.

The cooperation that is necessary to be established to satisfy the expression "agreement or understanding" has to be a co-operation in course or in aid of the substantial acquisition, that a subsequent getting together or a subsequent co-operation for some further acquisition would not be material for the previous acquisition, if the previous acquisition is impugned.

The position of each of the entities viz. IMFA, Mahameru and Shirish in

subsidiary company at the time of acquisition of 10.91% shares in the Target Company. It was only on 27.9.1996, (when Sevenstar acquired the entire capital of IMFA), that IMFA had a holding company for the first time. By that time, IMFA had already acquired the 10.91% shares in the Target Company. No further shares were acquired by IMFA thereafter under the 1994 Regulations. A creeping acquisition of 0.56% was made during the 1997 Regulations, i.e .after the repeal of the 1994 Regulations. The directors of IMFA during the acquisition of 10.91% were Shri Imtiaz Kheyroola, Shri Ram Raheja, Shri Harish Raheja, Shri C. Maniar, Shri Ramesh Ahuja and Shri Deepak Gwalani. The aforesaid directors would be deemed to have acted in concert with IMFA for the purpose of the 10.91% acquisition. The "associates" of these directors would be their relatives within the meaning of Section 6 of the Companies Act and directors or relatives who individually or in the aggregate hold more than 2% of the paid-up equity capital of IMFA. 99.96% of IMFA's share capital was held by Shri Ram Raheja. Shri Imtiaz Kheyroola and Ms. Farida Kheyroola collectively held only 0.04% of IMFA's capital. Therefore, the only person falling within the inclusive meaning of "person acting in concert" with IMFA is Shri Ram Raheja. Neither KRC nor MDC are relatives of any directors of IMFA within the meaning of the term relatives under the Companies Act. Neither KRC nor MDC held any share in the equity share capital of IMFA at the time of acquisition. It was only after Sevenstar became the holding company of IMFA that Sevenstar and MDC could be deemed to be persons acting in concert with IMFA. After such date IMFA did not acquire any share in the Target Company save and except for the 0.56%, which was within the limits permitted under the 1997 Regulation. At the highest, there could be said to be "co-operation" between IMFA

MDC nor Raheja attract the inclusive definition of 2 (d) of the 1994 Regulations, the mere fact that Shri Ram Raheja is a director in some Galan subsidiary or a nominee share holder in one of the Galan subsidiaries does not make him a person acting in concert in the matter relating to IMFA acquiring substantial shares in Herbertsons. Similar is the case with MDC.

In respect of Mahameru it was submittesd that Mahameru did not have either any holding company or any subsidiary. The directors and shareholders of Mahameru at the time of acquisition of 4.97% were either Mr. H.S.R. Sharma and Mrs. Sophia Sawant (upto December 5, 1995) or Mr. R. M. Sanghvi and Mr. Abid Ali (upto September 4, 1996). Thereafter the directors and shareholders in the ratio of 50 : 50 were Mrs. A. A. Kakade and Mr. S. Masand. It was only on February 13, 1997, that Sevenstar took over the entire capital of Mahameru and MDC became a director on the board. Therefore, until this date neither KRC nor MDC can be said to have been a person deemed to have been acting in concert with Mahameru. Neither MRC nor MDC are relatives of any of the directors of Mahameru within the meaning of the Companies Act, 1956. Neither KRC nor MDC held any shares in Mahameru for any of them to be considered to be persons deemed to be acting in concert with Mahameru.

In respect of Shirish it was submitted that Shirish did not have any holding company or subsidiary company either during the acquisition of 3.83% shares in the Target Company or thereafter. The directors and shareholders or Shirish during acquisition of the said shares in the Target Company were Mr. S. J. Chhabria and Mrs. S. S. Chhabria. MDC and his wife acquired the entire capital of Shirish only on February 18, 1997 by when Shirish has already acquired 3.83% shares in Target

acquisition of shares in the Target Company by Shirish. It is only after February 18, 1997, when MDC and his wife acquired the entire capital of Shirish that MDC became a director of Shirish. After this date Shirish has not acquired or agreed to acquire any shares in the Target Company.

Defferentiating the case laws cited by SEBI it was submitted that:

1. K.V. **Muthu V Angamuthu Ammal (1997 SC 628):**

Proposition: *A word and expression may be used in an Act in a different context than used in the definition clause.*

Paragraphs 9 to 13 of the above judgement have been relied upon for the proposition that notwithstanding the words or expression being defined in the definition section of the Act, such definition may not apply in all possible contexts in which the words or expression defined has been used in the Act.

This argument was advanced in the context of the word "relative" appearing in sub clause (a) and also appearing in sub clause (b) in the Explanation to Regulation 2(1)(d) of the 1994 Regulations. It has been suggested that the meaning of the words "relative" in sub clause (b) is different from the word as used in sub clause (a)

This argument, however, overlooks Regulation 2(2), which provides that words not defined in the Regulations would take the meaning from *inter alia*, the Companies Act, 1956. The word "relative" has the same meaning in sub clause (A) and (B) in the Explanation to Regulation 2(1)(d) of 1994 Regulations.

2. **Commissisoner of Income-tax V East Coast Commercial Co. Ltd.**

AIR 1967 SC 768:

section or in that Act. The expression "acting in concert" was used by the Supreme Court as an English expression.

In the instant case "persons acting in concert" is a defined term in the Regulations and there is no scope for relying on the expression as it is ordinarily used in ordinary parlance.

3. Delhi Development Authority V Skipper Construction Co.P.Ltd. (AIR 1996 SC 2005)

Proposition: *Lifting of corporate veil ; Court's power to remedy wrongs.*

The question of lifting of corporate veil is irrelevant in this case as no person has ever hidden behind any corporate veil. KRC has come forward (by letter dated 9.1.1996) to own up the shares that he controlled; MDC has volunteered information (by his note dated 22.7.1997) of the shares over which he exercises control. The principle of lifting of corporate veil arises to see human faces lurking beyond the corporate façade. This principle is irrelevant in this case.

As far the power of Courts to remedy wrongs, the reported case can not be relied upon because the Supreme Court was exercising powers under Article 129 and 142 to impose penalties on admitted contemnors.

4. Motichand V Ikram Ullah (AIR 1916 PC 56);

Proposition: *Device to defeat law should be discouraged*

There is no quarrel with this proposition. However, no "device" has been demonstrated in the instant case. The Impugned Order in the present proceedings has proceeded on surmises and conjuncture in suggesting that there was a device to defeat the provisions of the 1994 Regulation. However,

made by IMFA, Mahameru and Shirish could in no manner be linked to pre-1994 acquisitions of 27.21% shares by KRC through Galan.

5. **Mc Dowell & Co. Ltd. V Commercial Tax Officer (AIR 1986 SCC 649):**

Proposition :*Avoidance of tax is against public interest should not be condoned.*

This case is totally irrelevant in the present context.

The reported case referred to fiscal statutes and the underlying theme was the augmentation of revenue to enable the Government to discharge its functions in a welfare state. This case cannot be extended to other areas and has no relevance in the facts of the present case.

There is no attempt to avoid any tax or any payments nor any attempt to deprive any government revenue.

6. **Nar Bahadur Bhandari V State of Sikkim (1998 (5) SCC 39):**

Proposition : *The meaning of "anything done or any action taken"*

In this case, relating to former Sikkim Chief Minister Narbahadur Bhandari the Hon'ble Supreme Court found as a matter of fact that a report had been prepared under the Act which had been repealed, and by reason of such report having been prepared, the saving clause came into effect.

In the present case, whether "anything" had been done or "any action" had been taken under the 1994 Regulations, has to be decided on fact. The only "thing" relied upon is the purported enquiry made vide the 9.6.1995 letter by SEBI.

The 1994 Regulations do not contemplate any "enquiry" nor is the word used in the 1994 Regulations. Assuming that by the enquiry started by the

In any view of the matter "the enquiry" was completed upon the Target Company replied to the letter dated 9.6.1995.

It may also be borne in mind that even the show cause notice issued to Shri Ram Raheja has been "rightly" dropped by SEBI.

7. Public Prosecutor V R. Raju (AIR 1972 SC 2504):

Proposition: *"Anything done" includes "omission"*

The expression "anything done or any action taken" in the present case is to be read in the light of the repeal and the savings provisions contained in Regulation 47 of the 1997 Regulations. In the reported judgement, the Hon'ble Supreme Court was not dealing with any repeal or savings provisions. The Court judgement on "anything done" is as the expression appeared in the then existing version of Section 40(2) of the Central Excise and Salt Act.

Section 40 of the said Act, as was then being considered by the Court, reads as follows:

(1) No suit lie against the Central Government or against any officer of the (Government) in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of".

In paragraph 2 of the case reported, the Hon'ble Supreme Court says "The question which falls for consideration in these appeals is the interpretation of

47(2) of the 1997 Regulations. That is obvious from the expression "cause of action" used in the same sub-section.

This reported case is not only inopposite but any reliance placed on it in the context of the present case will be misleading.

8. **Rhodia S. A. Vs. SEBI (2001) 33 SCL 570**

Proposition: *Regulation 44 could be resorted to without Chapter V procedure being followed.*

In the Rhodia S. A. case an application for exemption from compliance of regulation 12 of the Takeover code was rejected by SEBI and action under Regulation 44 taken. The Tribunal held that since under Regulation 4 an entire procedure is laid down; Chapter V procedure need not be followed before resorting to directions under Regulation 44.

An application for exemption is on admission of the applicability of the Regulation and seeking dispensation of the procedure that is required to be followed. In such a case no investigation is necessary to ascertain whether the Regulations apply or any violation has taken place.

9. **State of Bihar V Kripalu Shankar (1987 (3) SCC 34):**

Sultan Singh V State of Haryana (1996 (2) SCC 66):

Proposition :*Notings are privileged material and can not be looked into*

In both the reported cases it was held that notings in files made by Government Officers in discharge of administrative duties cannot be taken cognizance of. In the second case the question before the Hon'ble Supreme Court was whether in making of notings any contempt had been committed, that the Court held there was no contempt.On facts, these cases are

10. **U. P. State Electricity Board V City Board, Mussoorie (1985 (2) SCC 16); Surinder Singh V Central Government (1986 (4) SCC 667):**

Proposition : *When Regulations not framed, the act is applicable.*

In both the cases, Regulations under the relevant Acts had not been framed, therefore, the provisions of the Act were resorted to. There is no quarrel with the proposition. It is however, irrelevant in the facts of the instant case. The cases have been cited in the context that prior to the 1994 Regulations action could have been taken directly under the Act despite there being no Takeover Regulations. However, the allegation is that in acquiring 27.21% by the Galan subsidiaries, the Listing Agreement had been breached. The Listing agreement being a subject matter of the Securities Contract (Regulations) Act and SEBI having only been delegated Central Government's powers under the said Act, SEBI could not resort to direction or penalties under the subsequent regulations in respect of alleged violation of the Listing Agreement.

The Appellant had submitted that SEBI's decision was influenced by certain extraneous consideration and referred to the following, with reference to the documents filed in the appeals, in support thereof. This is the gist of submissions:

Meeting held on 31.12.97 between MDC (represented by KRC) and SEBI Chairman whereat SEBI chairman directed that MDC make a public offer for acquisition of further shares in Target Company in accordance with the 1997 Regulations. Shri L.K.Singhvi, Sr. Executive Director (Investigation) on 20.1.98 recorded the decision conveyed by the Chairman to MDC in a noting

the regulation and make the required offer. He met me again and I told him the same. As regards prosecution, the matter can be considered later. First let the offer aspect be complete as discussed by us."

MDC wrote to SEBI on 20.1.1998 indicating his willingness to make a public offer (without prejudice to his earlier stand). On 21.1.98 Chairman SEBI recorded his decision which reads as under:

"We may ask the acquirer(s) to file the offer as required under 1001the Regulations immediately. The issue of prosecution will be decided later."

Sd/-

D.R. Mehta."

After the Chairman recorded his decision the file was forwarded to Shri P. Kar, Executive Director, SEBI who recorded on the file on the same day as under.

"Please issue a letter as instructed asking the offeror to file the offer documents. The draft letter to the offeror may be shown to ED (Law) because of the legal issue involved.

Sd/-
P.Kar
21.1.1998

Bachubhai Munim & Co. Advocates/Solicitors on behalf of their client viz. Sreenivasulu Reddy & Ors. wrote to Chairman SEBI on 27.1.98 requesting SEBI not to reach the final conclusion in Herbertsons Takeover matter until SEBI receives written opinion

eminent jurist" to the Executive Director (Legal)of SEBI forwarding a note in regard to Herberstons matter for the perusal and requesting her to go through it very carefully so that it will give her an idea of the issues involved was sent. In the said note it was also recorded that "the eminent jurist" will contact her on the following day.

Bachubhai Munim & Co,vide letter dated 10.2.98 to the Chairman SEBI forwarded a copy of the written opinion of "the eminent jurist" dated 10.2.1998

SEBI forwarded MDC's letter dated 20.1.1998 as Investor's complaint to Herbertsons Ltd..

Hariani & Co. Solicitors for Herbertsons Ltd. sent a letter to SEBI in reply to SEBI's letter 3.2.1998 requesting for copies of correspondence exchanged with regard to letter dated 20.1.1998 and requested SEBI not to direct MDC to take any steps for making public offer.MDC was not forwarded a copy of this letter either by Herbertstons Ltd or SEBI.

Hariani & Co. Solicitors for Herbertsons Ltd. sent letter dated 29.2.98 to SEBI in furtherance to their letter dated 16.2.1998 once again requesting SEBI to direct MDC not to take any steps towards making of a public offer. MDC was not forwarded a copy of this letter either by Herbertstons Ltd, or SEBI.

Vijay Mallya. (Chairman, Herbertstons) sent letter dated 24.7.98 to the Chairman SEBI referring to SBEI's letter dated 3.2.1998 inter alia dealing with MDC's etter to SEBI dated 20.1.1998 wherein

Application filed on 15.1.98 by Herbertstons Ltd. before Company Law Board, Western Region Bench,Mumbai in Appeal Nos.21/98 and 22/98 of Shirish and Imfa respectively for deferring the hearing of the said Appeals until the conclusions of investigations by SEBI. In the said Application the above letters between SEBI, Herbertstons Ltd. and Shri Vijay Mallya were annexed because of which MDC for the first time came to know that such correspondence was exchanged by and between SEBI, Herbertstons Ltd./Vijay Mallya behind his back.

In paragraph 7 of the said application Herbertstons has stated as under. "the Respondent believes that further show causes notices are likely to be issued by SEBI to IMFA, Shirish, Mahameru, Kishore Chhabria, and M. D. Chhabria calling upon the aforesaid to show cause why action should not be taken against them under the said Regulations and under the SEBI Act for contravention of the "Take Over" Regulations 1994 and 1997."

On 8.1.99 Show Cause Notice was issued by SEBI for the first time to MDC/KRC.

SEBI's partisan attitude is thus evident.

On the effect of the repeal of 1994 Regulations the Appellant submitted that it has not breached the 1994 Regulations. However, even on an assumption that they had been breached, the said Regulations have been repealed by the 1997 Regulations and the Savings Clause does not save the present case. The 1994 Regulations which came into effect form 7.11.1994 were repealed by the 1997

The said clause makes it clear that anything done or any action taken or purported to have been done or taken including the acts set out has to be anything done or action taken under the said regulations i.e. the 1994 Regulations. It is also clear more so from the inclusive acts set out in the Regulation 47(2) of the 1997 Regulations itself that anything done or any action taken pertains to anything done and action taken only by SEBI. It is the case of SEBI that an enquiry had commenced prior to the repeal of the 1994 Regulations. SEBI's contention is baseless and untenable since the 1994 Regulations (also the 1997 Regulations) do not provide for the conduct of any enquiry (as distinguished from an investigation) and therefore it is impossible for SEBI to have held any enquiry under the 1994 regulations. The said word 'enquiry' has crept in only because the language used in Regulation 47(2)(a) is picked up form a standard repeal clause from other legislations. The only "anything" done or action taken by SEBI in the instant case prior to the repeal of 1994 Regulations was issuance of a show cause notice u/s 24 of the SEBI Act to Ram Raheja on 9.10.1996. SEBI has in the last sentence of paragraph 15 of its affidavit in reply to MDC's appeal stated that SEBI rightly did not pursue the same.

The actions taken by SBEI after the repeal of the 1994 Regulations are therefore of no consequence are as under:-

a) On 31.3.1997 SEBI issued a show cause notice addressed to the "Managing Director" of IMFA. The notice calls upon the Managing director of IMFA to show cause as to why criminal prosecution should not be initiated u/s 24 of the Act for violation of Regulation 6 & 10 of the 1994 Regulations, failing

SEBI and neither criminal prosecution nor any other action was taken by SEBI under the 1994 Regulations.

b) On 8.1.199 SEBI issued a show cause notice to MDC/KRC . The notice alleges that "It appears that the acquisition of shares are done in a manner to circumvent the provisions of the SEBI (Takeover) Regulation 1994." The notice therefore calls upon MDC/KRC to show cause as to why actions u/s. 11, 11B and 24 of the said Act and Regulation 39 of the 1994 Regulations read with Regulations 44, 45 (6) and 47(2a) of 1997 Regulations be not initiated for the alleged violation.

Except for the show cause notice dated 9.10.1996 no other action had been initiated under the 1994 Regulations, either pursuant to the show cause notice or otherwise or were pending on the date of its repeal.

Although SEBI has inter alia stated in its affidavit in reply that the enquiry started after receiving a reply dated 3.7.1997 to its show cause notice date 31.3.1997 i.e. after the 1994 Regulations were repealed on 20.2.1997, SEBI has argued that the first communication from SEBI was a letter dated 9.6.1995 which constitutes an enquiry as envisaged by Regulation 47(2) and that the Advocates of KRC have in their letter dated 9.1.1996 stated that they have come to know of an enquiry being made by SEBI.

Apart from the fact that the enquiry envisaged under Regulation 47(2) of the 1997 Regulations has to be an enquiry under the Regulations and the 1994/1997 Regulations do not contain any regulation/provision pertaining to enquiry, a mere letter to the Target Company by SEBI asking for some information on the basis of

In any event it is not disputed that the letter dated 9.6.1995 from SEBI to the Target Company seeking comments on a newspaper report pertain to only 38% shares which included the 27.21% shares of the Galan Group of companies and the 10.91% share of IMFA. It is an admitted fact that no enquiry of any nature whatsoever had commenced prior to the repeal of the 1994 Regulations pertaining to acquisition of 4.97% shares by Mahameru and 3.83% shares by Shirish, which acquisitions had all been done before 20.2.1997, the date on which the 1994 Regulations were repealed.

According to the Appellant the impugned order is erroneous both on facts and in law, exposes non application of mind, is without jurisdiction, unsustainable and traverses well beyond the scope of the authority conferred on the Respondent under the Act and the Regulations, that the directions contained in the impugned order will result in an absurd situation which was neither concerned by the Regulations nor intended to be brought about under the SEBI Act, that the order is severely biased and is contrary to the principles of natural justice, that unless the findings are reversed, the Appellant, the Target Company and the investors would face irreparable harm and injury.

Submissions on behalf of MDC:

Shri C. A. Sundaram, learned Senior Counsel appearing for MDC made the following submissions:

By the impugned order the Appellant, who does not personally hold any shares in his name in the Target Company, has been directed to disinvest shares

By the impugned order, acquisitions made prior to the 1994 Regulations have also been directed to be disinvested on the ground of alleged violation of Clauses 40A & 40B of the Listing Agreement. Similarly, acquisitions made after the repeal of the 1994 Regulations, within the limits permitted under the 1997 Regulations have also been required to be divested, without any reasons being cited. By reason of the directions passed, in purported exercise of powers under Regulation 39 of the 1994 Regulations / Regulation 44 of the 1997 Regulations, a pecuniary loss (in the nature of penalty) to the extent of several crores of rupees has been imposed. In the process, a previous order by SEBI directing the making of a public announcement of an open offer has been sidelined and reviewed because of extraneous considerations.

The order directing to make disinvestment is the first order of its kind and made avowedly as a deterrent, that the order prejudices the small shareholders of the Target Company and is aimed solely to benefit the persons in management of the Target Company. The impugned order runs contrary to SEBI's statutory mandate of protecting the small investors and is otherwise against law and facts.

On the question of law/fact it was submitted:

Purpose of the Takeover Regulations is remedial and regulatory. Its purpose is three-fold (i) to ensure that the incumbent management of the Target Company is aware of the substantial acquisition,(ii)to ensure that in the process of substantial acquisition, the securities market is not distorted or manipulated, and, (iii) to ensure that the small investors are offered a choice viz., to either off-load their shares at a price generally higher than the prevailing market price or to continue as

by surprise, and therefore, it is necessary that the management of the Target Company is made aware of any person acquiring substantial shares in such Target Company. In the instant case, the shares aggregating to 27.21% of the Target Companay's paid up capital were acquired by Galan subsidiaries from Vijay Mallya's Companies i.e. the party in control and management of the Target Company, which was, therefore, fully aware of the acquisition of such shares. The 10.91% shares acquired by IMFA, which according to SEBI was allegedly part of the same group, were registered by the Target Company on 31.5.1996, to the knowledge of the Target Company and its management, despite reservations expressed earlier by the Target Company that such acquisitions were in breach of the 1994 Regulations. Even the 4.97% shares lodged by Mahameru for registration, were registered. Neither the management nor any party in control ever made any complaint of not being aware of such acquisition or of the persons connected therewith. In fact, it is not even SEBI's case that the acquisitions were made through subterfuge or in a clandestine manner, so as to surprise the management of the Target Company, nor is there any allegation made by SEBI of any violation of the Takeover Regulations on this score. SEBI has also not charged the Appellant with any market manipulation or distortion. In fact, the 27.21% shares were purchased from Vijay Mallya companies by the Galan subsidiaries at a negotiated price. The 10.91% shares purchased by IMFA, the 4.97% shares purchased by Mahameru and the 3.83% shares purchased by Shirish were all market purchases carried out through the stock exchange. Even the subsequent creeping acquisition (0.56% by IMFA; 1.31% by Beethoven; and, 0.27% by Darrel) were market purchases carried out through stock exchange transactions.

is however irrelevant in respect of the 27.21% shares held by the Galan subsidiaries as the shares were directly acquired on 14.12.1993 (prior to the 1994 Regulations) and the 3,75,000 shares obtained on conversion of 75,000 debentures during the currency of the 1994 Regulations. The said 75,000 fully convertible debentures were allotted on 14.12.1993. Even the Hon'ble Bombay High Court in Shirish has recognized that the conversion of the fully convertible debentures during the currency of the 1994 Regulations was irrelevant as the acquisition of such shares dates back to the acquisition of the debentures on 14.12.1993.

The only breach complained of, therefore, is one of failure to comply with the provisions of Regulation 10 of the 1994 Regulations i.e., not making a public announcement in the case of acquisition of 10.91% shares by IMFA and followed by the subsequent acquisition of 4.97% of shares by Mahameru and 3.83% by Shirish, since all such acquisitions, according to SEBI, were funded by the Appellant. Assuming this to be so, a public offer would have been the most preferred solution as such public offer would have been in the interest of the small investors. In fact, such public offer was ordered to be made but such order was sidelined by SEBI.

SEBI's mandate to act as a market regulator is primarily to ensure that the small investors are not prejudicially affected. The Takeover Regulations are therefore required to be implemented with this purpose in mind in a manner to right any wrong or prejudice, and to remedy any breach. Apart from the penalties under SEBI Act (Sec.15H and Sec. 24), as has been specifically conferred by legislature, SEBI has no authority to impose penalties, but only to direct remedial and regulatory

to direct remedial measures to be taken (like post facto public offers) rather than directing dis-investment of the acquired shares or such other measures. In fact even as on 06.08.2002, in the case of acquisition of shares in Ray Ban Sun Optics (formerly Bausch and Lomb, India) SEBI has directed a post facto public offer to be made, despite having come to a definite finding of the acquirer having created an artificial device with the clear purpose of circumventing the Takeover Regulations. In fact, neither the Impugned Order nor the Affidavit in Reply in this case filed before the Tribunal by SEBI claims that the directions were remedial or regulatory in nature, but instead are avowedly professed to be deterrent. Ipsi dixit of Counsel in course of arguments before the Tribunal cannot have any force nor can an order of a quasi-judicial authority be sought to be improved by an affidavit. Cited M. S. Gill V The Chief Election Commissioner in support of this. (AIR 1978 SC 851)

As regards the nature of powers under Regulation 39 of the 1994 Regulations and under Regulation 44 of the 1997 Regulations, the Appellant relied on the decisions of this Tribunal in the case of Sterlite Industries (India) Ltd. Vs. SEBI (2001 (34) SCL 485) and Mega Resources Ltd. Vs. SEBI (2002 (36) SCL 569) for the proposition that Regulation 39 of the 1994 Regulations and Regulation 44 of the 1997 Regulations are not and cannot be penal in nature, that Section 11B of the SEBI Act does not confer any power on SEBI to levy penalties.

Pursuant to the procedure under Chapter V of the 1994 Regulations, upon the investigation report being received by SEBI and the explanation of the person concerned being taken into account, SEBI was empowered under the 1994 Regulations to either take corrective or remedial measures under Regulation 37(2).

three-fold purpose of the Takeover Regulations, resorting to Regulation 37(2) of the 1994 Regulations or Regulation 42(2) of the 1997 Regulations can generally happen if there is breach of making of the public offer (Regulation 10 of the 1994 Regulations). However, if in the course of the breach of Regulation 10, the acquisition was such that it had distorted the market or resulted in price manipulation, regulation 37(2) or Regulation 42(2) may not be the ideal solution and Regulation 39 (or Regulation 44 of the 1997 Regulations) could then be pressed into service. In the instant case, it is not SEBI's case that there was either distortion of the market or price manipulation or of the management being taken by surprise or the working of the Target Company being affected. Therefore, beginning with the procedure of investigation provided at Regulation 33 in Chapter V of the 1994 Regulations, the process culminates either with a measure for "due compliance" being directed under Regulation 37(2) of the 1994 Regulations (or Regulation 42(2) of the 1997 Regulations) or by taking recourse to Regulation 39 of the 1994 Regulations (or Regulation 44 of the 1997 Regulations), which would only be taken for the purpose of regulation or remedy. The two courses of action are mutually exclusive, i.e., if the "due compliance" direction under Regulation 37(2) is issued, then ipso facto directions under Regulation 39 would not be necessary.Again, the precondition to exercise of powers under Regulation 39 is that such exercise has to be in the interest of the securities market and has also to be demonstrably in such interest.

Although Regulation 44 of the 1997 Regulations does not expressly require the investigation culminating in a report to be a pre-condition for the exercise of powers thereunder, such pre-condition amounts to an inbuilt safeguard in favour of a

being issued under the said Regulation 44, it would not affect in any other manner the protective rights conferred on a person under the 1994 Regulations before directions are issued for alleged violation of the 1994 Regulations.

On the question whether "acting in concert" is per se breach of the Takeover Regulations, it was submitted:

Persons acting in concert within the meaning of Regulation 2(1)(d) of the 1994 Regulations, do not commit any breach or offence, that in commercial transactions, persons generally act in concert, which is neither frowned upon nor called into question and such acting in concert by itself does not amount to a conspiracy to commit an illegal act. When acquisition of shares, however large the quantum, is not per se an unlawful or illegal act, acting in concert to do so cannot be stated in itself to be an unsavory or wrongful act.

The relevance of acting in concert is only for the purpose of determining the actual quantum of shares acquired so as to determine whether there is in fact a substantial acquisition of shares over 10%. It is also relevant that once there is an acquisition of over 10% the procedural requirements under the Takeover Regulations come into play, irrespective of quantum of shares purchased. Therefore, an acquisition of 10% would require the same procedural compliance as an acquisition of 99% in the matter of substantial acquisition of shares.

Two or more persons may act in concert to acquire substantial shares, which does not amount to a breach of the Takeover Regulations. The breach is not either in acting in concert or in acquiring substantial shares, but only in failing to comply with

single case other than the instant one. Acting in concert is only qua acquisition. A post-acquisition arrangement between several persons or several acquirers would not attract the definition of acting in concert nor amount to an acquisition requiring procedural safeguards as for example, public announcement being complied with. The definition of "persons acting in concert" is only relevant at the time of acquisition or at the time immediately prior to the acquisition.

In the instant case, the allegation that the Appellant acted in concert is primarily based on the post-acquisition declaration of 17.4.1997. It would appear from such declaration made under Regulation 6(3) and 8(2) of the 1997 Regulations, that MDC was supporting KRC in being vice-chairman of the Target Company with his control over the 47.48% shares, which could not have been made the basis of the SEBI proceedings. In both, the show cause notice dated 8.1.1999 and the Impugned Order, the IMFA acquisition of 10.91% is attacked on the basis of such acquisition being in addition to the shareholding aggregating to 27.21% shares already held by the Galan subsidiaries. The subsequent acquisition of 4.97% by Mahameru and 3.83% by Shirish are also clubbed together. In respect of IMFA shares, IMFA was the acquirer within the meaning of Regulation 2(1)(b) of the 1994 Regulations. In the matter of such acquisition the directors of IMFA could be said to be acting in concert with IMFA within the inclusive definition of Regulation 2(1)(d). Neither MDC nor Galan nor KRC fall within the inclusive definition contained in Regulation 2(1)(d) vis a vis IMFA and qua the said acquisition.

It therefore has to be established that MDC on the one hand, and KRC or Galan on the other hand, was acting in concert with IMFA in the matter of the said

There is no allegation indicating any acting in concert by either KRC or Galan in the said acquisition by IMFA. The burden of establishing that a person acted in concert with the acquirer under the 1994 Regulations rests on SEBI, once the person allegedly acting in concert is not covered by the deeming provisions of Regulation 2(1)(d). Such a conclusion cannot be reached through surmises and conjectures as this Tribunal held in the case of Videocon Ltd Vs. SEBI (2002) 38 SCL 422 (Sat) but must be based on clear, cogent evidence, which is lacking in this case.

In any event, when the acquisition of shares by IMFA was itself in excess of 10% it trigged the application of the 1994 Regulations in view of the subsequent interpretation of Regulation 10 as contained in the High Court order in Shirish (supra). Therefore, the issue as to whether IMFA acted in concert with Galan or whether MDC acted in concert with KRC or whether there was any concert at all, is wholly irrelevant with regard to the alleged breach, namely, the failure to make a public announcement. The reasons, therefore, was only a bonafide, belief that it was not required under Regulation 10, which was reasonable interpretation as even recognized by this Tribunal as the right interpretation in the case of Fascinating Leasing Vs. SEBI. (1998) 17 SCL 204) It is only in the said High Court judgement against which Special Leave has now been granted by the Supreme Court on 5.8.2002, that a different interpretation has been given to the said Regulation 10.

In respect of the shars of Mahameru and Shirish, the charge again, is that since the Appellant funded such acquisitions there is action in concert. At the highest, if this inference is correct, again, it is only the Appellant who could be alleged to have acted in concert in Mahameru and Shirish. However, such charge in respect of

provision, such violation ceased to be actionable. Further, such acquisition which had been declared to SEBI by the Appellant's note dated 22.7.1997 were dealt with together with the acquisitions by IMFA and the directions dated 21.1.1998 took into account such acquisitions, amongst others.

On the question as to whether Chapter V of the 1994 Regulations was dispensable, the Appellant has submitted:

There is no whisper either in the show cause notice or in the impugned order or even in the Respondent's Affidavit in Reply before the Tribunal that the provisions of chapter V were resorted to or complied with. Chapter V provides a protective mechanism. Chapter V of the 1994 Regulations was a substantive protection conferred on the person alleged to have violated the said provisions. SEBI has relied on the decision in Rhodia SA (supra) for the proposition that Regulation 44 pf the 1997 Regulations could be invoked without proceeding under Chapter V. This decision is inopposite in the facts of the present case. The basis for such finding of the Tribunal was: (i) that the complete procedure under Regulation 4 of the 1997 Regulations had been complied with; and; (ii) that Regulation 44 in its wording did not retain the opening words of Regulation 39 of the 1994 Regulations, i.e., the said Regulation 44 on its plain reading could be resorted to without the requirement of any investigation report; and (iii) the Rhodia case dealt with a violation of 1997 Regulations and not with a violation of 1994 Regulations. In the instant case, inasmuch as the protection of Chapter V procedure is available to any person alleged to have violated the 1994 Regulations, such protection has to be read into the 1997 Regulations if such person is being dealt with under the corresponding

penalties not provided for in the 1994 Regulations, they could not be made applicable for alleged violations of the 1994 Regulations by virtue of the deeming provision of the savings clause in Regulation 47(2) of the 1997 Regulations.

On the repeal and savings of the 1994 Regulations, the Appellant has submitted:

The expression "anything done or any action taken" in Regulation 47(2) implied only an act or action by SEBI under the 1994 Regulations.

The impugned order has borrowed the reasoning contained in the Bombay High Court's order in Shirish (supra) that inasmuch as an enquiry relating to 38% shares said to have been acquired by KRC was pending pursuant to the 9.6.1995 letter issued by SEBI to the Target Company, and that therefore all subsequent acts by SEBI leading upto the impugned order were "saved" by the saving provisions of Regulation 47(2). This is totally erroneous. The "enquiry" contemplated under Regulation 47(2) had to be an enquiry under the 1994 Regulations, that the word "enquiry" appears to have been mechanically included in Regulation 47(2) of the 1997 Regulations and has no meaning since a study of the 1994 Regulations would not disclose any form of enquiry or any reference to an enquiry contemplated therein. This aspect was not placed before or considered by the Hon'ble High Court and in fact the Court made it clear that matters relating to SEBI's jurisdiction and power ought to be decided by SEBI and cannot be decided in the absence of SEBI.

Regulation 47(2) is a standard savings clause incorporated in the 1997

acquisitions by IMFA has been made. Such notice, according to SEBI's admission in its Affidavit in Reply, was rightly not acted upon.

It was submitted, at the highest, that the "enquiry" was limited to the 38% shares referred to in the letter dated 9.6.1995. These 38% shares included the aggregate shareholding of 27.21% held by Galan subsidiaries and the 10.91% shares purchased by IMFA. Such purported enquiry in respect of "38% shares" could not embrace within its fold the Mahameru and Shirish acquisitions. The Mahameru and Shirish acquisitions were also subsequent to the letter dated 9.6.1995. In fact, Shirish was incorporated only on 19.08.1996, well after such alleged enquiry pertaining to the 38% shares is purported to have commenced. The repeal of the 1994 Regulations made the alleged violation of the 1994 Regulations by the Appellant or the other acquirer companies "non-actionable."

The Chairman, SEBI discharge quasi-judicial functions in passing orders or directions for alleged breach of the Takeover Regulations. Such quasi-judicial powers are only as assigned under the Act. The SEBI Act does not empower the Chairman, SEBI to review his order. A statutory authority has no power to review its order unless such power is conferred by statute. Neither the SEBI Act nor the Takeover Regulations confer such powers on the Chairman, SEBI.

As is apparent from the records of SEBI, a quasi-judicial order was passed by the Chairman on 21.1.1998 and the Appellant had constructive notice thereof, that it is evident from SEBI records that the quasi-judicial order was made, recorded and directed to be communicated. In the process of communication, the subordinate officers of SEBI did not complete their ministerial act of writing a letter to the

made, the quasi-judicial decision of the Chairman, SEBI cannot be robbed of its finality. The Chairman, SEBI has not passed any order expressly setting aside the order of 21.1.1998 and while so, the earlier order directing the Appellant to make an open offer cannot merely be given a go by and a contrary subsequent order passed. When there are two contrary orders passed by the same authority and the earlier order is not set aside, the earlier order would prevail and the latter order would be without jurisdiction, since the Authority would be functus officio. The judgment relied upon by SEBI to the effect that internal notings cannot be looked into or proceeded against, were in respect of administrative notings and not quasi-judicial notings. In any event, they were with regard to issues of contract being concluded where communication was of the essence; and of contempt of court as to whether a noting in a file disagreeing with a court order would amount to contempt.

The extraneous factors as stated in the submissions made for KRC came into play upon the Chairman passing the order of 21.1.1998 and directing the Appellant to make a public offer. The letter of the Appellant dated 20.1.1998 confirming his without prejudice agreement to make a public announcement was forwarded to the management of the Target Company under cover of SEBI's letter dated 3.2.1998 in the garb of an investor's complaint classifying the same as a complaint relating to "non-receipt of rights forms/interest on delayed receipt of refund order."

In a flurry of activities, an eminent jurist sent a personal note to the Executive Director (Legal) of SEBI and interested persons forwarded legal opinion / views with an intention to materially alter the course of action that would flow pursuant to Chairman, SEBI's order dated 21.1.1998. SEBI has entertained letters

offer after 21.1.1998 is attributable solely to SEBI, which, motivated by extraneous considerations, was engaged in getting a new order passed, and therefore, the Appellant cannot be held liable for such delay after 21.1.1998.

On "the unprecedented direction for disinvestment" the following submission was made:

SEBI's direction to the Appellant to disinvest its shareholding in the Target Companay is to protect Vijay Mallya's management control over the Target company rather than to protect the interests of the small investors. A management has a right to protection only if the management was taken by surprise and was not party to the substantial acquisition by an acquirer adopting a cloak and dagger procedure. In this case, the shares aggregating to 27.21% acquired by subsidiaries of Galan was sold by companies under the control of Shri Vijay Mallya. The transfer of shares acquired by IMFA (10.91%) was registered despite earlier reservations of such transactions being violative of the 1994 Regulations. Therefore there can be no question of the management being taken by surprise. Even while IMFA lodged 10.91% shares for registration, it informed SEBI that the 1994 Regulations were inapplicable as IMFA did not hold any share in the Target Company. This was a bona fide view held by IMFA and a possible interpretation of the 1994 Regulations. Such view was subsequently taken by the Hon'ble Tribunal in the case of Fascinating Leasing (supra). The Fascinating Leasing judgment was not appealed against by SEBI. It is only in the Bombay High Court order in Shirish that a divergent view has been expressed as regards interpretation of Regulation 10 of the 1994 Regulations. However, special leave to appeal against this High Court order

of contravention of the Takeover Regulations,to show that prior to the impugned order and even subsequent thereto, post facto public offers have been directed. In fact post facto public offers had been directed on the same day as the Impugned Order was passed, that for reasons beyond comprehension an exception was made in the case of the Appellant.

On the question whether the Creeping Acquisitions can be set aside as is the consequences of the impugned order the Appellant has submitted:

Neither the show cause notice dated 8.1.1999 nor the impugned order in any manner alleged or found any violation of the 1997 Regulations in respect of the Creeping Acquisitions. All these acquisitions were made after the notification of the 1997 Regulations. Regulation 11 of the 1997 Regulations permitted the Creeping Acquisitions expressly within the ceiling prescribed. The prevailing ceiling on such acquisitions at the relevant time was initially two per cent of the Target Company's capital and was thereafter hiked to five per cent in any block of twelve calendar months. The Creeping Acquisitions were always within this limit.

However, since the impugned order requires the Appellant and persons allegedly acting in concert with the Appellant to reduce their combined shareholding to below 10%, a penalty of sale of shares has been imposed even on the shares acquired through the Creeping Acquisitions, and to that extent clearly displays the non-application of mind rendering the impugned order a nullity to that extent. Moreover, this aspect betrays the pre-mediated design of SEBI in forcing the Appellant to reduce his shareholding to the limits desired by persons in management of the Target Company.

Submissions on behalf of SEBI:

Shri Rohit Kapadia, learned Senior Counsel appearing for the Respondent made the following submissions:

The order under challenge in the present appeals is in the context of substantial acquisition of shares of the Target Company by KRC and MDC acting in concert with each other through a web of private limited companies owned and or controlled by them, either jointly and or severally pursuant to the common objective and purpose to acquire substantial shares and voting rights of the Target Company. The Respondent SEBI on its own did not await the decision of the Hon'ble High Court in the suit, as alleged by the Appellants, that in fact the matter was deferred in the light of the request received by SEBI on behalf of MDC and KRC vide letter dated 22.01.99 to defer any further proceedings in the matter of the show cause notices issued to them till the disposal of the proceedings pending before the Bombay High Court. So far as the findings on law given by the Hon'ble High Court of Bombay (single judge) in its order in suit No.3910/97 (2001) 34 SCL 1 (Bom) and order of the Division Bench dated 28th September 2001 in Shrish on various legal issues, are binding not only on the parties to the said proceedings but also on SEBI and the Tribunal.

The facts before this Tribunal are the same as before SEBI and before the Hon'ble Bombay High Court. In spite of the fact that all parties were at liberty to lead evidence both oral and documentary at the inquiry proceedings, and before the

the Hon'ble High Court with respect of the said High Court Proceedings can be relied upon by SEBI and the Tribunal.

In terms of section 11(1) of the SEBI Act, subject to the provisions of the Act the Respondent is mandated to protect the interests of investors in securities and to promote the development of and to regulate the securities market by such measures as it thinks fit, that the provisions of section 11(1) are not restricted. Further, under section 11(2)(h) SEBI is required to take all necessary measures for regulating substantial acquisition of shares and takeover of companies, that under clause (i) of section 11(2) SEBI is empowered to call for information from, undertake inspections, conduct inquiries and audits of the stock exchanges, mutual funds, other persons associated with securities market, intermediaries and self regulatory organisations in the securities market.

Further, under section 11(B) of the SEBI Act SEBI is empowered to issue directions in the interest of investors or orderly development of securities market to any person or class of persons referred to in section 12, or associated with the securities market; or any company in respect of matters specified in section 11A, as may be appropriate in the interest of investors in securities and the securities market.

Even under clauses 40A and 40B of the Listing Agreement, in case of substantial acquisition of shares, SEBI had power to grant exemptions, prescribe details to be contained in the offer document, specify the agencies in case of whose acquisitions clauses 40A and clause 40B shall not apply and also the details, information and documents/ announcement about the offer are also to be lodged with SEBI. In terms

Supreme court i.e. U. P. State Electricity Board V City Board Mussorie (1985) 2 SCC 16 and Sunder Singh V Central Govt. (1986) 4 SCC 667 were cited. Such acquisitions and takeovers could be regulated by SEBI under the then existing clauses 40A and 40B specified by the Central Government, by invoking section 11(2)(h) and 11(2)(i) of the SEBI Act.

Under section 11(2) (i) of the SEBI Act the Respondent can call for information from or conduct inquiries of other persons associated with the securities market. The submission on behalf of KRC that he is not a person associated with the securities market is not tenable because there cannot be securities market without a company, its directors, its shareholders/ investors etc. KRC became a director of the Target Company from 21.12.1992 and Vice Chairman from 1.4.1995, that further, KRC having acquired shares of a listed company is a person associated with the securities market .

On the question as to when the enquiry commenced, the following submissions were made:

There is no procedure provided for the commencement of the inquiry. The moment some evidence/ information comes to the notice of SEBI which may give rise to some suspicion that the SEBI Act or regulations made thereunder have been violated, and it proceeds further on the basis of such evidence to collect material from the parties such enquiry must be deemed to have commenced. SEBI had commenced inquiry when it issued the letter dated 9.6.95 to the Target Company seeking certain details. The inquiry was within the knowledge of KRC. Vide their letter dated 9.1.96 Advocates of KRC stated that "Our client has come to know of an enquiry

shares and takeover of companies, the principles of natural justice is followed and the date of commencement of the inquiry would be the date on which SEBI took cognizance of the violations and proceeded in the matter to gather further information and evidence. The Hon'ble High Court of Bombay(DB) in Shirish has held the same.

On the interpretation of SEBI's 1994 Regulations, following submissions were made:

As title to the said Regulations itself suggest the said Regulations are meant to regulate not only takeovers but also substantial acquisition of shares. Regulaion 2 provides certain definitions and inter alia uses the expression "unless the context otherwise requires". The use of the said word give the Court flexibility in interpretation of the words defined and the Court can thus give contextual and purposive interpretation of the words used in the Regulations so as to ensure that object and purpose of the Regulations is achieved and not defeated. In K.V. Muthu Vs. Angamuthu Ammal (AIR 1997 S.C. page 628) the Hon'ble Supreme Court has inter alia held that while interpreting definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context but it should also be an aid for achieving the purpose which is sought to be achieved by Act. The construction which would defeat or was likely to defeat the purpose of the Act to be ignored and not accepted.

On the scope of definitions 'acquirer' and 'persons acting in concert' the following submissions were made.

Regulation 2(1)(b) defines the word "acquirer". In terms of the said definition, the word "acquirer" means any person who acquires or agrees to acquire shares in a

with the acquirer (iv) agrees to acquire shares with any person acting in concert with acquirer.

Regulation 2(1)(d) defines the expressison "person acting in concert". According to the said Regulation "person acting in concert" comprises persons who pursuant to an agreement or understanding acquires or agrees to acquire shares in a company for a common objective or purpose of substantial acquisition of shares and includes: (i)a company, its holding company, or subsidiaries of such companies or companies under the same management either individually or all with each other;(ii)a company with any of its directors, or any persons entrusted with the management of the funds of the company;(iii)directors of companies, referred to in clause (i) and his associates; and (iv)mutual fund, financial institution, merchant banker, portfolio manager and any investment company in which any person has an interest as director, fund manager, trustee, or as a shareholder having not less than 2% of the paid-up capital of that company.

For the purposes of this clause meaning of the expression"associate" has been explained to mean (A)Any relative of that person within the meaning of section 6 of the Companies Act, 1956;(1 of 1956) (B)The director or his relative whether individually or in aggregate holding more than 2% of the paid-up equity capital of such company."

First part of the definition appears to be an "exclusive definition" but the 2nd part i.e. after the word "includes" is an "inclusive definition". The first part of the definition does not control the second part of the definition. So far as definition of "associate" is concerned, the word "relative" in cl.(B) is not restricted to "relative" as defined under Section 6 of the Companies Act, 1956 and as set out in cl.(A). By the

persons acting in concert with the acquirer have to be considered as one set of acquisitions for the purpose of seeing as to whether the aggregate acquisition by the acquirer and the persons acting in concert with the acquirer have crossed the threshold limit prescribed by SEBI Regulations. It was also held that it is not necessary that the persons acting in concert must be related to each other within the meaning of section 6 of the Companies Act. Even two strangers can act in concert provided they act pursuant to a common plan and to achieve a common objective. The Court further observed that the course adopted by KRC and MDC leaves no room for doubt that they were acting in concert and through unlisted companies, who hardly had share capital base, and which were managed by persons related to or known to them. In the facts of the case elaborated herein below and taking into consideration the definition of the word "acquirer" and "the persons acting in concert" and the findings of the said Bombay D B Judgment, it is clear that KRC and MDC were acting in concert under a common plan with each other through a web of private limited companies owned or controlled by them either jointly or severally for the common objective of substantial acquisition of shares of the Target Company and thereby have attempted to take over the Target Company. Except for general denials of certain findings of the Hon'ble Bombay High Court, the Appellants have not submitted any material which may negate the findings of facts recorded by the Hon'ble High Court and found on record by SEBI.

On facts the Respondent submitted that the parties and the counsel appearing for both the Appellants have not disputed the facts and in fact have proceeded on the basis that facts relating to acquisition of shares to the tune of 27.21% of of the Target Company by KRC, 10.91% by IMFA, 4.97% of by Mahameru and 3.83% Shirish

through six companies owned and or controlled by him namely (i) Veneer Investments and Finance Pvt. Ltd, (ii) Algid Investment and Finance Pvt. Ltd (iii) Airedale Investment & Trading Pvt. Ltd. (iv) Beethoven Traders Pvt. Ltd, (v) Darrel Traders Pvt. Ltd and (vi) Stingray Traders Pvt. Ltd purchased 22,15,800 equity shares of HL representing 26% of the total equity share capital from four companies owned and controlled by Shri Vijay Mallya namely (i) M/s Enterprise Investment Ltd. (ii) M/s Endeavour investment Ltd, (iii) M/s United Breweries Ltd, (iv) M/s Vittal Investment Ltd**.** Airedale Investment and Trading Pvt. Ltd had also purchased 75,000 Fully Convertible Debentures from Vittal Investment Ltd, which were converted into 3,75,000 equity shares on 11.8.1995. Consequently the aggregate shareholding by the six companies in the Target Company increased from 26% to 27.21% with effect from 11.8.1995. It was sought to be contended that, in December 1993, Galan was a company fully owned and or controlled by KRC and that MDC had nothing to do with Galan and that a mistake had been made in letters addressed by KRC and MDC to SEBI and in the affidavit filed in the said High Court proceedings wherein it was wrongly stated that at the relevant time, KRC and his wife and daughters held 80% of the share capital of Galan and 20% of the share capital was held by MDC and his wife, which in fact it is not. Apart from the ipse dixit of counsel, no documentary or other proof was provided or produced either before SEBI or before the Tribunal to controvert the statements made on oath before the Bombay High Court and in the letter and in Affidavit filed by MDC in the said High Court proceedings as recorded in the order of the Bombay D.B. Judgement. Assuming without admitting that in December 1993, KRC owned and controlled Galan, MDC and Shri Ram Raheja alongwith KRC were nevertheless directors of the

record, it appears that with a view to see that the said purchases do not attract the requirements of the said clauses 40A and 40B of the Listing Agreement, a scheme was devised whereby purchases were made by six companies which were controlled and/or owned by KRC and which were subsidiaries and/or owned and/or controlled by Galan which was owned and controlled by KRC/MDC. Care was taken to see that shares purchased by each of the said 6 companies was below the triggering limit of 5%.

Regarding purchase of 10.91% shares by IMFA it was submitted that between 22.10.1994 and 25.11.1995, IMFA purchased through the open market 10.91% shares of the Target company. At that time, IMFA was a company owned and controlled by Shri Ram Raheja. Even though shares were purchased over a period of time all the said shares were lodged for registration on the same day i.e.7.12.1995 as recorded in the minutes of the Board Meeting of the Target Company held on 16.12.1995. In the Board meeting held on 16.12.1995, the transfer of said shares was kept pending as the quantity of shares lodged for transfer was voluminous. Later on in the Board meeting held on 3.1.1996 the said shares were not registered in view of the fact that the Board of Directors of the Target Company felt that the same were purchased in breach of SEBI Regulations and Listing Agreement, besides regulatory provisions of other laws. However thereafter the Board decided to register the said shares in the name of IMFA. IMFA by its letter dated 7.12.95 had also sought clarifications from SEBI as to whether its purchases were in violation of SEBI Regulations. On 21.5.1996, SEBI had intimated IMFA that IMFA had breached the Regulations and had called upon them to comply with the said Regulations. There were internal deliberations between IMFA and the

assuming without admitting that IMFA was required to make any public offer to acquire 20% of the shares of the Target Company looking to the share holding of the Target Company, it would not be possible to acquire the said percentage and even if acquisition was made, the same would result in the public shareholding of the Target Company falling below the requisite minimum resulting in de-listing of the Target Company. On or about 22.11.1996, KRC sold 30% shares held by him in Galan to MDC'S wife as a result of which KRC through his wife and daughter held 50% shares in Galan whereas MDC and his wife held 50% of shares in Galan. Directors of Galan inter alia, were KRC, MDC and Shri Ram Raheja. In spite of the fact that KRC through his wife and daughter held 505 share in Galan and continued to be a Director of Galan, KRC and MDC both claim that Galan after 22.11.1996 became a company owned and controlled by MDC. This is only an argument of convenience as it may be noted that the funds required for purchase of the 10.91% shares of HL by IMFA were provided by companies/firms owned and controlled by KRC and MDC by way of interest free loans. The said loans were alleged to have been advanced against security of Debentures which in fact were never issued. The said loans were advanced without specifying any period of repayment. The said loans alleged to have been advanced to IMFA were based on the evaluation of the capacity of the Directors to repay the loan and not on the basis of the share capital and/or net worth of the said companies, that the share capital of IMFA in March 1995 was only Rs.4,00,200/-, that on 27.7.1996 since the company was unable to repay the said loan, which were advanced as aforesaid, MDC took over the entire share capital of IMFA through Seven Star Investment Trading Pvt. Ltd and thereby obtained control of 10.91% shareholding of the Target Company, that 99.95% of the shares of IMFA

wife and as such appears to be a nominee or acting in concert with KRC. The shares were purchased out of funds provided by KRC and MDC through companies under their control. Since the loans advanced could not be repaid, Shri Ram Raheja sold his entire share holding in IMFA to MDC and MDC therefore obtained control to the said 10.91% shares of the Target Company purchased by IMFA. It is therefore clear that KRC and MDC were acting in concert with each other and it devised the aforesaid Scheme for purchase of shares of the Target Company.

With reference to purchase of 4.97% shares of the Target Company by Mahameru it was submitted that between 14.11.1995 and 28.10.1996 Mahameru purchased through the open market 4,73,100 shares of the Target Company. Funds for the aforesaid purchase were made available by MDC from his proprietary firm of M/s. Royal Wines. The said loans were supposed to be secured by issue of zero rated Fully Convertible Debentures. The said debentures were in fact never issued. The Appellants had claimed that the said loans were advanced on the evaluation of the capacity of the directors to repay the said loan and not on the basis of share capital or net worth of Mahameru. Promissory notes were also executed to secure the said loans. Though shares of the Target Company were purchased over a period of time they were lodged for registration at one time on 10.9.1996 and were registered on 26.9.1996. Mahameru had a share capital of Rs.200/- only. The Appellants had claimed that since Mahameru could not repay the loans taken for purchase of the said shares, Mahameru sold its entire share capital of Rs.200/- to MDC through his investment company Seven Star Investment & Trading Company on 13.2.1997 and after Mahameru was taken over by MDC, the said Promissory notes were returned duly cancelled. From the aforesaid facts, it is clear that purchase

effecting substantial purchase of shares for ultimate take over of the Target Company.

On the purchase of 3.83% by Shirish the Respondent has submitted that Shirish was incorporated only on 19.8.1996 with a share capital of Rs.200/- only, which was held by Shri S.J. Chhabria and his wife. Shri S.J.Chabria is a cousin of KRC and nephew of MDC. Shri S.J.Chabria was also director of several companies owned and controlled by KRC and MDC. Between 17.8.1996 and 13.2.1997**,** Shirish purchased through the open market 3,64,750 shares of the Target Company. The said shares were purchased out of the interest free loans made available to Shirish by a company owned and controlled by MDC. According to the Appellants the said loans were advanced on the evaluation of the capacity of the directors to repay the said loans and not on the basis of share capital or net worth of Shirish. Promissory Notes were also executed to secure the said loans. Though the Appellant claimed that the said loans were secured by zero rated unsecured Fully Convertible Debentures, these Debentures were never issued. On the ground that Shirish was unable to repay the said loan, MDC took over through his investment company Seven Star Trading Company the entire share capital of Shirish and thereupon got control of 3.83% shares of the Target Company owned by Shirish. After the said takeover, the said Promissory Notes were returned duly cancelled. From the aforesaid facts, it is clear that purchase of shares through Shirish through loans advanced by firm owned by MDC and subsequent take over of Shirish by MDC through his investment company Seven Star Trading Company was only a device under which the said shares were in fact purchased by MDC acting in concert with KRC pursuant to the common objective of effecting substantial purchase of shares of

companies had invested mainly in sizable amount in the Target Company's shares with the aid of the funds provided by KRC/MDC through their concerns and companies. The alleged FCDs were never issued and even the promissory notes were cancelled and returned after the takeover of IMFA, Mahameru and Shirish.

On Creeping Acquisitions the Respondent has submitted that certain further acquisitions of shares of the Target Company were made by KRC and MDC in concert with each other through their investment companies under the guise that these were Creeping Acquisitions permitted under the provisions of the Companies Act and SEBI Regulations and was therefore valid and unimpeachable and that no order could be passed by SEBI calling for dis-investment of those shares. Under regulation 11(1) of the 1997 Regulations (as applicable prior to 28.10.1998) an acquirer who together with persons acting in concert with him, has acquired, in accordance with the provisions of law,10% or more but less then 51% of the shares or voting rights in a company could acquire, through Creeping Acquisition, upto 2% of the voting rights in any period of 12 months. Since the entire purchase of KRC and MDC i.e. initial 27.21% by the six companies owned and controlled by KRC/MDC and 10.91% by IMFA and 4.97% by Mahameru and 3.83% by Shirish were all in violation of clauses 40A and 40B of the Listing Agreements and 1994 Regulations and 1997 Regulations, respectively, the creeping acquisitions were also invalid.

From the aforesaid facts it is clear that KRC acting in concert with MDC and other relatives i.e. Shri Ram Raheja and Shri S. J. Chabria were all acting in concert with each other for the purpose of substantial acquisition of shares of the Target

Target Company including 27.21% shares initially purchased through negotiated deal of KRC from Shri Mallya. The entire attempt has been to separate KRC and MDC and to argue that the purchase of KRC were prior to 1994 Regulations and therefore 27.21% shares were valid and legal and that no order of disinvestment could be passed in respect thereof and that purchase of MDC were after 1994 Regulations and as such the same were separate and distinct and had nothing to do with each other and that therefore only purchases by MDC over 10% could be ordered to be disinvested if at all and not all the shares purchased by MDC i.e.19.71%. However from the facts stated hereinabove it is clear that all the purchases made by KRC and MDC were part of a common design and object of effecting an ultimate take over of the Target Company

Apart from the fact that the aforesaid facts relating to the purchase of shares of the Target Company have been admitted and or in any event are not disputed. The facts and circumstances available on record clearly show that MDC and KRC had been acting in concert in respect of the impugned acquisitions. It is submitted that proof of acting in concert can be inferred from surrounding circumstances and also be proved by circumstantial evidence. In Moti Chand Vs. Ikram Ullah **(**AIR 1916 P C 59) the Privy Council held that policy of law is not to be defeated by device and arrangement or agreement and all such device and agreements which are in contravention of policy of law are illegal. In Commissioner Vs. E.C. Commercial Co **(**AIR 1967 S.C. 768**),** the Hon'ble Supreme Court has inter-alia held that it is sufficient after having regard to the relation, conduct and common intention to infer that persons must be acting together. Evidence of actual concerted acting is normally difficult to obtain and is not insisted upon. In M/s McDowell & Co. V/s

transaction is a device to avoid the provisions contained in the Statute and whether the transaction is such that the judicial process may accord its approval to it. The Hon'ble Court also held that colourable devices cannot form part of avoidance of the provisions of a statute.

On the repeal saving/regulation 47 of 1997 Regulations the Respondent made the following submissions:

Regulation 47(2) provides that notwithstanding such repeal anything done or any action taken or purported to have been done or taken including approval or letter of offer, exemption granted, fees collected any adjudication, enquiry or investigation commenced or show cause notice issued under the 1994 Regulations shall be deemed to have been done or taken under the corresponding provisions of the 1997 Regulations.

The word "anything done" would include "anything omitted to be done" under the regulations. Under the provisions of 1994 Regulations, once a person crossed the threshold limit of 10%, public offer is required to be made as per the provisions of the said Regulations. It is an admitted position that IMFA had purchased 10.91% shares of the Target Company and had therefore breached the threshold limit of 10% and was required under Regulation 10 of the 1994 Regulations to make a public offer. IMFA had omitted to make the said public offer in accordance with the said Regulations and therefore under the provisions of Regulation 47 SEBI was entitled to proceed against IMFA and the persons in control of IMFA i.e. MDC and KRC who were acting in concert with each other for making substantial acquisitions of shares of the Target Company with a view to ultimately

2504) the Hon'ble Supreme court inter alia held that non compliance with the provisions of the statute by omitting to do what the Act enjoins will be anything done or ordered to be done under the Act.

Without prejudice to the aforesaid, the word "Enquiry" under Regulation 47 does not necessarily mean formal enquiry commencing with a Show Cause Notice and enquiry, as held by the Hon'ble Bombay High Court (D B) in Shirish would include enquiries made with any person in relation to information received from any person or source relating to violation or breach of clauses 40A and 40B of the Listing Agreement and 1994 Regulation and 1997 Regulations. The Hon'ble High Court has also inter alia, held that there is no merit in the submission that in view of the repeal of 1994 Regulations, the present proceedings do not lie. In the circumstances SEBI is entitled to carry on with the enquiry commenced under the 1994 Regulation and complete the same and pass an order under the 1997 Regulation.

On the contention that SEBI could not have exercised powers under Regulation 44 of the 1997 Regulations without complying with the provisions of Regulations 33 to 37 of the 1994 Regulations, the Respondent submitted that since the facts relating to acquisition were not disputed either by KRC or MDC the question of SEBI initiating investigation under regulations 33 and 34 and then acting on the basis of any such investigation report under Regulation 35 to 37 does not arise.

The Tribunal has in Rhodia's case held, that exercise of powers under regulation 44 are not relatable or confined to evidence of any investigation under provisions of Regulation 33 to 37 of 1997 Regulations. SEBI is empowered to

The contentions of the Learned Counsel of Appellants that the Appellants' case was covered under regulation 42(2) of the 1997 Regulations are not correct. The provisions of 42(2) apply in case of investigations under regulation 38 of the 1997 Regulations. In the instant case the action has been initiated and taken under sections 11 read with 11B of the SEBI Act and Regulations 39 of the 1994 regulations read with Regulation 44 and 45(6) read with Regulation 47 of the 1997 Regulations.

On SEBI's power to review its order it was submitted that SEBI not having passed any order on or about Decemeber 97/ January 98 no question of review arises. According to the Appellants, IMFA, after 10.91% shares of the Target Companay were transferred to its name, by a letter dated 7.12.95, sought clarification from SEBI as to whether they were required to follow 1994 Regulations. SEBI had informed IMFA vide letter dated 21.5.1996 that 1994 Regulations apply to the purchase of 10.91% share of the Target Company by IMFA and that IMFA was required to follow 1994 Regulations. After internal deliberations between IMFA and the Target Company, IMFA by its letter dated 19.8.1996 intimated to SEBI that it was advised that 1994 Regulations do not apply to the purchase of 10.91 shares purchased by IMFA and that in any event assuming without admitting that the 1994 Regulations do apply, assuming that pursuant to open offer made, IMFA was able to purchase 20% of the outstanding shares of the Target Company, it would result in de-listing of said company. On or about 31.12.1997 KRC on behalf of MDC and IMFA met the Chairman of SEBI to discuss the said issue. It has been claimed by the Appellants that at the said meeting the Chairman had passed an order directing IMFA to make a public offer. They have also claimed that the Chairman had

with appointment of a merchant banker who will contact SEBI. Nothing further however appears to have been done pursuant to the said letter. MDC by his letter dated 16.3.1998 recorded the meeting held with the Chairman on 31.12.1997 and stated that he had taken necessary steps to go ahead with the public offer including selection of merchant banker and was only awaiting confirmatory letter from SEBI.. If as alleged by KRC and MDC that decision had been taken by SEBI on 31st December 1997 and noted in the files on 21.1.1998, and since the said decision had been communicated by KRC to MDC who was present at the said meeting there was no need to seek any confirmation from SEBI. This itself clearly shows that at the relevant time, neither KRC nor MDC considered the discussions held with Chairman on 31.12.1997 by KRC on behalf of MDC. In the meantime, SEBI by its letter dated 24.3.1998 had called upon MDC to furnish various details as set out therein. MDC by its letter dated 2.4.1998 referred to its earlier letter dated 20.1.1998 and 16.3.1998 and complained that inspite of having agreed to make an open offer, he had received letter dated 24.3.1998 from SEBI asking him to furnish various details as set out therein. In the said letter he had further stated that he hoped that he would be asked to make open offer. From the said letter it is clear that MDC as late as on 2.4.1998 did not believe that any order has been passed by the Chairman at the meeting held on 31.12.1997 or that the file noting made by the Chairman on 21.1.1998 was an order passed by SEBI. The stand now being taken by KRC and MDC to the effect that there was an order passed by SEBI's Chairman on 31.12.1997 and the same was recorded on the file on 21.1.1998 and which order having been communicated to MDC could not be reviewed by SEBI by issuing the said Show Cause Notice. From the aforesaid facts it is clear that at the meeting held on 31.12.1997, what was

Target Company effected by IMFA and that IMFA was advised to comply with the provisions of the said Regulations immediately failing which appropriate action would be initiated against IMFA. Strangely, KRC and MDC have not contended that the said letter is an order passed by SEBI, however when the same was stated in the said meeting by the Chairman, on 31.12.1997, the Appellants are now attempting to allege that the same is an order. In spite of the fact that MDC had without prejudice agreed to make public offer, no such public offer was ever made by him. If the order had been passed by SEBI he was required to comply with the same and not ask for SEBI's confirmation as to whether he was required to make public offer or state that he hoped SEBI would direct him to make a public offer. His letters asking for confirmation from SEBI itself controvert KRC and MDC stand that an order was passed by SEBI on 31.12.1997 and recorded on 21.1.1998. In the circumstances, on these facts itself, the contention of KRC and MDC that order was passed by Chairman on 31.12.1997 and the recording on the file on 21.1.1998 is an order is incorrect.

The Appellants had been under obligation to make the public offer and are not supposed to wait for any direction. At every stage the Appellants had been offering to make public announcement but had not been doing so. Vide letter 23.12.98 enclosing an opinion dated 22.11.98 it was suggested by and on behalf of the Appellants that they could withdraw their unilateral offer to make public announcement. Vide para 172 of the Single Judge order in Sreenivasulu Reddy (supra) it is found that "what is further interesting to note is that after the decision of SEBI's Appellate Tribunal in case of Fascinating Leasing Company (decided on July16, 1998), MDC withdrew his offer to make public announcement, which is

notation was not an order of SEBI. In any event, without prejudice to the aforesaid, "notation" on the file is not an order. In State of Bihar V/s Kripula Shankar **(** 1987 (3) S.C.C 34) the Hon'ble Supreme Court inter alia, held that notings in a note file, not only of officers but even of a minister will not constitute an order to affect others unless it is done in accordance with Article 166(1) & (2) and communicated to the persons concerned. In Sultan Singh V/s State of Haryana (1996 (2) S.C C 66) the Hon'ble Supreme Court has inter alia held that an administrative order is not a quasi Judicial order and is based on subjective satisfaction of the Government and there is no lis involved. Thereby there is no need to issue any notice before making a reference or refusing to make a reference.

The Respondent submitted that the directions issued under Regulation 39 of 1994 Regulation and 44 of the 1997 Regulations are remedial and not penal.

It has been held by Hon'ble Bombay High Court in Shirish Finance that Regulations contemplated that purchase of shares beyond the prescribed limit requires a party purchasing shares beyond the prescribed limit to do various things as set out in the said Regulation. Failure to comply with the said Regulation renders the purchase of shares beyond the stipulated limit illegal and void. In view thereof it is impractical that shares purchased in breach of the said Regulations could be sold back to the original sellers and the consideration paid to them could be received back from the original sellers of the said shares. Direction to sell shares purchased in breach of Regulation have been passed by SEBI. The said directions are not penal in nature but merely remedial to remedy a situation created by purchase of shares beyond specified or prescribed limit (Delhi Development

regulations, that the said order has also been appealed in appeal No.15/2002, that the impugned orders in the appeals No. 13/14 and 15/2002 be upheld in view of the reply, oral and written submissions of the Respondent. The contention that SEBI has been established to protect the interests of investors only, is not maintainable, that the SEBI has been established with object inter alia to develop and regulate the securities market also. The list submitted by the Counsel for the Appellant wherein certain SEBI orders directing making of public announcement are mentioned contains almost all cases where exemption from applicability of Regulations 10,11 and 12 of the 1997 Regulations (i.e. exemption from making open offer) were applied for and applications for exemption having been rejected the Applicants had been directed to comply with the provisions of the Regulations and make the open offer. The other cases relate to cases where there had been a change in control and non compliance with the Regulations i.e. obligations to make an open offer or the cases which involved restructuring of the companies at international level. In these cases the facts are different. The Appellants' case is not that of change in control or international restructuring or non applicability of exemption provisions. Further, the orders in all the cases are based on the facts and circumstances of individual cases and directions suitable to the facts of each case are passed. In certain cases, of violations of 1997 Regulations, the Respondent has ruled that the open offer was not in the public interest e.g. Bharat Gears Ltd. and Shakti Sugars Ltd. In these cases none of the rights of the shareholders was prejudiced in any manner and it was felt that the interest of the shareholders would not be served by directing the acquirers to make public offer.

Countering the Appellants' submission that the impugned orders are 'penal'

discouraging certain behaviour. By the impugned order the directions have been issued under the authority of statute, to prevent or discourage the illegal aquisitions. If the directions were issued under the facts of this case, to make public offer, it would amount to facilitate further consolidation of illegal acquisitions. Therefore, the directions/order issued/ passed in this case are under authority of law, reasonable, remedial and in the interest of investors and towards the development of the securities market.

Findings

The impugned order is based on the perception of the Respondent that the acquisition of shares of the Target Company by the Appellants/entities owned and controlled by them is in violation of the terms of Clauses 40A and 40B of the Listing Agreement between the Target Company and stock exchange and in contravention of the provisions of regulation 10 of the 1994 Regulations. Consequently vide the impugned order the Appellants have been directed to disinvest the shares so acquired, at the price as specified by the Respondent. According to SEBI's direction "the offer price shall be at the face value of the shares as on the date of the order or the lowest price at which these shares were acquired, whichever is lower." The rationale of the said price fixation has not been explained in the order. The purchase price of the shares was reportedly much higher than the face value of the shares. The face value of each share is ten rupees. The shares, therefore, are required to be disinvested @ Rs.10/- per share. It is also noticed that the Appellants are required to disinvest their holding in the Target Companay's capital in such quantity so that their

Rs.9,52,23,230/- divided into 95,22,323 equity shares of Rs.10/- each. The impugned order therefore requires the Appellants to unload in one go about 37.48 per cent (about 35.69 lakh shares)of the Target Company's shares (that is after retaining maximum upto 10% of the shares acquired). Therefore, about 35.69 lakh shares of the Target Company at the rate of ten rupees per share are required to be sold in the open market in one go. The Respondent has also directed to initiate adjudication proceedings against the Appellants under section 15A of the SEBI Act for violation of regulation 6 and 8 of the 1997 Regulations and also under section 15H for violation of regulation 10 of the 1994 Regulations.

The quantum of shares acquired, and the period in which the acquisitions were made are not under dispute. These acquisitions can be safely grouped broadly under three heads, with reference to the date of acquisitions - i.e. (i) prior to notification of the 1994 Regulations (ii) during the currency of the 1994 Regulations and (iii) after the repeal of the 1994 Regulations – i.e. during the currency of the 1997 Regulations.

Pre 1994 Regulation acquisitions:

Admittedly, on 14.12.1993 six subsidiaries of Galan purchased 26% shares (22,15,800 shares) of the Target Company through negotiations from the entities stated to be belonging to Shri Vijay Mallya, who is stated to be the principal promoter of the Target Company. It is noticed that none of these six companies individually purchased shares accounting 5% or more of the Target Company's paid up capital. It is noted that these 6 companies are subsidiaries of Galan. These

made by one or two companies also. But it was not done, for obvious reasons. If the purchase of such a large quantity of shares had been made by one or two companies, the quantum so purchased would have crossed the cap of 5% prescribed in the Listing Agreement. Therefore, it can be safely inferred that the 6 companies were put in position so as to ensure that acquisition of each one of them would be below the 5% bench mark provided in clause 40A of the Listing Agreement. It appears that it was a precautionary measure.

On 14.12.1993, Airedale, one of the six purchasers of the shares referred to earlier also purchased 75,000 fully convertible debentures from another company stated to be under the control of Shri Vijay Mallya. These debentures were converted into 3,75,000 shares on 11.8.1995. Thus the total acquisition of shares of the Target Company, by Galan subsidiaries prior to the notification of the 1994 Regulations touched 27.21% (25,90,800 shares) of the paid up capital of the Target Company.

Acquisition during the currency of the 1994 Regulations:

The 1994 Regulations was in force from 7.11.1994 to 20.2.1997.

(i) IMFA purchased 10,39,341 shares representing 10.91% of the paid up capital of the Target Company during the period 27.10.1994 to 22.11.1995.

(ii) Mahameru purchased 4,73,100 shares representing 4.97% of the paid up capital of the Target Company during the period 14.11.1995 to 28.10.1996.

(iii) Shirish purchased 3,64,750 shares representing 3.83% of the paid up capital of the Target Companay during the period 27.8.1996 to 13.2.1997.

Acquisition after the repeal of the 1994 Regulations and during the currency

(ii) Beethoven Traders P. Ltd. purchased 1,25,000 shares representing 1.31% of the paid up capital of the Target Company betewen 10.9.98 and 19.9.98.

(iii) Darrel Traders P.Ltd. purchased 25,800 shares representing 0.27% of the paid up capital of the Target Company on 16.12.1998.

Thus it is noticed that 27.21% shares were acquired prior to the notification of the 1994 Regulations, 19.71% shares during the currency of the 1994 Regulations and 2.14% shares during the currency of the 1997 Regulations.

As stated earlier acquistion of subject shares made during the currency of the 1994 Regulations and the 1997 Regulations was challenged in suit No.3910 of 1997 in the Hon'ble Bombay High Court by some shareholders of the Target Company. It is noted that acquisition of 27.21% shares made prior to the coming into force of the 1994 Regulations was not the subject matter of the said suit.

Having noticed the brief background of the case, it is considered necessary to refer to the regulatory provisions relevant to the case, before proceeding further.

Clauses 40A and 40B stated to have been violated by the Appellants are as follows:

40A. Substantial acquisition of securities. -- The company agrees that the following shall also be the conditions for continued listing:

(a) When any person acquires or agrees to acquire any securities in the company and when the total nominal value of such securities so acquired or agreed to be acquired together with the total nominal value of the

for acquisition, by the company, by the authorised intermediary and also by the acquirer.

(b) When any person holds securities which in the aggregate carry less than 10% of the voting rights in the company, he shall not acquire any securities which, when aggregated with the securities already held by him, shall carry 10% or more of the voting rights unless he notifies the stock exchange and fulfils the conditions specified in clause 40B.

Provided that nothing in the above sub-clause shall apply to a person who on an application to the SEBI is specifically granted exemption.

(c) The company shall notify the stock exchange within seven days about any information which has an effect on its assets and liabilities or financial position or on the general course of its business leading to substantial movements in the price of the securities and in particular information about transactions mentioned above.

(d) The above conditions shall not be applicable to an acquisition by a person who has announced his firm intention to make an offer to the company and also notified to the stock exchange."

"40B. Take-over offer –(1) The company also agrees that it is a condition for continuous listing that whenver a take-over offer is made to or by it whether voluntarily or compulsorily, the following requirements shall be fulfilled.

(2) A public announcement of a take-over offer shall be made both by the offeror company and the offeree company when –

(a) any person in his own name or in the name of any other person acquires, whether by a series of transactions over a period of time or otherwise,

(b) secure the control of management of a company, by acquiring or agreeing to acquire, irrespective of the percentage of the voting capital, the securities of the directors or other members who, by virtue of their shareholdings together with the shareholding of their relatives, nominees, family interest and group, control or manage the company, or

(3) If the offer is made by a peprson other than the ultimate offeror, the identity of such other person shall be disclosed at the outset in the public announcement as also in the notification to the stock exchange.

(4) The offer shall be placed, in the first instance, before the board of directors of the offeree company and shall contain the following particulars, namely:--

(a) detailed term of offer,

(b) identity of the offeror,

(c) details of offeror's existing holding in the offeree company,

(d) all conditions to which the offer is subject, and

(e) confirmation by the auditors of the offeror that resources available to the offeror are sufficient to satisfy full acceptance of the offer.

(5) All the above information shall be made equally available to all the shareholders (both of the offeror company and the offeree company) at the same time and in the same manner, along with copies of all documents and announcements bearing in offer which shall simultaneously be lodged with SEBI.

(6) (a) The offer document (addressed by the offeror company to the offeree company) shall contain the following information –

(i) financial information of the offeror company,

(iv) long-term commercial justification of the offeror company for the proposed offer, and

(v) such other details as may be precribed by SEBI.

(b) The offer must state the extent to which its directors have an interest in the bid.

(7) Dealings in any securities by the offeror company or the offeree company and by any of their associates for and on behalf of discretionary investment clients, during an offer period, shall be notified to the stock exchange by the respective company.

(8) The offeror company shall, either before or immediately after making the offer to the offeree company, make an offer to the remaining members of the offeree company to purchase, their securities at a price not lower than either the average of highest weekly prices during the immediately precedding 26 weeks from the public announcement of the take-over offer or the negotiated price, whichever is higher. The price will be paid by way of cash only.

(9) The offer to the remaining security holders of the transferee company shall be to acquire from them an aggregate minimum of 20 per cent of the total securities of the company. Such offer, however, shall not result in the public shareholding being reduced to less than 20 per cent of the voting capital of the company, subject to (10) below.

(10) From each of the security holders accepting such offer, the acquirer shall acquire his full holding upto 100 securities of the face value of Rs.10 each or upto 10 securities if the face value is Rs.100.

(11) When the diriectors of an offeree companay sell securities to a purchaser

(a) issue any authorised but unissued securities,

(b) issue any securities carrying rights of conversion into or subscription for securities, or

(c) sell, dispose of or acquire or agree to sell, dispose of or acquire, assets of a substantial amount.

(13) Notwithstanding anything contained in clause 40A and clause 40B above, nothing shall apply to acquisition of seucirites in the company by –

(1) Unit Trust of India

(2) SBI Capital Market Ltd.

(3) Canbank Financial Services Ltd.,

(4) LIC mutual funds

(5) Such other agencies or mutual funds as may be specified by SEBI from time to time.

(6) In pursuance to orders of amalgmations, mergers and acquistions passed by the court under sections 391 and 394 of the Companies Act.

(7) In pursuance to orders passed by the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985.

(14) The provisions contained in this clause will be without prejudice to the approval required to be obtained under the Companies Act, the Monopolies and Restrictive Trade Practices Act and the Foreign Exchange (Regulation) Act, 1973."

It was in April, 1984, for the first time certain restrictions were imposed on the transfer of shares involving substantial quantum of shares through the Listing Agreement by inserting therein a new clause number 40. In April 1990 the said

development of, and to regulate, the securities market and for matters connected therewith or incidental thereto." Section 3 of the SEBI Act provides for the establishment of the "Board" by the name of "The Securities and Exchange Board of India" (SEBI) for the purposes of the Act. Section 11 of the Act provides that subject to the provisions of the Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit. In terms of sub section (2) to section 11 SEBI is empowered to take certain measures for the purposes enumerated in the said sub section. One of such measures which SEBI is empowered to take is "regulating substantial acquisition of shares and take over of companies" (vide section 11(2)(h). Section 11B empowers the Board to issue directions. As per the said section :.

" Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary, --

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market ;or

(iii) to secure the proper management of any such intermediary or person,

it may issue such directions, --

(a) to any person or class of persons referred to in section 12, or associated with the securities market, or

(b) to any company in respect of matters specified in section 11A as

Chapter VIA of the SEBI Act provides for penalties and adjudications. SEBI has invoked Section 15A and 15H for the purpose of imposing monetary penalty. The Text of these two sections are as follows:

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

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousand rupees for each such failure

(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 not exceeding five thousand rupees for every day during which such failure continues.

(c) to maintain books of account or records, fails to maintain the same, he shall be liable to a penalty not exceeding ten thousand rupees for every day during which the failure continues."

15H. If any person, who is required under this Act or any rules or regulations made thereunder, fails to, –

(i) disclose the aggregate of his share holding in the body corporate before he acquires any shares of that body corporate; or

(ii) make a public announcement to acquire shares at a minimum price,

he shall be liable to a penalty not exceeding five lakh rupees."

Section 15K provides for establishment of one or more Appellate Tribunals to exercise the jurisdiction, powers and authority conferred on such Tribunals by or

opportunity of being heard, to pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.(emphasis supplied)

Section 24 provides for criminal prosecution for the offences under the Act.

Section 30 vests in SEBI, by notification to make regulations consistent with the Act and the rules made thereunder to carry out the purposes of the Act.

As stated earlier, the Respondent is mandated to protect the interests of investors in securities, and to promote the development of and to regulate the securities market by such measures as it thinks fit. Regulating substantial acquisition of shares and takeover of companies is one of the specific measures SEBI is empowered to take. To accomplish this mission, the Respondent had put in position a set of regulations titled Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 through a notification dated 7.11.1994. Since this Regulation was found wanting in certain aspects, an expert committee under the Chairmanship of Justice P. N. Bhagwati was appointed in November 1995 by SEBI, "to examine the areas of deficiencies in the 1994 Regulations and to suggest amerndments in the Regulations with a view to strenghtening the Regulations and making them more fair, transparent and unambiguous and also protecting the interest of investors and of all parties concerned in the acquisition process". The committee viewed that the Regulations for substantial acquisition of shares and takeovers should "operate principally to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers". The committee also recognised that the process of takeover is complex and is inter-related to the dynamics of the market place and felt that it

Regulations especially in circumstances which are not explicitly covered by the Regulations. “Equality of treatment and opportunity to all the shareholders” and "Protection of interests of shareholders” are two such principles amongst others set out by the committee. According to the committee “in the event of any ambiguity or doubt as to the interpretation of the regulation, the concerned authority shall pay adequate attention to and be guided by any one or more of the aforesaid general principles having a bearing on the matter.”

After taking into consideration the recommendations of the committee the 1997 Regulations was brought in position with effect from 20.2.1997, repealing the then existing 1994 Regulations.

From the scheme of the Regulations and the background of the same it is clear that it is a piece of beneficial legislation directed to protect the interests of shareholders in the context of substantial acquisition of shares and takeovers. It is noted that SEBI, the enforcement authority is also mandated to protect the interests of investors in securities. Therefore, the interpretation of the provisions of the Regulations and scrutiny of SEBI’s action as the enforcement authority of the Regulations, whether it is 1994 Regulations or 1997 Regulations should be by taking into consideration the objective of the Regulation as well as the general principles formulated by the committee. While considering the sustainability of the impugned order one has to follow the aforesaid requirement also.

Certain provisions of the 1994 Regulations considered relevant in the present context are extracted below:

Regulation 2(1)(d)-- "person acting in concert" comprises persons who, pursuant to an agreement or understanding acquires or agrees to acquire shares in a company for a common objective or purpose of substantial acquisition of shares and includes:

(i) a company, its holding company, or subsidiaries or companies under the same management either individually or all 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) and his associates; and

(iv) mutual fund, financial institution, merchant banker, portfolio manager and any investment company in which any person has an interest as director, fund manager, trustee or as a shareholder having not less than 2% of the paid up capital of that company.

Explanation: For the purpose of this clause "associate" means

(A)any relative of that person within the meaning of section 6 of the Companies, 1956 (I of 1956)

(B) the director or his relative whether individually or in aggregate holding more than 2% of the paid up equity capital of such company.

Regulation 2(1)(i) "Shares" means share in the share capital of a company carrying voting rights and includes any securities which would entitle the holder to receive shares with voting rights."

Regulation 9. Acquisition of 10% or more of the shares of any company

rights, unless, the acquirer makes a public announcement to acquire shares at a minimum offer price from the other shareholders of the company in accordance with these regulations, or

(2) Any acquirer who on the date of commencement of these regulations, holds shares in a company which carry more than ten per cent of the voting rights in the capital of the company, shall not acquire any further shares through negotiations unless, the acquirer makes a public announcement to acquire shares at a minimum offer price from the other shareholders of the company in accordance with these regulations

(3) Where an acquirer acquires securities which would entitle him more than ten per cent of the voting rights together with voting rights on shares already held by him, then, such person shall make a public announcement referred to in sub-regulation (1) at the time immediately before his entitlement to obtain voting rights on such securities.

Regulation 10. Acquisition of 10% or more of the shares of anay company through open market purchases.—(1) An acquirer, who holds shares carrying ten per cent or less of voting rights in the capital of the company shall not acquire any further shares in the company from the open market which when taken together with his existing shareholdings, would carry more than ten per cent of the voting rights, unless such acquirer makes a public announcement of intention to acquire shares in the open market in accordance with these regulations.

(2)An acquirer who on the date of commencement of these regulations, holds shares which carry more than ten per cent of the voting rights in the capital of

Regulation 33. Board's right to investigate – (1) Where it appears to the Board so to do, it may appoint one or more persons as investigating authority to investigate and undertake inspection of the books of account, other records and documents of any person who may have acquired or sold securities to any person for any of the purposes specified in sub-regulation (2).

(2) The purposes referred to in sub-regulation (1) may be as follows:

(a) to investigate into the complaints received from investors, intermediaries or any other person on any matter having a bearing on the allegations of substantial acquisition of shares and take-overs; and

(b) to investigate suo motu upon its knowledge or information, in the interest of securities business or investors interests, for any breach of the regulations.

Regulation 34 Procedure for investigation - (1) Before undertaking any investigation under regulation 33 the Board shall give a reasonable notice to the person concerned for that purpose.

(2) Notwithstanding anything contained in sub-regulation (1), where the Board is satisfied that in the interest of the investors or in public interest no such notice should be given, it may by an order in writing direct that the investigation be taken up without such notice.

(3) On being empowered by the Board, the investigating authority shall undertake the investigation and the person against whom an investigation is being carried out shall be bound to discharge his obligations as provided under regulation 35.

Regulation 37. Communication of findings, etc – (1) The Board shall after consideration of the investigation report communicate the findings to the person concerned to give him an opportunity of being heard before any action is taken by the Board on the findings of the investigating authority.

(2) On receipt of the explanation, if any, from the person concerned, the Board may call upon the person concerned to take such measures as the Board may deem fit in the interest of the securities market and for due compliance with the provisions of the Act, rules and regulations.

Regulation 39. Directions by the Board. – On receipt of the report under regulation 36, the Board may without prejudice to its right to initiate criminal prosecution under section 24 of the Act give such directions as it deems fit for all or any of the purposes namely:-

(a) directing the person concerned not to further deal in securities

(b) prohibiting the person concerned from disposing of any of the securities acquired in violation of these regulations.

(c) directing the person concerned to sell the shares acquired in violation of the provisions of these regulations;

(d) taking action against the person concerned who is an intermediary holding a certificate of registration under section 12 of the Act

Certain Regulations of the 1997 Regulations are also having a bearing on the issues raised in the appelas. Those regulations are extracted below:

Consolidation of holdings 11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, not less than 10% but not more than 51% of the shares or voting rights in

unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.

(2)No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any held by him or by persons acting in concert with him) entitle such acquirer to exercise more than 51% of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations.

Explanation:- For the purposes of regulation 10 and regulation 11, acquisition shall mean and include-

(a) direct acquisition in a listed company to which the regulations apply;

(b) indirect acquisition by virtue of acquisition of holding companies, whether listed or unlisted, whether in India or abroad.

Regulation 38. Board's right to investigate:

The Board may appoint one or more persons as investigating officer to undertake investigation for any of the following purposes, namely:-

(a) to investigate into the complaints received from the investors, the intermediaries or any other person on any matter having a bearing on the allegations of substantial acquisition of shares and takeovers;

(b) to investigate suo motu upon its own knowledge or information, in

Regulations 39. Notice before investigation:

(1) Before ordering an investigation under regulation 38, the Board shall give not less than 10 days notice to the acquirer, the seller, the target company, the merchant banker, as the case may be.

(2) Notwithstanding anything contained in sub-regulation (1), where the Board is satisfied that in the interest of the investors no such notice should be given, it may, by an order in writing direct that such investigation be taken up without such notice.

(3) During the course of an investigation, the acquirer, the seller, the target company, the merchant banker, against whom the investigation is being carried out shall be bound to discharge his obligation as provided in regulation 40.

Regulation 41. Submission of report to the Board:

The investigating officer shall, as soon as possible, on completion of the investigation submit a report to the Board:

Provided that if directed to do so by the Board, he may submit interim reports.

Regulation 42. Communication of findings:

(1) The Board shall, after consideration of the investigation report referred to in regulation 41, communicate the findings of the investigating officer to the acquirer, the seller, the target company, the merchant banker, as the case may be, and give him an opportunity of being heard.

securities market and for due compliance with the provisions of the Act and the regulations.

Regulation 44. Directions by the Board:

The Board may, in the interest of the securities market, without prejudice to its rights to initiate action including criminal prosecution under section 24 of the Act give such directions as it deems fit including –

(a) directing the person concerned not to further deal in securities;

(b) prohibiting the person concerned from disposing of any of the securities acquired in violation of these regulations;

(c) directing the person concerned to sell the shares acquired in violation of the provisions of these regulations;

(d) taking action against the person concerned.

Regulation 45. Penalties for non-compliance:

(1) Any person violating any provisions of the regulations shall be liable for action in terms of the regulations and the Act.

(2) If the acquirer or any person acting in concert with him, fails to carry out the obligations under the regulations, the entire or part of the sum in the escrow account shall be liable to be forfeited and the acquirer or such a person shall also be liable for action in terms of the regulations and the Act.

(3) The board of directors of the target company failing to carry out the obligations under the regulations shall be liable for action in terms of

cancellation of registration of an intermediary holding a certificate of registration under section 12 of the Act:

Provided that no such certificate of registration shall be suspended or cancelled unless the procedure specified in the regulations applicable to such intermediary is complied with.

(5) For any mis-statement to the shareholders or for concealment of material information required to be disclosed to the shareholders, the acquirers or the directors where the acquirer is a body corporate, the directors of the target company, the merchant banker to the public offer and the merchant banker engaged by the target company for independent advice would be liable for action in terms of the regulations and the Act.

(6) The penalties referred to in sub-regulations (1) to (5) may include:-

(a) criminal prosecution under section 24 of the Act;

(b) monetary penalties under section 15H of the Act;

(c) directions under the provisions of section 11B of the Act.

Regulation 47. Repeal and saving :

(1) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 are hereby repealed.

(2) Notwithstanding such repeal –

(a) anything done or any action taken or purported to have been done or taken including approval of letter of offer,

been done or taken under the corresponding provisions of these regulations;

(b) any application made to the Board under the said regulations and pending before it shall be deemed to have been made under the corresponding provisions of these regulations;

(c) any appeals preferred to the Central Government under the said regulations and pending before it shall be deemed to have been preferred under the corresponding provisions of these regulations.

It is an admitted fact that Galan subsidiaries acquired 26,90,800 equity shares (27.21%) of the paid up capital of the Target Company. Out of the same 22,15,800 (26%) shares were acquired on 14.12.1993 and 3,75,000 shares as a result of coversion of 75,000 debentures. These debentures were also purchased on 14.12.1993, though converted to shares only on 11.8.1997. According to the definition of the expression "shares" provided in the 1994 Regulations "Shares" means "share in the share capital of a company carrying voting rights and includes any securities which would entitle the holder to receive shares with voting rights." (emphasis supplied) The debentures purchased being convertible to equity shares with voting rights, in terms of the said definition, are also to be considered as "shares". These "shares" were also purchased on 14.12.1993, prior to the notification of the 1994 Regulations. It is noticed that Hon'ble Bombay High Court also in its order in the Notice of Motion (Shirish) cited stated earlier has held

According to the Respondent's version, the Appellants through Galan subsidiaries acquired 27.21% shares, of the Target Company that Galan was jointly owned and controlled by KRC and MDC, that the acquisition was so structured with a view to defeat the requirements of clause 40A and 40B of the Listing Agreement. The Respondent has countered the submission of the Appellants that on 14.12.1993 Galan was wholly owned and controlled by KRC only, and MDC had nothing to do with Galan and the version that it was mistakenly stated in the Appellants' letter dated 2.4.98 to SEBI and in their affidaivt before the Hon'ble High Court that KRC, that his wife and daughter held 80% and MDC and his wife held 20% in the capital of Galan. According to the Respondent having so stated the factual position, the Appellants can not be allowed to take a different version now. It was also pointed out that even if it is assumed that in December 1993, KRC owned and controlled Galan, MDC and Shri Ram Raheja both related to KRC, along with KRC were directors of Galan in December 1993 and at all relevant times and thus KRC and MDC were aware that the purchase of shares and debentures made by Galan would trigger the requirement of clauses 40A and 40B of the Listing Agreement.

Countering the Appellants' contention that SEBI has no authority to issue any such direction under the Act or the Regulations to the Appellants to divest the shares acquired prior to the notificiation of the 1994 Regulations, the Respondent had submitted that Section 11 and 11B vest in SEBI the requisite authority and jurisdiction to deal with acquisition of shares made in contravention of the provisions of the 1994 Regulations even if the acquisition was made before the

takeovers, SEBI in exercise of the same could regulate substantial acquisition of shares and takeovers even in the absence of any Regulation in position. Learned Senior Counsel in support of the said submission had cited two decisions of the Hon'ble Supreme Court in U. P. State Electricity Board V City Board, Mussorie (1985) 2 SCC-16)(ii)Surinder Singh V Central Government (1986) 4 SCC 669.

According to the Respondent under section 11(2)(i) of the SEBI Act, KRC and MDC being investors in listed securities of the Target Company are certainly persons associated with the securities market and as such amenable to the measures taken by the Respondent under the SEBI Act and the Regulations.

The Appellants had contested the Respondent's version that Galan at the relevant time was jointly owned and controlled by KRC and MDC. According to them Galan was exclusively owned by KRC and though this fact was placed before SEBI, it was expected to deal with the same, and not to go by the wrong information inadvertently furnished earlier. Since the Hon'ble High Court had directed SEBI to examine the facts afresh, SEBI was duty bound to verify the factual position, and further that since SEBI had charged the Appellants, it was for SEBI to prove its case on being dispsuted by the Appellants. According to the Appellants on 14.12.1993 Galan was wholly owned and controlled by KRC and that by SEBI's own admission the funds for the acquisition of shares were also made available by KRC, and therefore, it was not tenable to hold that 27.21% shares were acquired by KRC and MDC by concerted action. According to the Appellants Listing Agreement was between the Target Company and stock exchange and neither KRC, nor Galan and its subsidiaries was party to the Listing Agreement of which violation is complained

put in SCRA on 25.1.1995, that as per the SCRA even today the Listing Agreement is not legally binding on any other person than the listed company, that clauses 40A and 40B would apply to an acquirer only , if such acquirer itself is also a listed company. According to them there was no law prescribing any penalty of the nature inflicted by SEBI vide the impugned order, that SEBI cannot purport to invoke the general provisions of section 11 and 11B of the SEBI Act since any breach of Listing Agreement could be actionable only under SCRA and not under SEBI Act, that there is no quarrel on the proposition that when Regulations are not framed, the Act is applicable, that the said proposition relying on the decision in 1985 (2) SCC 16 and 1986 (4) SCC is not relevant as the Listing Agreement being a subject matter of the SCRA and SEBI having been a delegatee to exercise the powers of the Central Government under the said Act cannot resort to directions or penalties for the alleged violation of the Agreement.

It is an admitted fact that Galan subsidiaries acquired 27.21% shares of the Target Company before the notification of the 1994 Regulations. Though the Appellants claimed that Galan was wholly owned and controlled by KRC even if one goes by the shareholding pattern of the said company as per the Respondent's version it is difficult to come to a conclusion that Galan was owned and controlled by KRC and MDC, as KRC was reportedly holding 80% of the voting capital of the company. Therefore, in the absence of any other evidence it is difficult to accept that MDC was also in control of Galan with just 20% holding in the said company's capital. 80% voting capital in a company by a person, in the normal course is sufficient o provide absolute control over the company to that person, in the absence

it relates to the said acquisition of 27.21% go into the details of the ownership and management of those subsidiaries. The fact is that they are subsidiaries of Galan. Galan was controlled by KRC. Whether MDC owned 20% capital of Galan on 14.12.1993 or subsequent to the said date is of not much relevance to decide the limited question referred to above. I do not also consider it necessary to find out as to whether the said acquisition was in violation of the requirements of clause 40A and 40B in the light of my views on SEBI's powers in this regard stated in the following paragraphs.

Listing means admission of the securities of a company to trading privileges on a stock exchange. The principal objectives of listing are to provide ready marketability and impart liquidity and free negotiability to securities, ensure proper supervision and control of dealings therein and protect the interests of shareholders and of the general investing public. Stock exchanges are the "market places" providing trading facilities to securities. It is in the said context the Listing Agreement with stock exchange becomes relevant. Listing Agreement is to enable the companies to avail of the facility for trading securities provided by stock exchanges. Listing Agreement as such appears to be one sided. It is not signed by the concerned stock exchange. Only the company seeking listing signs the agreement. Strictly speaking it is an undertaking by the company to comply with certain conditions so as to continue the facility for trading its securities provided by stock exchange. In this context it is to be noted that SCRA regulates trading in securities in the stock exchanges. According to the preamble of the said Act, it is an act "to prevent undesirable transactions in securities by regulating the business of

SCRA did not contain any provision in relation to Listing Agreement. By the Securities Laws (Amendment) Ordinance 1995, Section 21 was amended providing that "Where securities are listed on the application of any person in any recognised stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange". The object of the said provision as stated in the "Statement of objects and Reasons" is "to make violation of the listing agreement an offence". In terms of section 23(2) of SCRA any person who fails to comply with the provisions of section 21 is liable to prosecution and shall be punishable with fine upto one thousand rupees. It is thus clear that the obligation to comply with the conditions of the listing agreement is fasten on the person based on whose application securities are granted listing. Such person referred to in section 21 is the applicant and the applicant is the company whose shares are sought to be listed. Thus it is clear that the scope and reach of the provisions of the SCRA, in the case of the failure to comply with the conditions of the Listing Agreement, is restricted to the company, whose shares are listed.

From the text of clauses 40A and 40B extracted in the earlier part of this order it could be seen that the conditions in the said clauses are accepted by the company "for continued listing" of the security, thereby implying that if the conditions are not complied with it will not be entitled to have the benefit of continued trading of its securities on the concerned stock exchange. That means its securities would be delisted. Shri Kapadia, learned Counsel appearing for the Appellants had submitted that reference to "any person" in clause 40B (2)(a) includes also entities other than the listed companies. I have very carefully perused

in the said clauses cannot be any entity other than the company. Listing Agreement is executed by those companies whose shares are listed on stock exchanges. In the event of violation of the terms and conditions of the Listing Agreement, by a company, the consequence would be that of deslisting the company, by the concerned stock exchange. The provisions of Listing Agreement are binding on the company. It is enforceable against the company. Listing Agreement as it is drafted, can not fasten any binding obligation on a person who is not privy to that agreement. Even if any obligation is put in the agreement on a third party, he cannot be forced to fulfil those obligations and there is no consequences provided to meet such default. Shri Kapadia's proposition that not only listed company but other persons acquiring shares are also required to make a public offer., is untenable as no course of action lies against such a person who fails to fulfil the obligation. Because "any person" other than listed companies is out of reach for the purpose of enforcing the requirement of the clauses. It is in the said context the scope and reach of clauses 40A and 40B need be interpreted. On a purposive interpretation of the said clauses, it is difficult to subscribe to the Respondent's version that the clauses are applicable not only to listed companies but also to other persons. There is no scope for providing such an obligation in clause B, without a corresponding provision to enforce the same. As I stated earlier, for the failure to fulfil the obligation to make a public offer, consequences have been provided that would visit only listed companies. It can not be that for failure to fulfil the obligation by listed companies they can be punished but for such failure others can not be punished. It is also noted that it was for continued listing the companay had agreed to the conditions put in the clauses A & B. Therefore, in my view, obligation to comply with the requirements

responsible and its responsibility can not be transferred to the Appellants. The argument that the said clauses recognise the role of SEBI and as such it can take action for violation of the condition stipulated therein is difficult to accept. A private contract between two parties cannot bestow statutory powers on SEBI. SEBI's power flows from the relevant statutes and not at the pleasure of companies listed on the stock exchanges. In my view for the reasons stated, Galan companies, cannot be subjected to any action under the SEBI Act even if it is found that the requirements of 40A and 40B of the Listing Agreement were not complied with in respect of the acquqisition of 27.21% shares of the Target Company. I fully agree with Shri Kapil Sibal's submission that for non compliance if any, of the provisions of the SCRA, SEBI cannot invoke the provisions of section 11(h)(2) or section 11B of the Act and direct disinvestment of shares acquired by Galan companies. The Respondent's reliance on the decision in U.P. State Electricity Board (supra) and Surinder Singh(supra)in support of the proposition that when Regulations are not framed, the Act is applicable is of no support to the present case in view of the facts of the case. Shri Rohit Kapadia had cited the two authorities in the context that prior to the 1994 Regulations, action could have been taken under Section 11(2)(h) of the SEBI Act. The Hon'ble Supreme Court had held in the said cases that "where a statute confers powers on an authority to do certain acts or exercise of power in respect of matters, subject to rules, the exercise of power conferred by the statute expresslsy provides for the same. Framing of the rules is not a condition precedent to the exercise of the power expressly and unconditionally conferred by the statute" Hon'ble Court had in the said order, relied on its earlier decision in U.P. State Electricity Board. It is noted that under section 30 of the Act SEBI is empowered to make regulations for the

domain of SCRA, for breach of the same, applicable provisions of SCRA are to be resorted to and not the provisions of SEBI Act. It is also noted that section 11B was brought on the Statute Book only with effect from 25.1.1995. It has no retrospective appalication. It is seen that the 1994 Regulation was put in position on 7.11.94. Powers under the said regulation have no retrospective application. Further in terms of regulation 39(c) direction can be issued to sell the shares acquired in violation of the 1994 Regulations. Regulation specifically says "directing the persons concerned to sell the shares acquired in violation of these regulations." Reference to "these regulations" is to 1994 Regulations. In fact the said regulation was not even in existence at the time when Galan subsidiaries acquired the shares. It is also not SEBI's case that 27.21% shares of the Target Companay was acquired in violation of the 1994 Regulations.

In para 12.9 of the impugned order there is an affirmative finding that "MDC and KRC have contraved then existing provisions of clause 40A and 40B of the Listing Agreement as they acquired 27.21% without making a public announcement before acquisition." Based on the said finding direction to disinvest the shares so acquired was passed. Facts on record show that on 14.12.1993 Galan was controlled by KRC and family. SEBI has not brought any evidence in the proceeddings, rebutting the said contention of KRC. MDC was not a shareholder of Galan on 14.12.1993. He was only a director of Galan at the relevant time. But that by itself does not suggest that he was controlling Galan with KRC who held 100% of the Galan's paid up capital. Further by SEBI's own version funding for the purchase of the said shares was also made by KRC. It is not SEBI's case that MDC

and therefore he also should be considered as an acquirer of the said shares at that point of time. On the contrary Shri Rama Raheja's presence in the Board supports that Galan was a KRC company. The fact that MDC is the maternal uncle of KRC is also of not much help in this regard. There is nothing on record to show that on 14.12.1993 MDC was an acquirer or a person acting in concert with KRC for the purpose of acquiring the shares of the Target company. From his subsequent conduct or involvement after 2 years in acquiring Target Company's shares it cannot be inferred that in 1993 he had acted in concert with KRC. Whether there was any concerted action by them subsequently will be examined at the appropriate stage in this order. Based on the material available before me, I am inclined to hold that 27.21% shares of the Target Company was acquired by KRC through the companies controlled by him. There is no material to hold that it was joint acquisition by KRC and MDC acting in concert with each other. Whether the quantum of the 27.21% shares also should be added for the purpose of working out the threshhold limit under regulation 10 and 11 with reference to the subsequent acquisition referred to in the order has been discussed at the appropriate place in this order.

In the light of the factual and legal position as discussed above I am of the view that the Respondent has no jurisdiction or authority to direct the Appellants to disinvest 27.21% shares of the Target Company acquired by KRC in December, 1993.

SEBI's order is not confined only to the acquisition of 27.21% shares by Galan subsidiaries. In the impugned order it has been alleged that the Appellants

SEBI has reached the conclusion need be considered, as the same has a bearing on the alleged concerted action. IMFA acquired 10,39,341 (10.91%) shares of the Target Company in separate lots at different times from the open market between 27.10.1994 to 22.11.1994. IMFA's paid up capital was Rs.4,00,200/-. 99.95% of the paid up capital of IMFA at that point of time was held by Shri Ram Raheja. Shri Imtiaz Kheyrolla a close associate of KRC and his wife held 10 shares each of IMFA. Shri Ram Raheja, the 99.95% stake holder of IMFA, is the husband of KRC's wife's sister. He was also a director of Galan with KRC and MDC. Shri Ram Raheja at the relevant time was also a director of Darrel and Stingray, both subsidiaries of Galan. He was also a director of Cocomistle, subsidiary of Galan and intermediate holding company of Darrel and Stingray. It is noted that by November 1996 MDC and KRC were holding 50% shares each in Galan. It has been stated by the Respondent that KRC through Galan and the companies controlled by him provided funds to the extent of Rs.1.31 crores to IMFA. No doubt the Appellant had submitted that the show cause notice did not allege any such funding by KRC and that the Respondent has relied in this regard on a statement made by the Plaintiff's Counsel in the suit before the Hon'ble Bombay High Court. I find that the Appellant has except for challenging the funding on technicalities has not categorically refuted the said version of their funding. Though the loans were said to have been secured by issue of zero rated debentures, it appears that the debentures were never issued. The only quoted investment of IMFA was in the shares of the Target Company. Later on a sum of Rs.4.13 crores was made available to IMFA by MDC through his proprietory concern Royal Wines, and the said amount was also utilised for the acquisition of the shares. The above funds were also advanced by

thereby he also got control over 10.91% shareholding of the Target Company. IMFA was taken over by MDC on the ground that the erstwhile owners of IMFA were unable to repay the loans.

With regard to acquisition of 4,73,100 shares (4.97%) of the Target Company by Mahameru, it is noted that the acquisition was during 14.11.1995 and 10.8.1996. The paid up capital of Mahameru was just two hundred rupees. In this case also interest free loan without any security and without any stipulated period of repayment was advanced by MDC through his proprietory concern (Royal Wines) to the tune of Rs.1.12 crores. Mrs. A. M. Kakade and Shri Sanjay Masand became directors of Mahameru on 2.9.96 Mrs. Kakade is the wife of M. G. Kakade, who was director of Darrel and Stingray, the subsidiaries of Galan. Since Mahameru was stated to be not in a position to repay the loan, its entire share capital with its holding of 4,73,100 shares of the Target Company were sold to Seven Star on 13.2.1997. In this case also zero rated unsecured fully convertible debentures were purported to have been issued by Mahameru. But there is nothing on record to show that the debentures were ever issued.

Shirish acquired 3,64,750 shares (3.83%) of the Target Company between 27.8.1996 to 13.2.1997. This company was incorporated on 19.8.1996. Shirish's paid up capital was also just two hundred rupees. The entire share capital was held by Shri S. J. Chhabria and his wife. Shri S. J. Chhabria, was a director of Shirish, Airedale, Beethoven, Veneer and Algid. He is also stated to be related to KRC being his cousin and related to MDC being his nephew. A sum of Rs.1.35 crores

in Shirish along with 3,64,750 shares of the Target Company to Seven Star on their inability to repay the loans.

The capital size of these three companies, i.e. IMFA, Mahameru, Shirish, their ownership pattern, the time band of the acquisition of the shares of the Target Company by them, financing pattern of the acquisitions and the ultimate acquisition of these companies by Seven Star of MDC is really striking. The commonality involved is difficult to believe was a mere coincidence.

According to the Respondent the factual position do lead to the conclusion that KRC and MDC acted in concert with Airedale, IMFA, Mahameru, Shirish, Algid, Beethoven, Darrel, Stingray and Veneer to acquire the shares of the Target Company over a period of time, that since they were acting in concert the acquisition by each one of them must be considered to be the acquisitions of others as well. The funds for the acquisition of the shares whether through Airdale, Algid, Beethoven, Darrel, Stingray and Veneer or through IMFA, Mahameru and Shirish originated from entities controlled either by KRC or MDC or both, that advancing of funds to IMFA, Mahameru and Shirish can not be said to be by way of investment because the facts disclose that the amounts were advanced free of interest and without any security and were used for acquiring the shares of the Target Company. The Respondents had further stated that if the shares were purchased only as a matter of investment they should have been sold when the market was favourable, but that was not done and instead MDC took over the three investment companies along with the shares of the Target company, that the medium of unlisted companies was employed

MDC, it must he held that the concerted action was of an acquirer holding more than 10 per cent shares in the capital of the Target Company that in the facts of this case regulation 10(2) of the 1994 Regulations was attracted, and as regards acquisition of 4,73,100 (4.97%) shares through Mahameru which was made during 14.11.1995 to 28.10.1996 and 3,64,750 (3.83%) shares through Shirish during 27.8.1996 to 13.2.1997 was clearly in violation of regulation 10(2) of the 1994 Regulations.

Details of ownership and control of Galan companies through which KRC acquired 27.21% shares of the Target company on 14.12.1993 have already been stated in the earlier part of this order and interconnection of some of the Galan subsidiaries with the management of IMFA, Mahameru and Shirish is also available from the facts stated earlier. It is in the light of the factual background as explained, one has to see as to whether the acquisition of shares through IMFA, Mahameru and Shirish attracted the provisions of regulation 10(2).

Regulation 10(2)prohibitted any acquirer who on the date of commencement of the regulations, held shares in a company which carried more than ten per cent of the voting rights in the capital of the company, from acquiring any further shares from open market unless, the acquirer makes a public announcement to acquire shares in accordance with the regulations. It is noted that the obligation to make public announcement to acquire shares in accordance with the regulations is fastened on the acquirer. The expression “acquirer” has been defined in the Regulations. Acquirer, as per the definition means any person who acquires or agrees to acquire shares in a company either by himself or with any person acting in

acting in concert is relevant. That nexus as the Bhagwati Committee put is "the commonality of objective and the community of interest" If it is established that two or more persons with a common objective are acquiring shares in a company, it can be safely concluded that they are acting in concert. The commonality of objective is not amenable to any litmus test. The facts and circumstances provide the clue. The conclusion could be on inference also. Not on imagination. Inference is not imagination. An inference is a deduction as to the existence of a fact which human experience teaches us can reasonably and logically be drawn from proof of other facts. No doubt an inference must be based on probability and not on mere possibilities or on surmise or conjuncture, and must be drawn reasonably and supported by the facts upon which it rests. Following few paragraphs provide the answer, in this regard.

The Appellants had submitted that any interpretation of the provisions of the SEBI Act and the Regulation which would require addition or omission of words or introduction of new concepts whereby a person would be attached with the penal provision which he otherwise would not, should not be resorted to. In this connection I would like to refer to the observation made by Hon'ble Supreme Court in Reserve Bank of India V Peerless General Finance & Investment Co. Ltd., (AIR 1987 SC 1023) that

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the

> statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With those glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place".

In Kanwar Singh V Delhi Administration (1965) 1 SCR 7 Hon'ble Supreme Court had held that

> "It is the duty of the Court in construing a statute to give effect to the intention of the Legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute would defeat the object of Legislature, which is to suppress a mischief, the Court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will advance the remedy and suppress mischief."

One should note the opening words in regulation 2 in the 1994 Regulations that "in these regulations, unless the context otherwise requires". The words "unless the context otherwise requires" assume relevance. The "contextual interpretation"is called for, for the purpose. The object of the SEBI Act and the Regulations need also be followed while interpreting various provisions of Act and the Regulations. In this context it is noted that scope of the expression acquirer, persons acting in

Supreme Court does not take away the binding nature of the decision of the Hon'ble High Court, as far as this Tribunal is concerned.

It seems that the issues raised by the Appellants on the concepts of acquirer, persons acting in concert, etc. and reach of section 10(2) raised in the present appeals were raised before the Hon'ble Bombay High Court also in Shirish. The Appellants had inter alia urged that as per regulation 2 (1)(b) the acquirer must himself be an acquirer of shares in the listed company, that it also makes it imperative that apart from the acquirer the person acting in concert must also acquire shares and, therefore, unless the alleged acquirer and the person(s) alleged to have acted in concert both acquire shares of the same Target Company, no allegation of acting in concert could be sustained, that further the word "with" occuring in Regulation 2(1)(b) is significant as the definition refers to any person who acquires or agrees to acquire shares either by himself or with any person acting in concert with him, that a case of 'acting in concert' has to be made out by person alleging it, in every one of its particulars, especially in view of the penal consequences involved. It was also urged that regulation 10(1) and 10(2) would be applicable only to an existing shareholder of the target company and that in support of the said proposition, this Tribunal's decision in Fascinating Leasing Finance Private Ltd. V SEBI [(1998) 17 SCL 204)] was cited. An argument was advanced that in terms of regulation 3(d) acquisition of shares "in companies whose shares are not listed on any stock exchange" did not attract the provisions of regulation 10, that if a person acquired shares of an unlisted company, which was already holding more than 10% shares in a listed company, then such person is not required to comply with regulation in view of the specific exemption provided in regulation 3(d). In support,

Hon'ble Bombay High Court (DB) while deciding the appeal filed by Shirish (supra) had interpreted the scope of and reach the said concepts and the sections, as follows:

"68. From the authorities cited at the bar, it is quite apparent that under the Companies Act, the words "member" "shareholder" and "holder of a share" are used as synonymous, but the question arises as to whether in the context of the provisions of the 1994 Regulations having regard to its scheme and objective, the term "holder of share" should be given the same meaning as in the Act, meaning thereby that it must be construed as restricted to those whose names appear in the register of members. In Howrah Tradings case (supra), the Court held that there was no reason to give the term a different meaning under the Act than the meaning assigned to it under the Act. In Balkrishna Gupta case (supra), it held that the right to vote was not affected by a pledge of the shares or the receiver being appointed in respect thereof. In Worldwide Agencies case (supra), however the court clearly held that a "member" may be a "holder" but a "holder" may not be a member of the company. It is, therefore, possible to give to the words "who holds shares" a meaning different than the one assigned to it under the Act as including a person who holds the shares by reason of his having purchased the same with a right of registration of those shares on the strength of the blank transfer forms, but in whose favour the shares have not actually been registered. The question that arises is that whether in the scheme of the 1994 Regulations, "who holds shares" must be given a narrow meaning as canvassed by Mr. Chidambaram or the wider meaning so as to include the holder of a share

person who holds shares with a right to get his name registered as a member, but whose name has not actually been entered in the register of members. If such a meaning is not given to those words, the consequence will be that while a person who holds shares will be required to comply with the regulation 9 and 10, but one whose name does not appear on the register of members will not be required to comply with those regulations 9 and 10, It would thus be possible for a stranger to defeat the provisions of the regulation though that would not be possisble for an acquirer if he happens to be an existing shareholder. There appears to be no reason to create this distinction between an acquirer who is a shareholder and one who is not. The object of the Regulations is to bring about transparency in the dealing of securities and also to enable the existing shareholders to take informed decision to accept or not to accept the public offer that may be made by a person who seeks to acquire substantial shares in the company. There appears no rational basis for distinction between an acquirer who is an existing shareholder and an acquirer who is not, since the regulatory measures are designed primarily to regulate substantial acquisition of shares by any acquirer, not necessarily a member of the company. We, therefore, hold that the words "an acquirer who holds shares" carrying 10 per cent or less of voting rights must include an acquirer whose holding in a company may be NIL. Less than 10 per cent of the voting rights must include NIL shareholding in the context of regulations 9 and 10 of the Regulations. Any other interpretation would completely defeat the provisions of the regulations as it would permit a person who does not hold shares in the company to acquire substantial shares

provisions of the Regulations, nor by the prohibition as mandatory requirement thereof.(emphasis supplied)

The Hon'ble Court also considered the view expressed by this Tribunal in Fascinating Leasing (supra) and did not accept the same reiterating its view stated above that "the words "who holds shares" in the 1994 Regulations include an acquirer who has acquired the shares by purchase under a blank transfer form with a right of registration but who has not actually got the shares registered in his name. In fact this Tribunal in Sharad Doshi V Adjudicating Officer [(1998) 16 SCL 269)] had held that "holder" in the regulations means a person who has acquired shares notwithstanding they are not registered. In Fascinating Leasing, acquisition was in one go and not in different lots. But in IMFA's'case it is noted from the facts on record that it had purchased 10.91% shares involving several transactions during the period 27.10.1994 – 21.11.1995 and not in one go as was the case in the acquisition by Fascinating Leasing. The fact that these shares were tendered for transfer in one lot is not of relevance, as the trigger point is acquistion of shares making the acquirer the holder of the shares.

Appellants' submission that IMFA, when it acquired shares was not holding any shares in the Target Company and as such regulation 10 was not applicable, is untenable in the light of the facts of the case and the interpretation of the expression "holder of shares" given by the Hon'ble Bombay High Court in Shirish (supra)

The Appellants had contended that the acquisition of shareholding of IMFA, Mahameru, Shirish by Seven Star and MDC did not violate regulation 10 as these

Chapter III referred to in regulation 3 is the core chapter relating to "Takeovers". It is seen that the Appellants had rised more or less similar contentions in this regard as raised before the Tribunal, before the Hon'ble Bombay High Court (DB) also. The following views taken by the Hon'ble Court, in the same set of facts, therefore is in equal force are applicable to the instant case.

It is felt that for a better understanding of the decision of the Hon'ble Court in this regard the arguments advanced by the parties need also be noted. A gist of the arguments made for the parties has been stated in the order itself preceding the decision, as follows:

74. It is true that in view of regulation 3(d), Chapter III of the regulations does not apply to acquisition of shares in companies whose shares are not listed on any stock exchange. Defendant Nos.3 to 5 companies(IMFA, Mahameru and Shirish) undoubtedly, are companies whose shares were not listed on any stock exchange. It would, therefore, follow that, if without anything else, the shares of these companies were acquired by the defendant No.11, (MDC) the acquisition of these companies by him may not come within the purview of regulation 10. But the facts of the case give a different picture altogether. It was not as if defendant Nos. 3 to 5 had acquired the shares of Herbertsons Ltd., on their own. These companies were controlled by persons known to defendant Nos. 1(KRC) and 11, and in fact, related to them though not within the meaning of section 6. These companies did not have the capacity to make such huge investments in shares of Herbertsons Ltd. According to the plaintiffs, and indeed admitted by the defendants, the

other. A concerted plan had come into existence much before the acquisition of these three companies by the defendants No.11, and it was in pursuance of such a common plan that funds were made available to the three unlisted companies who acquired the shares of Herbertsons Ltd., and later, handed over those companies to the defendant No.11. Since an acquirer by definition includes any person acting in concert with the acquirer, the acquisition by these three unlisted companies of the shares in Herbertsons Ltd., were in fact acquisition by the acquirer within the meaning of regulation 10. When two or more persons acquire shares in the company, acting in concert with each other, each one of them is an acquirer within the meaning of regulation 2(b) of the 1994 Regulation. If this Court ultimately finds that the defendants were acting in concert with each other pursuant to a common plan to acquire substantial shares of Herbertsons Ltd., the acquisition of these unlisted companies by the defendant No.11, at a later stage, would not help the defendants because the initial acquisition by the aforesaid three unlisted companies would itself be an acquisition of shares by an acquirer in breach of the prohibition contained in regulation 10.

75. So far as the judgment of the SEBI and the appellate authority in Sesa Goa is concerned, the facts of that case are distinguishable. The acquisition of Sesa Goa Co. Ltd., by Mitsui & Co., Japan through Finsider International Co. Ltd., was alleged to be in violation of the SEBI Regulations, and in violation of the provisions of clauses 40A and 40B of the listing agreement. In that case, it was found that after the regulations came into force, no

> Regulations, the fact remains that no shares of Sesa Goa have been acquired either by Finco, Mitsui, or Early Guard. Sesa Goa is the company which is said to have been taken over. However, this change in control, if at all, has taken place without acquiring anyshares. Even if interpretation of the petitioner is accepted, the provisions of the Regulations dealing with substantial acquisition of shares could not be applicable in the facts of the case. It is worth mentioning that the Regulation does not have any concept of change in control of management requiring public offer. Therefore the question of violation of Regulations does not arise. It may be mentioned that these Regulations have now been repealed by SEBI and new Regulations have been notified on February 20, 1997. Only in the new Regulations, the concept of control triggering off public offer been introduced."

So far as the instant case is concerned, the acquisition of shares of Herbertsons Ltd., defendant No.12, took place while the 1994 Regulations were in force. The decision of the SEBI and the appellate authority in Sesa Goa must, therefore, be understood in the facts and circumstances of that case, because the question of acquisition of shares in breach of regulation 10 did not arise in that case.

76. It was then submitted on behalf of the appellant/defendants that certain changes were brought about in the 1997 Regulations which repealed the 1994 Regulations based on the report of the Committee on substantial acquisition of shares and takeovers under the Chairmanship of Justice P.N.

sought to be remedied and the concept of indirect control or acquisition was introduced for the first time in the 1997 Regulation which came into force on 28-2-1997. Regulations 2(d), (c) and (o) specifically introduced the concept of indirect acquisition and control. The Regulations also did away with the requirement of an acquirer being an existing shareholder. According to him, the validity of acquisition of the defendant Nos. 3 to 5 has to be determined on the plain terms of the 1994 Regulations which were clearly inapplicable to the acquisition of the defendant Nos.3 to 5.

77. As noticed earlier, Mr. Nariman also agrees that the provisions of the 1994 Regulations must be understood on their own, and in fact he went to the extent of submitting that the aid of a subsequent law cannot be taken for interpretating an earlier law. He, therefore, submitted that one need not look at the 1997 Regulations. Even without the aid of the 1997 Regulations, it must be held that under the 1994 Regulations, an acquirer need not be a registered shareholder, and a holder of shares on the basis of blank transfer with a right to get his name registered was included in that term. On the question of indirect acquisition and control, he submitted that in the facts and circumstances of this case that was not relevant in view of the fact that the defendants were acting in concert with each other, and therefore, on a purposive interpretation whether acquisition was direct or indirect is immaterial.

78. We are inclined to agree with Mr. Nariman. We have already recorded our conclusions earlier. As far as indirect acquisition is concerned, in the facts and circumstances of this case, if it is held that the Defendants were acting

79. Relying upon the judgement of the Supreme Court in Md. Quasim Larry v. Muhammad Samsuddin AIR 1964 SC 1699, Mr. Nariman submitted that in the 1997 Regulations, there are at least three matters in regard to which the regulations are merely clarificatory and declaratory. In this regard, he referred to – (i) definition of 'acquirer' which has been defined to mean 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; (ii) regulation 3 (1) (k) makes it explicit what was implicit in regulation 3 of 1994 Regulations by providing that the exemption under clause (k) (acquisition of shares in unlisted companies) shall not be applicable if, by virtue of acquisition or change of control of any unlisted company, the acquirer acquires shares or voting rights or control over a registered company; and (iii) in regulation 10, the addition of the words 'if any' has clarified that an acquirer need not bean existing shareholder.

80. We agree with Mr. Nariman in view of the findings already recorded by us, but we may only add that so far as acquisition of unlisted companies is concerned, under the Regulations of 1997, regulations 10 to 12 thereof will apply to the acquisition of shares in unlisted companies in the category of cases enumerated under the Explanation, to which the Regulations of 1994 may not have applied, such as Sesa Goa's case (supra), it is not necessary for us to delve into this question further as this issue does not arise in this case.

the Appellants and the companies involved (not the Target Company) were acting in concert with each other, each one of them must be deemed to be an acquirer and the question of direct or indirect acquisition does not arise. The facts on record, as discussed in this order, establish that the Appellants and the companies viz. IMFA, Mahameru and Shirish acted in concert with each other in the acquisition of the shares of the Target company. The Appellants' contention that the acquuisition is saved under regulation 3(d) in my view, is untenable.

The Appellants' contention that in terms of regulation 2(1)(b) apart from the acquirer, the person acting in concert must also acquire shares and therefore unless the alleged acquirer and the persons alleged to have acted in concert both acquire shares of the same target company, no allegation of acting in concert can be sustained was considered by the Hon'ble High Court in Shirish. Hon'ble Court after considering the relevant aspects(in Shirish) viewed as under:

> "86. The submission urged by Mr. Chidambaram that the use of the words "with" in regulation 2(1)(b) means that the acquirer must acquire the shares with the person acting in concert with him, does not impress us. It is not necessary that if two persons act in concert with the common objective to pruchase shares in a company, they can not be said to have acted in concert with each other unless the shares are acquired in their joint names or by each of them during the period in question. Such an intepretation would completely defeat the very purpose of the regulations as it would amount to saying that unless the name of a person appears as a member, he cannot be said to have acted in concert with the other. In our view, concerted action must relate to their action to acquire shares. <u>If one provides the fund and the</u>

has to be see that whether in the light of the facts and circumsmtances of the case, KRC and MDC can be considered to have acted in concert and acquired the shares." (emphasis supplied)

It is not in dispute that on 14.12.1993 KRC through Galan subsisdiaries had acquired 27.21% shares of the Target Company. However, MDC's role in this acquisition has been disputed. According to the Respondent at the relevant time MDC was holding 20% of Galan and KRC was holding 80% of the shares. But it is seen that the Appellants had in their representation before SEBI contested the said version and claimed that the entire share capital of Galan (it was 2 shares of 100 each) as on 14.12.1993 was held by KRC and his wife, and for the first time 20% of the shares of Galan was allotted to MDC on 29.3.1995 and thereafter on22.11.1996 KRC sold his 30% holding to MDC. In this context, in the light of the said version of the Appellants, and also in the light of the Hon'ble Court's direction to consider the matter pending before it in the light of the additional evidence if any adduced, it was incumbent on the part SEBI to consider the Appellants' version and ascertain as to whether Galan at that point of time was an exclusive outfit of KRC or it was jointly owned by KRC and MDC. It is seen from the order that SEBI had noted the Appellant's contention that Galan was an exclusive outfit of KRC on 14.12.1993. SEBI has not disproved the said contention SEBI's contention that it has gone by the Appellants' letter dated 2.4.1998 and the factual position stated by the Appellants in its affidavit would havde been sufficient, if the Appellant had not brought out the factual position at variance with the factual position stated earlier, in the proceeding before SEBI. Both the statements are made by the same persons and SEBI cannot accept the one ignorning the other, without proper verification. It is not the "toss" of

considered as an acquirer. Shareholding pattern of Galan could have been easily verified from the Register of Members of the company or from the records of the Registrar of Companies. There is nothing on record to show that MDC had funded thesaid acquisition wholly or partly. On the contrary, by the Respondent's own version the acquisition of shares by Galan subsidiaries was funded by KRC. The subsequent changes in the owneship pattern of Galan, and based on that change it is not possible to make any inference and hold MDC an acquirer or as a person acted in concert with KRC with reference to acquisition of 27.21% shares of the Target Company on 14.12.1993. But in the light of the subsequent development whether KRC can be considered to have acted in concert with MDC in the acquisition of the shares of the Target Company, made during the currency of the 1994 Regulations is a matter to be considered in the light of the facts then prevailed. In this context, it is felt that it is also necessary to have a look at the ownership and controlling pattern of the companies including Galan, in whose name the shares were purchased.

On 14.12.1993, i.e. on the date of acquisition of shares by Galan subsidiaries, Galan's paid up capital was Rs.200/- comprising two shares of Rs.100/- each of which one share each was held by KRC and his wife Mrs. B. K. Chhabria. On 29.3.1995 Galan further issued 498 shares. Thes shares were allotted as under:

Sr.No.	Name of the Allottee	No. of	Percentage Shares of paid up capital
1.	Ms. Resham K. Chhabria (d/o. KRC)	50	10%
(2)	Mrs. Nisha K. Chhabria (d/o KRC)	50	10%
(3)	MDC	50	10%
(4)	Mrs. L. M. Chhabria (w/o. MDC)	50	10%
(5)	KRC (one share already held on 14.12.93)	149	30%
		150	

On 22.11.1996, entire shareholding i.e. 30% in the name of KRC was transferred to Mrs. L. M. Chhabria, wife of MDC. As a result of the said transaction MDC family's holding in the cpital of Galan increased to 50% and correspondingly KRC family's holding came down to 50%. As a result of transfer his 30% holding in the Target Company's capital, KRC ceased to be a member of Galan. But his family (wife and daughter) was still holding 50% of Galan's shares. He continued to be a director of the company, despite transfer his shares. KRC and MDC became equal owners of Galan from 22.11.1996. In this context it is also noted that KRC and MDC and Shri Ram Raheja were directors of Galan at all the relevant times. Shri Ram Raheja is the husband of KRC's wife's sister. Whether Ram Raheja is a relative in terms of section 6 of the Companies Act is not relevant. Given the need to give a contextual and purposive interpretation of the expression relative in clause B of the explanation to regulation 2(1)(d), it is felt that the scope of the said definition can not be restricted only to the list of few relatives specified in section 6 of the Companies Act. It is the proximity and closeness of the person that matters in the context. In this connection it is also considered relevant to have a look at the strucutre of Galan's six subsidiaries in whose name the shares were purchased. They are Airedale, Algid, Beethoven, Darrel, Stingray and Veneer. It is noted that Galan has three subsidiary companies namely Mozzarat Traders P. Ltd. Yadeer Traders P. Ltd., and Cocomistle Finlease and Investment P. Ltd. Each of these subsidiaries had a paid up capital of two hundred rupees comprising two equity sharesnof rupees hundred each. Each of the said three subsidiaries in turn had two subsidiaries and the paid up capital of each one of them was also two hundred rupees comprising two equity shares of hundred each.. Veneer and Algid are subsidiaries of Mozzarat,

holding one share each and Airdale has two shareholders viz. Yadeer and Beethoven holding one share each. It all Appears to be a consciously structured set up. As I stated earlier, since the extent of compliance of clauses 40A and 40B of the Listing Agreement is not taken up for scrutiny by me in this appeal proceedings, for the reasons already stated, I do not propose to go further into the matters which are extraneous to the issues under consideration.

IMFA acquired 10,39,341 shares (10.91%) of the Target Company in separate lots at different times from the open market between 27.12.1994 and 21.11.1995. 99.95% share of IMFA during the said period was held in the name of Shri Ram Raheja. Shri Ram Raheja as noted earlier is KRC's wife's sister's husband. It is to be noted that the same Raheja was also a director of Galan, the ultimate holding company of six subsidiaries who purchased 27.21% shares of the Target Company on 14.12.1993. Shri Imtiaz Kheyrolla, stated to be a close associate of KRC (KRC has not disputed this association) and his wife held 10 shares each. Shri Kheyrolla was also a director of Darrel and Stingray, both subsidiaries of Galan and also of their immediate holding company Cocomistle at the relevant point of time. As per the facts on record, the funds for the purchase of 10,39,341 shares were provided to IMFA by KRC and MDC. A sum of Rs.1.31 crores is stated to have been provided by the companies under the control of KRC. This has not been denied by KRC. The Appellants have only questioned the source of this information and the Respondent relying on the information as stated by the Counsel of the plaintiff before the Hon'ble High Court, in the suit referred to earlier. MDC had also provided funds to the tune of Rs.4.13 crores, through his proprietory concern Royal Wines.

companies of KRC and the sum of Rs.4.13 crores from the proprietory concern of MDC were advanced without specifying any period of repayment and without any security. It is noted that IMFA's capital was just Rs.400,200. IMFA had no known financial resources to purchase such a huge quantity of shares involving few crores of rupees. Huge advance of such amounts to such a company, without any security itself in my view can not be considered as a normal transaction of investment. IMFA was taken over by Seven Star, a company belonging to MDC on 29.7.1996 along with its investment of 10.91% shareholding in the Target Company. This takeover was in a year of the purchase of the shares of the Target Company by IMFA. IMFA's takeover has been attributed to the failure of IMFA to repay the money advanced to it by the Appellants. Appellants have not produced any evidence to show that they had taken any steps to recover the money from the said companay before deciding to acquire its shares. But strangely enough, though KRC and MDC had reportedly advanced money and repayment to both of them were defaulted, the shares of IMFA was purchased by MDC through his company Seven Star and nothing is on record as to the fate of the sum of Rs.1.31 crore stated to have been advanced by KRC. The possible inference in that context is that it did not matter for KRC, as MDC his uncle was the acquirer and their interest was common. In my view, IMFA was only a front company, a name lender, that the real acquirer was MDC and KRC. In this context the following observation made by the Hon'ble Bombay High Court in Shirish need be noted that – "Concerted action must relate to their effort to acquire shares. If one provides the funds and the other acquires the shares in his name, it must be held that they have acted in concert to acquire the shares." In my view in the light of the facts and circumstances, acquisition of

private limited company with a paid up capital of two hundred rupees with two shareholders. 4,73,100 shares (4.97%) were purchased in the name of Mahameru during the period 14.11.1995 to 10.8.1996. In this case also MDC through its proprietory concern Royal Wines advanced 1.12 crores to Mahameru. On 13.2.1997 MDC through Seven Star purchased the entire share capital of Mahameru (Rs.200) along with Mahameru's investments in the share of the Target Company. The reason – that Mahameru could not repay the money advanced to it by MDC's Royal Wines. It is noted that Mahameru had no financial capacity to buy on its own, such huge quantity of shares in the Target Company. It is also noted that the money advanced by MDC through Royal Wines, was also interest free and without any back up security. In this case also though it was stated that the loan was secured by issue of zero rated debentures, the records before me do not show that such debentures were ever issued. It is also noted that the shares were acquired during 14.11.1995 – 10.8.96. On Mahameru completing its mission of purchase of 4.97%, without any delay MDC acquired the shares of Mahameru on 13.2.1997.

It is noted that Shirish finance in its name purchased 3,64,750 shares of the Target Compay during the period 27.8.1996 and 13.2.1997. Shirish's share capital, as in the case of Mahameru, was also just two hundred rupees only. Its entire capital was held by Shri S. J. Chhabria and his wife. The company was registered on 19.8.1996. Shri S. J. Chhabria is not an outsider. Though not a relative in terms of section 6 of the Companies Act, the said S. J. Chhabria is a cousin of KRC and nephew of MDC. He was also a director in Airedale, Algid and Beethoven Shri S. J. Chhabria's proximity to KRC and MDC is thus clear.

of Rs.5 lakhs. Again, as in the case of IMFA and Mahameru the said Shirish was taken over by acquiring its capital along with its investments in the Target Company on 18.2.1997 i.e. immediately after 5 days of advancing Rs.5 lakhs – on the ground that Shirish was not in a position to repay the money received by it from MDC. Shrirish's shares were transferred to MDC and his wife. In this case also though it was claimed by the Appellants that Shrirish had issued zero rated unsecured convertible debentures, there is no evidence to show that such debentures were ever issued.

In the light of the facts and circumstances, there is every reason to believe that IMFA, Mahameru and Shirish were only front companies put up by the Appellants to acquire shares of the Target Company, perhaps hoping that acquisition of shares separately by these three companies would not attract the provisions of the 1994 Regulations. Otherwise, there seems to be no other reason to resort to such a strategy. The capital size of these companies and their standing, in the normal course would not have encouraged any person to advance such huge amounts, that too without obtaining sufficient tangible securities as back up. It is also noted that these three companies were takenover shortly after the acquisition of the shares of the Target Company by them. It is also noted that these companies did not make any attempt to dispose of the 'their holding ' in the target company and meet their liabilities, as the Target Company's shares, at that point of time were stated to be traded at a very good price. It is also noted that the purchase of shares by Mahameru and Shirish was capped below 5%, obviously to avoid certain reporting requirements under the Regulations. The speed with which these 3 companies were taken over by

Committee in its report dated 18.1.1997 had recommended to bring in indirect acquisitions under the purview of the Regulations. New Regulation was notified on 20.2.1997. Takeover of IMFA by MDC was on 27.9.1996, Mahameru on 13.2.1997 and Shirish on 18.2.1997. It can be inferred from the circumstances that these companies were hurriedly taken over to save the socalled indirect acquisition of shares of the Target Company from the scope of the proposed new Regulations. This is only an inference. As stated earlier, as there was no other convincing reason to take over these companies within such comparatively short span of time from the date of providing funds.

The Appellants had attempted to establish that the acquisition of shares by Galan subsidiaries IMFA, Mahameru, Shirish are independent of each other, that KRC and MDC are not relatives in terms of section 6 of the Companies Act etc. In my view the first test and perhaps the prime test to ascertain as to whether a person had acted in concert with another in the acquisition of shares is the one provided in the opening portion of the definition "person acting in concert" appearing in regulation 2(d) of the 1994 Regulations. According to the said regulation:

" 'person acting in concert' comprises persons who, pursuant to an agreement or understanding acquires or agrees to acquire shares in a company for a common objective or purpose of substantial acquisition of shares and includes:

(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

(iv)mutual fund, financial institution, merchant banker, portfolio manager and any investment company in which any person has in interest as director, fund manager, trustee or as a shareholder having not less tha 2% of the paid up capital of the company.

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

(A) any relative of that person within the meaning of section 6 of the Companies Act,

(B) the director or his relative whether individually or in aggregate holding more than 2% of the paid up equity capital of such company;"

As Bhagwati Committee stated persons acting in concert have particular relevance to public offers, for often an acquirer can acquire shares or voting rights in a company 'in concert' with any other person in a manner that the acquisitions made by him remain below the threshhold limit, though taken together with the voting rights of persons acting in concert, the threshhold limit may well be exceeded. To be acting in concert with an acquirer, persons must fulfil certain tests. They must have commonality of objectives and a community of interests which could be acquisition of shares or voting rights beyond the threshhold limit, and their act of acquiring the shares or voting rights in a company must serve this common objective. Implicit in the concert action of these persons must be an element of co-operation. This co-operation could be extended in several ways, directly or indirectly, or through an agreement – formal or informal. The regulation has identified certain persons who, by their position in relation to an acquirer or by the very nature of their business, could be generally presumed to be acting in concert. In

In this context following observation made by the Hon'ble Bombay High Court in Shirish and the factual background based on which such observation was made, is noted:

" 92. On the basis of these facts, Mr. Nariman submitted that Imfa Hodlings P. Ltd., was almost a proprietary concern of Ram Raheja who was related to K.R. Chhabria, being his co-brother. The defendant nos.2 and 6 to 10 companies were companies of which Galan Finvest P. Ltd., was the ultimate holding company, and in the latter, at one stage, K.R. Chhabria, the defendant No.1 and M.D. Chhabria, the defendant No.11 along with their family members held 80 per cent and 20 per cent shares respectively, and after November 1996, they held 50 per cent shares each. The Chhabrias, acting through Galan Finvest P. Ltd., and the companies controlled by them provided funds to the extent of Rs.1.31 crores to Imfa Holdings P. Ltd., which was a company controlled by Ram Raheja, the co-brother of the defendant No.1. Some amount was also made available by a company controlled by M.D. Chhabria, the defendant No.11.

Mr. Nariman then submitted that the nature of transaction entered into with Imfa Holdings P. Ltd., does not appear to be a purely business transaction by way of investment, as submitted by Mr. Chidambaram, on the advice given by a professionally qualified Chartered Accountant Mr.Ashok Kukerja. Though the loans were said to be secured by issue of zero rated debentures, as would appear from the report of the Directors for the years 1995, 1996 and 1997 of Imfa Holdings P. Ltd., the debentures were never issued. Moreover, the only quoted investment of Imfa Holdings P. Ltd., as

a director in three of the companies controlled by the defendant No.1, including the defendant Nos. 8 and 9 companies.

Later, a sum of Rs. 4.13 crores was made available to Imfa Holdings P. Ltd by M.D. Chhabria, the defendant No.11 through his proprietary concern, Royal Wines, and the said amount was utilised for the acquisition of the shares. Mr. Nariman referred to the note of the defendant No.11 to the SEBI dated 22-7-1997 and affidavit of the defendant No.11 dated 21-12-1998. In this manner, a sum of Rs.1.31 crores coming from the companies under the control of K.R. Chhabria, the defendant No.1 and a sum of Rs.4.13 crores coming through the proprietary concern or defendant No.11 were advanced by way of interest-free loans to Imfa Holdings P. Ltd.,without any specified period of repayment and without any security. As noticed earlier, the fully secured debentures were in fact never issued. The shares so acquired were registered in the name of Imfa Holdings P. Ltd. The share capital of Imfa Holdings P. Ltd., was only Rs.4,00,200. The defendant No.11, M.D. Chhabria, acquired the entire shareholding of Imfa Holdings P. Ltd., through Seven Star Investments & Trading P. Ltd., on 29-7-1996, and thereby he got control over 10.91 per cent shareholding of Herbertsons Ltd. This was ostensibly on the ground that the erstwhile owners of Imfa Holdings P. Ltd., were unable to repay the loans, and agreed to sell away their shareholding in Imfa Holdings P. Ltd., to the companies of the defendant No.11.

These facts, therefore, establish the circumstance that 10,39,341 shares of Herbertsons Ltd., were acquired by Imfa Holdings P. Ltd., of which 99.95

Holdings P. Ltd., had a share capital of only Rs.4,00,200, and did not have the means to acquire such large number of shares of Herbertsons Ltd.

97. We are satisfied that the circumstances established on record prima facie do lead to the inference that the defendant Nos. 1 and 11, acting in concert with the defendant Nos.2 to 10, acquired the shares of Herbertsons Ltd., over a period of time. Since they were acting in concert, the acquisition by each one of them must be considered to be the acquisition of the others as well. The funds for the acquisition of the shares, whether through the defendant Nos. 2 and 6 to 10 or through defendant Nos. 3 to 5, originated from the companies controlled either by the defendant No. 1 or the defendant No.11. Advancing of funds to the defendant Nos. 3, 4 and 5 cannot be said to be by way of investment because the facts disclose that the amounts were advanced free of interest and without any security, and for acquiring the shares of Herbertsons Ltd., the defendant Nos. 3, 4 and 5 were also managed by persons known to the defendant Nos. 1 an 11 and associated with them in their various companies. It is not necessary that person acting in concert must be related to each other within the meaning of section 6. Even two strangers can act in concert, provided they act pursuant to a common plan and to achieve a common objective. Even if we assumed that the defendant No.1 had acquired shares of Herbertsons Ltd., to the extent of about 27 per cent, before the coming into force of the 1994 Regulations, the moment it is found that he was acting in concert with the defendant No.11, it must be held that the concerted action was of an

concert, and through unlisted companies, who hardly had a share capital base, and which were managed by persons related to known to them. They provided funds to those companies to acquire the shares of Herbertsons Ltd., and in all three cases, the companies were unable to repay the loans and, therefore, the defendant No.11 took over those companies. The identical nature of transactions and the events that followed, prima facie established that the defendant Nos. 1 and 11 along with the defendant Nos. 3, 4 and 5 were acting pursuant to a plan and that the similarity of events was not accidental. Funds were advanced to all the three companies for the purchase of shares of Herbertsons Ltd., and all the three companies failed to repay with the result that they were taken over by the defendant No.11. In all the three cases, there is hardly anything to suggest that apart from major investments in the shares of Herbertsons Ltd., those companies invested any sizeable amount in shares of other companies, except in one case, where some shares of one other company were purchased. It, therefore, appears that these three companies which purported to be investment companies, invested only in the shares of Herbertsons Ltd, and that too, with the aid of funds provided by the defendant No.1 and the defendant No.11 through their concerns/companies."

(emphasis supplied)

The Hon'ble Court had also observed that:

99. Mr. Chidambaram submitted that the plaintiffs have erred on facts in submitting that the loans were interest-free loans. Reliance is placed on the

M.D. Chhabria, and the scheme prepared by the professionals shows that he would get a return of 25 per cent on investments.

We have carefully perused the reports submitted by these two Chartered Accountants. In their recommendation to M.D. Chhabria, they had suggested that the borrower must give a commitment to give minimum return of 45 to 50 per cent at the end of two years. They had suggested the issuance of zero rated unsecured FCDs with no premium. Each debenture was to be of Rs.100 each, with a right to convert it into 10 shares of Rs.10 each, after a period of two years. The experts expected that the FCDs issued be taken over after two years at a premium of 45 to 50 per cent before conversion, which will give an earning of 25 per cent per annum. Based on anticipation of professional experts, it was sought to be argued before us that M.D. Chhabria, the defendant No.11, was assured a return of 25 per cent on his investment. All that can be stated is that on the basis of calculation made by the qualified Chartered Accountants, and on the anticipation that the value of the shares will rise, it was expected that he would get a return of 25 per cent per annum on his investment. The plaintiffs are therefore, not wrong in contending that the amounts advanced carried no interest.

100. Commenting on the conduct of M.D. Chhabria, the defendant No.11, Mr. Chidambaram, submitted that he acted on the advice of professionally qualified Chartered Accountants. Each transaction provided adequate safeguards to him, and all the transactions were duly recorded in the books

Chhabria, as instruments to acquire the shares of Herbertsons Ltd., there was no reason for him to take over control of these three unlisted companies because, it would have been wiser for him to leave those three companies in the hands of the erstwhile management who would have acted on his directions. The extent of the share capital of these three companies was irrelevant because in the case of an investment company, the strength of the company lies in the persons behind the company and their solvency. Obviously, an investment company may not have substantial assets. He, therefore, submitted that the transaction was transparent, and there was no evidence on record to conclude or suspect even remotely that the acquisition of the defendant Nos. 3 to 5 companies were not real, or not on their own behalf that they were actually acting in concert with anyone when the acquisition of shares took place.

101. We are not impressed by the submissions urged by Mt. Chidambaram. We have earlier held that much value cannot be attached to the reports of the professionals experts who also cannot be characterised as independent persons, in view of their association with other companies of defendant No.11. Moreover, the FCDs were never issued, and even the promissory notes were cancelled and returned after take over of the companies. The facts on record do prima facie establish that the three companies, the defendant Nos. 3, 4 and 5 made substantial investments in the shares of Herbertsons on the strength of the funds advanced to them by the companies under the control of the defendant No.1 and the defendant

matters which will have to be decided on evidence. What is apparent is that the acquisition of Herbertson's shares was substantially funded by the defendant No.1, defendant No.11 and the companies and concerns under their control. Similarly, all transactions and the events that followed lead as to hold prima facie that it was a well thought out plan to acquire shares of Herbertsons Ltd., with the parties acting in concert".(emphasis supplied)

It is true that the Hon'ble Bombay High Court had also made it clear in Shirish that :

102."On the basis of the facts on record as at present the conclusion appears to be inescapable that defendant No.1 (i.e. KRC) and 11 (MDC) were acting in concert with the companies under their control viz. Defendant Nos. 2 to 10 (i.e. Airdale, IMFA, Mahameru, Shirish, Algid, Beethoven, Darrel, Stringray and Veneer) in the matter of substantial acquisition of shares of Herbertsons Ltd. the defendant No.12. We may hasten to add that this is only a prima facie view based on the material on record as they appear. The defendants are yet to file their written statement, and the parties had yet to lead evidence in support of their respective cases. A final finding of fact can be recorded only after evidence is brought on record by the parties. The conclusion reached by us is only prima facie and only for the purpose of disposal of the Notices of Motion. The material on record does establish a prima facie case of defendant Nos. 1 to 11 having acted in concert with each other in the acquisition of substantial shares of Herbertsons Ltd., (defendant No.12) in breach of the Regulation of 1994."

can not be taken together. As stated earlier, I do not consider that it is the relationship that decides as to whether the persons acted in concert. KRC's interest in MDC has been admitted by KRC himself as could be seen from the Board Resolution dated 30.5.96 of the Target Company in which the Board decided to transfer certaian quantum of shares in the name of IMFA. It is seen from the extract of the minutes of the Target Company's Board meeting that "Mr. K. R. Chhabria did not participate in the discussion and voting in respect of this item in accordance with his letter dated 28.5.1996". What was the reason ? " It was stated that at the meeting since Mr. Ram Raheja a director of IMFA Holdings Pvt. Ltd., was his brother in law (wife's sister husband) though not a relative within the meanaing of section 6 of the Companies Act, 1956." That is the true spirit. To be a person acting in concert one need not be a relative. Even strangers can act in concert. As stated earlier the test is as to whether there is a commonality of objective and community of interest. It is also seen that in the declarations filed by the Appellants under regulation 6 and 8 of the 1997 Regulations it was shown that KRC & MDC were persons acting in concert. It is an admission of fact by the persons concerned. They know well as to whether they acted in concert or not. The fact that the declaration was made post acquisition does not matter. It is a declaration of fact. That is all. The Appellants knew what they were declaring. Such a statutory declaration can not be easily discarded. In this context KRC's explanation to SEBI in the circumstances in which such declarations were filed is also worth noting. In his letter dated 2.4.98 hehad stated that —" However, for the purpose of record, I would like to state that under legal advise, I had filed with Herbertsons Ltd., declarations under regulation 6(3) and 8(2) of the Takeover Code, 1997 which was introduced with effect from 28.2.1997,

who owns/controls 47.48% of the shareholding of the Herbertsons Ltd., This admission of allegiance to MDC by KRC clearly indicates their association and relationship and vis-à-vis the action of acquisition of shares in the Target Company.

It is true that the views expressed by the Hon'ble Bombay High Court in its order cited earlier, was only a prima facie view made on the basis of the facts on record before it. But in the absence of sufficient evidence it is not possible for this Tribunal to reach at a materially different conclusion. I have very carefully perused whatever material brought on record by the parties in the appellate proceedings and considered the same. The parties have not produced adequate evidence before the Tribunal to take a different view. In fact I do not have before me such material based on which I can take a view different from what the Hon'ble High Court had taken. Based on the facts and circumstances of the case brought to my notice, I am of the view that KRC and MDC acted in concert with each other in the acquisition of substantial shares in the Target Company, through IMFA, Mahameru and Shirish. But it is made clear that there is no evidence to hold that for acquisition of 27.21% shares of the Target Company on 14.12.1993 KRC and MDC had acted in concert. In my view it was an acquisition made by KRC not with MDC. But the evidence shows that in subsequent acquisition KRC had co-operated with MDC and as such both of them can be considered to have acted in concert with each other in the subsequent acquisition of shares of the Target company. In that context the shares acquired by KRC has also to be taken into consideration for the purpsoe of deciding the threshhold limit for the purpose of compliance of the requirements of regulation 10. Since KRC was holding 27.21% already and as he is considered as a person

In this context it is also to be noted that acquisition of 10.91% shares by IMFA itself being above the 10% limit prescribed in regulation 10(2), the provisions of regulation 10 attracted. The shares acquired in the name of IMFA, Mahameru and Shirish can not in the light of the facts, stated be considered as separate and unrelated. The role of KRC and MDC in the said acquisition has already been stated in the earlier part of the order. In my view in the light of the factual and legal position discussed above the acquisition of shares during the currency of the 1994 Regulations attracted compliance of the requirements of regulation 10(2) by the acquirers.

The Respondent's contention that the acquisition of 0.56% of shares of the Target Company by IMFA, 1.31% by Beethoven and 0,27% by Darrel during the currency of the 1997 Regulations cannot be considered as creeping acquisitions in terms of regulation 11 of the 1997 Regulations on the ground that the acquisitions preceding the said acquisitions were illegal and void is untenable in the light of the finding that KRC and MDC acted together and KRC was already holding 27.21% shares and there was nothing to the effect that the acquisition of the 27.21 per cent shares was illegal. As per regulation 11(1) as it then existed, no acquirer who together with persons acting in concert with him has acquired in accordance with the provisions of law not less than 10 per cent but not more than 51 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 votings rights entitling him to exercise more than 2 per cent of the voting rights in any period of 12 months unless such acquirer makes a public announcement to acquire shares in accordance

that the acquisition of shares by IMFA, Mahameru and Shirish under the regime of the 1994 Regulations was not in accordance with the Regulation, still the acquisition of 27.21% shares being not hit by any provisions of law, and that KRC and MDC having acted in concert subsequently the benefit of creeping acquisition is available to the acquisition made by the said entities after the notification of the 1997 Regulations.

The Appellants have challenged the impugned order on several other grounds also.

In their pleadings the Appellants had alleged failure on the part of SEBI to follow the principles of natural justice, and fair play. But the issue was not pressed at the time of argument, and as such I do not consider it necessary to deal with the same, in this order.

The Appellants had cited the Respondent's order and stated that the order is based only on the basis of prima facie findings. The portion in support of this contention relied on is from para 12.19 of the impugned order that "The circumstances established on record prima facie do lead to the conclusion that KRC and MDC acted in concert with…….to acquire the shares of the target company, over a period of time" I am not inclined to agree with the said submission. One can not ignore the rest of the order and go only by an isolated statement. On a perusal of the order as a whole it is clear that it is a final order, and not an interim order based on mere prima facie finding. In this context it is to be noted that SEBI has issued directions under regulation 39 of the 1994 Regulations/44 of the 1997 Regulations.

not be able to put the acquirer in the same position as he was when the proceeding was commenced. An order of the instant nature cannot be issued under regulation 39/44 based only on a prima facie view. Therefore, it is difficult to accept that the impugned order is an interim order based on a prima facie finding.

The Appellants had also alleged that SEBI has wrongly taken guidance and based its order on the prima facie observations of the Hon'ble Bombay High Court in Shirish, at an inter locutory stage whilst passing the impugned order. This was denied by the Respondent. According to the Respondent it has only taken into consideration the "comments of the Bombay High Court enunciated in the said order", that the order is not based on the prima facie findings of the court. I do not find anything wrong on the part of SEBI relying on the observation of the Hon'ble High Court in the parallel set of facts and circumstances. SEBI or for that even this Tribunal can not take a view at variance from the Hon'ble High Court's view, in the absence of adequate additional material brought out in the proceedings before them; warranting to take a different view. To negate the prima facie views expressed by the Hon'ble High Court, the Appellants should have produced such material having a hearing in the matter which was not before the Hon'ble High Court while considering the matter.

The Appellants had seriously canvassed that the impugned order was passed and that the Respondent's direction to make disinvestment of the shares held by the Appellants is intended to protect the management control of Shri vijay Mallya in the Target Company. In this context learned Counsel for the Appellants had referred to

(i)"The appellant, on behalf of MDC and in relation to shares of the Target company, owned and controlled by companies under control of MDC (i.e. IMFA, Mahameru and Shirish) had met the Chairman, SEBI on 31.12.1997 about the various newspaper articles speculating about SEBI's views regarding acquisition of such shares. During the meeting and after discussions the Chairman ordered MDC to make a public offer in compliance with the 1997 Regulations and also directed MDC to confirm in writing his agreement to comply with such order. Pursuant to such order, MDC, personally and on behalf of the Companies owned/controlled by him, confirmed vide his letter dated 20.1.1998 his agreement to make a public offer without prejudice to his stand that there was no violation of the 1994 Regulations. On 20.1.1998 L. K. Singhvi, Sr. Executive Director (Investigation) recorded the decision conveyed by the Chairman to the Appellant in a noting in the SEBI file which reads as under:

"This was discussed. Shri K. Chhabria took Chairman's appointment also and met him in presence of ED (PK) and myself. He was informed that he is required to comply with the regulation and make the required offer. He met me again and I told him the same. As regards prosecution the matter can be considered later. First let the offer aspect be complete as discussed by us.'

The file is therefore being sent to IIMARP for further needful.

Chairman may also like to see for information.

Sd/-

L.K.Singhvi

"W*e may ask the acquirer(s) to file the offer as required under the Regulations immediately. The issue of prosecution will be decided later.*

Sd/-

D.R.Mehta,

21.1.1998."

Thereafter the file was forwarded to Mr. P. Kar, Executive Director who recorded his direction to issue a letter instructing the acquirer to file the offer document and recorded as under:-

" Plelase issue a letter as instructed asking the offeror to file the offer document. The draft letter to the offeror may be shown to ED (Law) because of legal issue involved.

Sd/-

P. Kar

21.1.98."

(ii) Having come to know of such order/direction of SEBI, Vijay Mallya, through the letter of the Advocates of the Balaji/Reddy Group dated 27.1.1998 addressed to the Chairman SEBI *inter alia* requested SEBI not to reach any final conclusion in the matter on the ground that the Balaji/Reddy Group is about to forward an opinion of an ement jurist in the matter.

(iii)The said eminent jurist in the first instance wrote a personal letter dated 29.1.1998 (See Page 715, Volume – III of the MDC Comilation) to the Executive Director (Law) SEBI along with a "note" pertaining to the acquisition of the said shares, requesting the said Executive Director to go through the note very carefully so that it would give her an idea of the issues

treating the same as a purported investor grievance, and called upon the Target Company to answer the same. MDC had complained of this conduct on the part of SEBI by his Advocates letter dated 18.9.1998 addressed to SEBI.

(v)The opinion of the said eminent jurist was forwarded to SEBI on behalf of the Balaji/Reddy Group only on 10.2.1998 through their advocates. SEBI appears to have followed what the said eminent jurist has in the said opinion strongly recommended viz. to order disinvestment of the said shares in the Target Company by the companies now controlled by MDC.

(vi)Thereafter, SEBI for the first time wrote to the Appellant on 24.3.1998 seeking information about the Appellant's shareholding in the Target Company.

(vii)All the required information was duly provided by the Appellant on 2.4.1998.

It is pertinent to note that the show cause notices, which have been issued on 8.1.1999, were predicted in an affidavit filed on behalf of the Target Company by their Dy. Company Secretary, Bharat Raghavan before the Company Law Board on 15.9.1998. The attention of SEBI was invited to this fact by MDC's Advocate's letter dated 18.9.1998 addressed to SEBI, to which SEBI failed to respond. Furthermore the news item appearing in the newspaper Pioneer dated 8.12.1998 also clearly suggested that further show cause notices were to be issued under pressure from Vijay Mallya to MDC. According to the Appellant SEBI was influenced by the view and opinions of a person so closely associated with SEBI"

Adviser of Mallya family. Respondent had denied the allegation that SEBI has been biased towards Dr. Vijay Mallya. According to the Respondent

> "normally an acquirer who has acquired shares in violation has to make a public offer in terms of the Regulations. However, in some cases such direction may amount to further consolidation of illegal acquisition by defaulting acquirer instead of acting as a deterrent. Therefore, even though such alternative action was proposed by SEBI, but eventually no such diriection or formal order for public offer was issued".

The Respondent has not denied the fact of taking a view by it requiring public offer by the Appellants. It is also true that SEBI had forwarded to the Target Company MDC's letter dated 20.1.1998 seeking clarification from SEBI by viewing the said letter as a complaint warranting redressal by the Target Company. This action looks strange. However, in the context, I would like to state that in the present appeals we are considering the validity of the impugned order. If the said order is found sustainable, the order has to be upheld. Otherwise the order has to be set aside. For the purpose of deciding the present appeals, I do not consider it necessary to find out as to whether the impugned order was meant to protect someone else's interst. What is primarily required to be addressed is whether the order is to be sustained on fact and law. Extraneous matters are of little relevance in the process. I have already discussed the factual and legal position with reference to the impugned order. However, I find from the material on record that, SEBI based on the material available before it on 20.1.1998, had come to the conclusion that in the light of the facts and circumstances of the case the Appellants acquisition of shares was in

remains clueless as to based on what additional information SEBI decided to direct the Appellants to divest their holdings in the target company instead of insisting them to make the public offer as was decided earlier. I have perused the material on record and also considered the submissions made by SEBI. But I do not find anything, in the given set of facts, justifying issuance of a divestment order at variance with its earlier decision requiring the Appellants to make public offer. SEBI no doubt has the power to further investigate and issue further show cause notices and based on the material so collected to pass a different order. But in this case all along SEBI was holding that the Appellants have violated the provisions of clause 40A and 40B and regulation 10(2) of the 1994 Regulations. Even after adjudication of the show cause notice issued on 8.1.1999, SEBI has not arrived at any "additional violations or new violations" by the Appellants with reference to the acquisition of the Target Company's shares during the relevant period so as to pass an entirely different order. In any case as stated earlier, I am considering the legality of the order and for the purpose I do not consider it necessary to delve into matters which are extraneous.

Appellants had submitted that SEBI having passed an order on 21.1.1998 requiring them to make a public announcement, was not entitled to review that order and pass an altogether different order on 19.2.2002. SEBI has not denied that it had earlier viewed that it was a case warranting public announcement by the Appellants. However its contention is that no such direction was issued, that it is at liberty to carry forward the enquiry in case it was considered necessary and pass appropriate order depending on the outcome of such enquiry. Both the parties had cited

not empower SEBI to review its orders. But the question here is whether SEBI had passed any such order in that sense. In the light of the facts of the case, I am not inclined to accept the Appellants' version that it was an order as contented passed in the matter not subject to review or variation by SEBI. At the best what the Chairman recorded on file on 21.1.1998 could be considered as a clarification which the Appellant was seeking from SEBI with reference to the acquisition of shares. Appellants had claimed that they had constructive notice of the said order. If it is so, what prevented them from making pulic announcement, making public offer etc. as required by regulation 10(2) It is not a precondition of regulation 10(2) that the public offer required to be made therein should precede an order from SEBI. SEBI had pointed out that earlier also it had asked the Appellants in the context of acquisition of shares by IMFA, to comply with the requirements of regulation 10(2). Since it was not a formal order as such, SEBI's right to vary the same in the light of information/material subsequently obtained is unquestionable. But then SEBI cannot escape its obligation to explain reason for having taken a different view, as the earlier stand was reportedly made known to the Appellants orally. Transparency is the hallmark of credibility. Credibility brings acceptability. Acceptability also provides strength to the Regulator. If SEBI had reasons to take a different view, SEBI should have stated the reasons.

The effect of the repeal of the 1994 Regulations by the 1997 Regulations was also raised. According to the Appellants even if it is assumed that the Regulations of 1994 was breached, the Regulations having been repealed, it must be treated as if it never existed, and the saving clause in regulation 47 of the 1997 Regulation do not

Regulations for the ommissions and commissions, if any, committed with reference to the 1994 Regulations. The Respondent on the other hand had contended that the repeal of the 1994 Regulations did not have the effect of making legal what was illegal under the 1994 Regulations that in anay event, the facts of the case show that the proceeding had been initiated under the 1994 Regulations, that an enquiry followed by a show cause notice had commenced. According to the Respondent SEBI's action was saved by the repeal and saving provision in the 1997 Regulations. Both the parties had cited several authorities in support of their rival contentions, which has been referred to in their respective submissions earlier. The scope and reach of the repeal and saving provision in regulation 47(2) of the 1997 Regulations is not disputed. The dispute is as to in the light of the facts specific, regulation 47(2) is avilable or not. I do not see any help from the various authorities cited by the parties in resolving the said dispute.

As stated earlier the 1994 Regulations brought into force on 7.11.1994 was repealed by the 1997 Regulations brought into force from 20.2.1997. Regulation 47 of the 1997 Regulations is on "repeal and saving". Sub regulation (1) repeals the 1994 Regulations. Sub regulation (2) is the saving clause which reads as under:

"2. Notwithstanding such repeal

(a) Anything done or any action taken or purported to have been done or taken including approval of letter of offer, exemption granted, fees collected, any adjudication, enquiry or investigation commenced or show cause notice issued under the said regulations shall be deemed to have been done or taken under the corresponding provisions of

(c) Any appeals preferred to the Central government under the said regulations and pending before it shall be deemed to have been preferred under the corresponding provisions of these regulations."

Scope of Regulation 47, is unambiguous. It saves any action taken or purported to have been taken under the 1994 Regulations and expressly includes any enquiry or investigation commenced or show cause notice issued under the said Regulations. By a fiction it was deemed that such action was taken, or anything done was deemed to have been done, or taken under the corresponding provisions of the 1997 Regulations.

It is an admitted fact that in the wake of an article published in one of the newspapers on 29.4.1995 alleging substantial acquisition of shares by KRC in the Target Company, SEBI by its letter dated 9.6.1995 adressed to the Target Company called for certain details pertaianing to the acquisition of the Target Company's shares by KRC. It is noted that the impugned order also inter alia deals with the said acquisition. Since the reply received from the Target Company was found incomplete, SEBI wrote again to the Target Company on 29.6.1995 for details, and again on 13.7.1995 and thereafter on 30.8.1995. Target Company furnished certain details vide its letter dated 6.9.95. SEBI found the same inadequate and sought details again on 22.9.95. According to the Appellants' (KRC)averments in the Memo of appeal "while the target company for some reason was avoiding to give the required details about the acquisition of 27.21% by the said companies it was KRC who suo motu provided SEBI all the relevant details including his control over the said six co mpanies on 9.1.1996. By the said letter it was also explained by KRC as

that SEBI had issued a show cause notice to Shri Ram Raheja on 9.10.96 for the alleged violation of the 1994 Regulations relating to acquisition of 10.91% shares. It is also seen that on 31.3.1997 SEBI issued another show cause notice to the Managing Director of IMFA seeking to initiate prosecution under section 24 of the SEBI Act for the alleged violation of the 1994 Regulations relating to acquisition of shares in the Target Company. As stated earlier show cause notice was addressed to the Appellants specifically on 8.1.1999.

The Appellants' contention that in the show cause notice dated 9.10.1996 to Shri Rama Raheja and the show cause notice dated 31.3.1997 addressed by designation to the Managing Director of IMFA (Shri Ram Raheja had ceased to be the Managing Director of IMFA by that time)no allegation was made against the Appellants and as such they are not show cause notices as far as the Appellants are concerned is difficult to accept. It is an admitted fact that SEBI had taken cognizance of the acquisition of shares by KRC on 14.12.1993, and had made enquiries by writing to the Target Company on 9.6.1995 and the said enquiry was pursued and in the process show cause notice was issued to Shri Ram Raheja/IMFA Managing Director and to the Appellants. The expression enquiry has not been defined in the Act or in the 1994 Regulations or in the 1997 Regulations. Therefore, the expression has to be understood in its generic sense. The word enquiry does not always mean judicial enquiry. Enquiry as it is generally understood is the process of gathering information. In the absence of any specific procedure prescribed for the purpose it is open to the person enquiring into the matter to adopt proper procedure to elicit the requisite information. However, if the enquiry result is likely to

pertaining to the acquisition of shares by initiating an enquiry as far back as on 9.6.1995 by writing to the Target Company and pursued the matter and on coming to the conclusion in the light of the material so collect, that the Appellants had violated certain statutory requirements, asked them to show cause as to why action should not be taken for the said violations. The Show cause notice dated 8.1.1999 to the Appellants is thus the one issued to enable the Appellants to explain their version in the light of the charges referred to in the notice and those charges are the outcome of the enquiry initiated by the Respondents by writing to the Target Company on 9.6.1995. By issuing the show cause notice on 8.1.1999 no fresh enquiry was initiated. It was a part of the ongoing enquiry in the matter. The Appellants' submission that no action had been initiated by SEBI or was pending under the 1994 Regulations against the Appellant on the date of repeal of the said Regulations for the reasons stated above is not correct. The repeal and saving clause under Regulation 47(2) saves the action initiated by the Respondents under the 1994 Regulation in the matter of acquisition of shares by the Appellants. In this context the observation made by the Hon'ble High Court (DB) in Shirish need be noted. The court held, explaining the ingredients of regulation 47(2) that

> "We have, therefore, no doubt that if under the Regulations of 1994, an enquiry or investigation had been commenced or a show cause notice issued it shall be deemed as if they had been commenced or issued under the corresponding provisions of the Regulations of 1997. Regulation 47 introduces a legal fiction whereby anything done or action taken under the Regulations of 1994 shall be deemed to have been done or taken under the corresponding provisions of the Regulations of 1997. The effect of the

It is seen from the order that the Hon'ble Court noted the facts presented by the Plaintiffs and also their submission and observed that

> "The date of commencement of the enquiry is, therefore, not the date on which notices are issued, but the date on which the enquiring authority takes cognizance of the violations and proceeds in the matter together further information and evidence". The Hon'ble Court viewed that "in the instant case, on the basis of material on record, we find that the earliest communication was addressed to Herbertsons Ltd., by SEBI on 9.6.1995." and also viewed that "we find that there is material to support the submission of Mr. Nariman". (i.e. the enquiry commenced under the 1994 Regulation). However, it was also stated by the Hon'ble Court that "we express this view on the basis of the material on record and it may be possible for the parties to adduce further evidence on the subject at the trial of the suit."

The parties have not produced any additional evidence in the appeal proceedings requiring the Tribunal to take a decision that the action taken by the Respondents was not saved in terms of regulation 47(2) of the 1997 Regulations.

The Appellants had stated that SEBI had not followed the requirements as set out in Chapter V of the 1994/1997 Regulations prior to issuance of the show cause notice. According to the Appellants investigating authority has not been appointed, no order appointing investigating authority was made , no notice was given to the Appellants, since no investigating authority was appointed, no report could have been submitted and in any case no finding of the Board was communicated to the

in that way or not all. The Hon'ble Supreme Court had referred to the observation made by Craies on Statute Law, 96th edn. P 263) and noted in the said order that:

> "If the requirements of a statute which prescribe the manner in which something is to be done are expressed in negative langauge, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding."

It was, therefore, contended that since the order was made by the Respondent without following the specific procedures to be followed as per Chapter V of the Regulations, it is invalid. In support of the said contention he also cited Privy Council Decision in Nazer Ahmed V King Emperor (AIR 1936 PC 263(2) and also another decision of the Hon'ble Supreme Court in Mayurdhwaj Group Co-op. Housing Society Ltd. V Presiding Officer, Delhi Co-operative Tribunal (AIR 1988 SC 2410). Appellants submitted that Rhodias case cited by SEBI is not relevant to the facts of the case, that in Rhodia there was no question of any investigation under chapter V, as implicit in an application for exemption, is the admission of the trigger of the threshhold limit. It was also submitted that if the 1997 Regulations contained a more onerous covenant or penalties not provided for in the 1994 Regulations they could not be made applicable for alleged violations of the 1994 Regulations by virtue of the deeming provision of the saving clause in regulation 47(2) in the 1997 Regulations. According to the Appellants Chapter V of the 1994 Regulations prescribing the procedure to be followed for issuing directions is a protective mechanism, that as the protection of Chapter V procedure is avilable to any person

According to the Respondent since the Appellants had not disputed the facts relating to the acquisitions, the question of initiating investigation under regulation 33 and 34, preceding action under regulations 35 to 37 did not arise. It was also submitted citing this Tribunal in Rhodia that exercise of powers under regulation 44 is not relatable or confined to evidence of any investigation under the Regulations. According to the Respondent it is empowered to exercise powers under Regulation 44 read with section 11B of the Act to pass the impugned direction. It was also submitted that the Appellants' case is not one covered by regulation 42(2) of the 1997 Regulations, as the regulation 42 (2) would apply in case of investigation under regulation 38 of the 1997 Regulations, that in the instant case the action has been taken under section 11 read with 11 B of the SEBI Act and regulation 39 f the 1994 Regulations read with Regulation 44 and 45(6) read with regulation 47 of the 1997 Regulations.

As I could understand the main objection for invoking regulation 44 of the 1997 Regulations is that the said regulation does not provide the protection available to the concerned person as provided in the 1994 Regulations before passing orders under regulation 39. In this context it is noted that in terms of regulation 33 of the 1994 Regulations SEBI is empowered to appoint investigating authorities to investigate and undertake inspection of the books of accounts of any person who had acquired or sold securities. This investigation is possible on the basis of any complaints received relating to substantial acquisition of shares or suo motu upon SEBI's own knowledge or information, in the interest of securities business or investors' interest for any breach of regulation. (Regulation 33) It is also seen that

the investigation report is required to communicate the findings to the person concerned to give him an opportunity of being heard before any action is taken on the findings of the investigating authority. Thereafter, on receipt of the explanation, if any, from the person concerned, SEBI may call upon the peprson concerned to take such measures as the Board may deem fit in the interest of the securities market and for due compliance with provisions of the Act, rules and regulations. In this context it is to be noted that if the Respondent wants to take any action based on the investigation irrespective of its effect on the person concerned, he is required to be given an opportunity of being heard. In the instant case there is nothing on record to show that SEBI had appointed an investigating authority in terms of the Regulations. Therefore, there is no question of SEBI relying on an investigiation report which the investigating authority is required to submit. Therefore, the authority in AK Roy and other two cases referred to above cited by the Appellants has no application to the case. If SEBI had relied on any investigation report, SEBEI was required to follow the procedure prescribed for the purpose. But SEBI has not relied on any investigation report. SEBI has not failed to comply with the prescribed procedure as alleged.

It is also noted that the impugned order is not issued under regulation 37. As per the impugned order it is issued under “Sections 11, 11Bof the & SEBI Act and Regulation 39 of the 1994 Regulations and corresponding provisions of regulation 44 and regulation 45 of the 1997 Regulations. In this context it is considered necessary to look at the said three regulations.

(a) directing the person concerned not to further deal in securities;

(b) prohibiting the person concerned from disposing of any of the securities acquired in violation of these regulations.

(c) directing the person concerned to sell the shares acquired in violation of the provisions of these regulations;

(d) taking action against the person concerned who is an intermediary holding a certificate of registration under section 12 of the Act

Regulation 44 of the 1997 Regulations--Directions by the Board -- The Board may, in the interest of the securities market, without prejudice to its rights to initiate action including criminal prosecution under section 24 of the Act give such directions as it deems fit including –

(e) directing the person concerned not to further deal in securities;

(f) prohibiting the person concerned from disposing of any of the securities acquired in violation of these regulations;

(g) directing the person concerned to sell the shares acquired in violation of the provisions of these regulations;

(h) taking action against the person concerned.

Regulation 45 provides penalties for non comliance. Since under challenge in the appeals are the directions issued by the Respondent, it is not felt necessary to go into the details of the provisions of regulation 45 of the 1997 Regulations.

On a comparison of the provisions of regulation 37 of the 1994 Regulations and 42 of the 1997 Regulations it is clear that person concerned is required to be communicated the findings of the investigating authority and also give him an

an opportunity of being heard. It is an implied requirement. The protective measure, of which the Appellant has been refering to is available to the person concerned even in the case of application of regulation 44. It is noted that the Respondent had issued show cause notice giving them adequate opportunity to put forth their point of view with reference to the charges. They were also given adequate opportunity to present their case orally before the Respondent. It is on record that the Appellants had responded to the show cause notice and detailed replies were filed with SEBI. They had also made oral submission through their counsel and aslo filed written submissions. Therefore, it cannot be said that the Appellants were denied of the protective measure otherwise available before issuing the impugned order. For the reasons stated above and also after taking into consideration the provisions of regulation 47(2) I do not find any infirmity in the process of issuance of the impugned order.

The Respondent vide its order dated 19.2.2002, in addition to the direction to divest the shares acquired by the Appellant, had also directed to initiate

> (ii)Adjudication proceedings against KRC and MDC and persons acted in concert with them under section 15A of the Act for violation of the provisions of Regultion 6 and 8 of the Regulations, 1997 and also initiate adjudication proceedings against the said persons under section 15H of the Act for violation of the 1994 Regulations.

Chapter VI A on “Penalties and Adjudication” was inserted in the SEBI Act with effect from 25.1.1995, by the Securities Laws (Amendment) Act. In sections 15A to 15H, several offences have been indentified which would attract monetary penalty. Section 15I empowers SEBI for the purpose of adjudging under sections

empowered to pass such orders thereon as it thinks fit. In the light of the legal position stated above, it is clear that SEBI is empowered to order adjudication and SEBI exercising its power has directed to initiate adjudication proceeding against the Appellants. If any person feels aggrieved by the order of the adjudicating officer he has a remedy by way of appeal. This Tribunal cannot interfere at this stage in any manner with SEBI's direction to initiate the adjudication proceedings against the Appellants under section 15A and 15H of the Act. If they, for any reason feel aggrieved by the order passed by the adjudicating officer they are at liberty to avail of the appeal remedy available under section 15T of the Act. Therefore, I leave SEBI's direction to initiate adjudication undisturbed.

Next question to be considered is the validity of the Respondent's direction requiring the Appellants and persons acted in concert with them "to disinvest shares of the Target Company acquired in violation of the Listing Agreement and 1994 Regulations (i.e. beyond the then existed threshhold limit of 10%) through an offer for sale to public in terms of an offer document" on an offer price "at the face value of the shares as on the date of the order or the lowest price at which these shares were acquired whichever is lower." The order has further stipulated that "such offer shall be for a minimum number of shares so as to reduce the share holding of KRC and MDC and persons acted in concert with them to less than 10%".

SEBI had submitted that it is empowered to order disinvestment of illegally acquired shares in terms of the provisions of regulation 39 of the 1994 Regulations and corresponding regulation 44 of the 1997 Regulations and that the order directing

impugned order is penal. According to him a deterrent order need not necessarily be penal, that deterrance means the act or process of discouraging certain behaviour.

SEBI has relied on the observation made by the Hon'ble Bombay High Court in Shirish (supra) that the requirement of Regulation 9 and 10 are mandatory in character and as such any breach thereof renders the transaction void, and since the Appellants have not complied with the requirements of regulation 10, the acquisitions made by them are not legally valid. SEBI, based on the said perception issued the impugned direction. It has not given any other reason. However, the learned Counsel appearing for SEBI had submitted that though failure to comply with the regulation renders purchase of shares beyond the stipulated limit illegal and void, since it was impractical to restore the shares to the original sellers and obtain the consideration paid to them back, SEBI directed the Appellants to disinvest the shares through a public offer. The learned Counsel had cited Hon'ble Supreme Court's decision in Delhi Development Authority V Skipper Corporation (supra), particularly, the observation that when the corporate personality is being blatantly used as a cloak for fraud or improper conduct, the corporate veil need be discarded. He had also referred to the observation in the said order that "where the protection of public interest is of paramount importance or where the company has been formed to evade obligations of law, the court will disregard the corporate veil". Learned Counsel for SEBI had denied the Appellants' charge that the Respondent's direction was intended to protect the interst of Shri Mallya and also stated that the impugned order was issued in the light of the facts specific to the case and therefore, not comparable to the directions issued in other cases. Learned Counsel had submitted

the directions were to make public offer, in the present case that would amount to facilitate further consolidation of illegal acquisition by the Appellants.

The Appellants' contention is that since they have not violated any of the provisions of the Regulations the impugned direction asking them to disinvest the shares held by them is uncalled for. They had alleged that the direction is penal and SEBI has no power to issue such a penal order, as was made clear by the Tribunal in Sterlite (supra) case. The Tribunal's observation therein that Section 11B does not even remotely empower the Respondent to impose penalty was cited, after referring to the detailed reasoning given by the Tribunal in support of the said view. The Tribiunal's following observation in Sterlite (supra)was also cited -- that "Since legislature had deliberately chosen to create specific offences and penalties thereto, it is not possible to view that under section 11B the Respondent is competent to issue a direction which tentamounts to imposition of penalties. While widening the scope of "such measures" used in section 11, to include penalties, and thereby stretching the scope of the section for issuing directions under section 11B to cover imposition of penalties, the limitation stated above need be kept in mind.", that "the power under section 11B is restricted to issue appropriate direction for the purpose of protecting the interests of investors etc. mentioned in the section." According to the Appellants the impugned direction requiring disinvestment of the shares acquired allegedly without making a public announcement as per regulation 10, is an unprecedented one as SEBI never in the past or even after the issuance of the impugned order directed any acquirer to disinvest the shares, that consistently SEBI used to direct the acquirer to make a public offer. It was also submitted that the

I do not find Skipper's case any support to SEBI's decision directing disinvestment of shares, as the facts and circumstances based on which the Hon'ble Supreme Court decided Skipper case are entirely different from the facts and circumstances of the present case. The charge against the Appellants is that they acquired shares without making public announcement as required under the regulations. There is no charge of fraud etc. as was in Skipper. SEBI has not explained how the impugned order would protect the public interest. In fact the only reason given in the order justifying the decision to direct disinvestment of the shares is that the transactions are void. But SEBI has recognised that even if the transaction is void, viewed from the practical angle the Appellants' title to the shares acquired by them has to be recognised. If the Appellants' title to the shares is not recognised direction to disinvest the shares in the open market can not operate.

In the earlier part of this order I have already stated that 27.21% shares of the Target Company acquired by KRC on 14.12.1993 and the creeping acquisition made by IMFA, Beethoven and Darrel under the 1997 Regulations can not be considered as illegal. Therefore, even if it is held that the impugned direction survives the validity test, 27.21% shares acquired on 14.12.1993 and the shares acquired by way of creeping acquisition can not be directed to be disinvested. What is to be considered therefore is the applicability of regulation to the acquisition of shares made in the name of IMFA (10.91%) Mahameru (4.97%) and Shirish (3.83%) during the currency of the 1994 Regulations. I have already held, based on the material on record, that these acquisitions were made by the Appellants acting in concert with each other and the acquisition attracted the provisions of regulation 10(2) of the 1994

It is noted that SEBI has invoked section 11 and section 11B of the SEBI Act and regulation 39 of the 1994 Regulations and regulation 44 and 45 of the 1997 Regulations for the purpose of issuing the directions. Since regulation 39/44 empowers SEBI to issue directions to sell the shares acquired in violation of the provisions of the Regulations, and the impugned order is issued under the said Regulations as well, it can not be held that the said directions are penal and therefore untenable – Regulation 39/44 empowers SEBI to direct the acquirer to sell the shares acquired in violation of the Regulations. So the Regulation empowers SEBI to issue such directions for justifiable reasons. Vires of regulation 39/44 is not under challenge in the present appeal. In Sterlite, the order was not made by SEBI in terms of any such regulations, but only in terms of section 11B. So the ratio in Sterlite has no application in the present case. SEBI has already provided measures to regulate substantial acquisition of shares and takeovers by notifying the regulations and the regulations specifically provide for the nature of the directions empowered to be issued. Therefore, the governing regime for the purpose is the regulation notified and nothing else.

Obviously the impugned direction is issued in terms of regulation 39/44 as it specifically provides for issuing directions to the person concerned to sell the shares acquired in violation of the provisions of the Regulations. The text of these regulations has been furnished in the earlier part of this order. The Appellants' contention that SEBI has no power to fix the sales price is unfounded. Fixing the sales price is incidental to the direction to sell the shares. But the sale

In terms of section 11 "the duty of SEBI is to protect the interest of the investors in securities and to promote the development of, and to regulate the securities market by such measures as it thinks fit." This is in tune with the objective of the SEBI Act as evidenced in the preamble to the Act that "it is an Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto." Section 11B of the Act vests in SEBI power to issue certain directions to certain persons. According to the said section, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary (i) in the interest of investors or orderly development of securities market, or(ii) to prevent the affairs of any intermediary or other persons referred to in section 12, being conducted in a manner detrimental to the interest of invedstors or securities market or (iii) to secure the proper management of any such intermediary or person appropriate direction can be issued. The section has also identified the persons to whom such directions can be issued viz.(i) any person or class of persons referred to in section 12, or associated with the securities market; or (ii)any company in respect of matters specified in section 11A. Section 11A is on "matters relating to issue of capital" to be disclosed by the companies. We are not concerned with the requirements of section 11A in the present appeals. It is, therefore, clear that SEBI's primary duty is to protect the interests of investors and regulate the securities market. Any direction by SEBI should be for the said purpose. In fact regulation 44 of the 1997 Regulations clearly states that the directions specified thereunder are to be issued "in the interest of the securities market." It goes without saying that interest of investors is also built in the regulation as the interest of securities market and

direction in any case cannot reach them for the reason that they are neither intermediaries referred in section 12 nor "persons associated with the capital market", is untenable in the light of the Hon'ble Gujrat High Court's observation in [(Karnavati Fincap V SEBI (1996) 23 CLA 113 (Guj). In the said case the Hon'ble Gujrat High Court had held that " It is inconceivabe to think that a buyer or seller of a scrip is not a person associated with the securities market, where or through which he transacts his business whether as trader or as investor of selling or buying the required scrip.

The Hon'ble Bombay High Court (DB) in Shirish after referring to certain authorities had observed that --

> "it will be found that the legislative intent was to prohibit acquisition of shares in breach of the Regulations. For the violation of the relevant Regulations, an acquirer could be prosecuted and sentenced to a term of imprisonment. He was also liable to pay a penalty, apart from prosecution. The whole purpose of the Act is to protect the right of investors in securities and to promote the development of, and to regulate the securities market. The Regulations were framed with a view to bring about transparecny in transactions relating to securities and to safeguard the interest of the investors. The regulatory measures were designed to achieve these objectives. If the regulations relating to acquisition of shares in certain cases, are not treated as mandatory, and an acquirer is permitted to acquire substantial shares in any way he likes, and in breach of the Regulations, the entire scheme of the Act and the regulations will be defeated. The Board will

primarily to protect his interest, causing him grave injustice. Such being the consequences, and having regard to the negative form of the language, the mandatory character of the prohibition is strengthened. We are, therefore, of the view that the intentment of the Act and the regulations is to prohibit completely the acquisition of shares in breach of the Regulations, particularly regulations 9 and 10 thereof, and not merely to punish an acquirer who acted in breach thereof. The words 'shall not acquire' in Regulation 9 and 10 are mandatory in character, and any breach thereof must render the transaction void. Such acquisition oor transrer of shares must be considered to be void under section 6(h) of the Transfer of Property Act as being forbidden by law and opposed to public policy within the meaning of section 23 of the Contract Act. The fact that under the Regulations, the Board may direct the acquirer to sell the shares so acquired or to retain the same, thereby recognising the validity of transfer, is of no avail because the SEBI Act is in addition to and not in derogation of the provisions of any other law for the time being in force, which includes the Transfer of Property Act and the Indian Contract Act. It, therefore, follows that if the transfers are void under section 6(h) of the Transfer of Property Act, the 1994 Regulations cannot save them from such invalidity."

As stated earlier validity of SEBI's direction under regulation 39/44 in the instant case has to be tested with reference to the objective of the SEBI Act and the duty cast on SEBI. In my view the provisions of the law need be interpreted keeping in mind the objective of the Act and the obligation cast on SEBI to protect

> "True, normally courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for courts to take into account of the ostensible purpose and object of the real legislative intent otherwise, a bare mechanical interpretation of the words and application of the legislative intent to devoid of concept of purpose and object will render the legislature inane. .....Authorities a few of which we have referred to above show that in given circumstances it is permissible for courts to have <u>functional approach</u> and look into the legislative intention and some times it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity practical inconvenience may result and the legislative exercise and its scope and object may not become futile."

In another case the Hon'ble Supreme Court had held that --

> "To be literal in meaning is to see the skin and miss the soul of the Regulation" [(Board of Mining Examination and Chief Inspector of Mines V Ramjee (1977 2 SCC 256)]

In (Organo Chemical Industries V Union of India (1979) 4 SCC 5730) the Hon'ble Supreme court had held that

As stated earlier section 11 inter alia mandates SEBI to take appropriate measures to protect the interests of investors in securities. For the purpose section 11(2)(h) empowers SEBI to take measures to provide for "regulating substantial acquisition of shares and takeover of companies." SEBI Regulations on substantial acquisition of shares and takeovers is framed with the said avowed objective – i.e. to afford protection to investors in securities. In this context the observation made by the Hon'ble Supreme Court in Kunj Biharilal V State of Himachal Pradesh (JT 2000(2) SC 307) need be noted. The Hon'ble Court had held that:

> "We are also of the opinion that a delegated power to legislate by making rules for carrying out the purposes of the Act is a general delegation without laying down any guideline, it can not be exercised as to bring into existence substantive rights, obligations or disabilities not contemplated by the provisions of the Act."

What is contemplated by section 11(2)(h) of the Act is to provide for measure to protect the interests of the investors and the securities market. The Bhagwati Committee appointed to to re-examine the 1994 Regulation had more specifically set out the objective of Takeover Regulations as follows:

> "The Committee was of the view that the Regulations for substantial acquisition of shares and takeovers should operate principally to ensure equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers……The objective of the Regulations should therefore, be to provide an orderly frame work within which such process could be

theyshould not concern themselves with issues of competition or financial or commercial advantages or disadvantages of takeover." (emphasis supplied)

The Committee had also viewed that "Equality of treatment and opportunity to all shareholders" and "protection of interests of shareholders" should guide the interpretation and operation of the Regulations.

It appears that it is in the context of the objective of the SEBI Act and the Regulations and the functional/practical difficulties involved in restoring the shares acquired by the Appellants to their original owners and obtaining back the consideration paid for the purchase of shares, the Hon'ble Court having viewed that acquisition of shares without complying with the requirements of regulation is void, still held in its order in Shirish that "Since SEBI has issued notice for breach of SEBI Regulations, 1994, it may not be proper for us to suggest what orders it may pass. We leave it to the SEBI to pass such orders as it may deem fit and proper, and nothing said in this order should be construed as expression of our opinion on the question as to whether the Defendants should be permitted to make a post-facto public offer or not."(emphasis) "Whether the Defendants (i.e. Appellants herein) should be permitted to make a post facto public offer or not" would not have been included in the Hon'ble High Court's order, but for the practical and functional difficulties involved in case the transaction is treated as void and acted upon accordingly. If the transaction is treated void in the strict sense, the Respondent's direction to the Appellants to sell the shares can not hold good, as the Appellants will not have the title of the property (shares) to sell the same and collect the consideration. It was also not practically possible to restore the shares purchased in

permitted to make a post facto public offer or not" in the order is significant. Learned Counsel for the Respondent had admitted that it is impractical to restore the shares to the original owners and therefore, the Respondent chose to direct the Appellants to disinvest the shares. Thus SEBI itself has admitted that even though the transaction was void, since it was difficult to remedy the situation decided to direct to disinvest. If that is so why disinvestment was chosen instead of taking a measure that would benefit the shareholders in tune with SEBI's primary duty of protecting the interest of the investors. For violation of the provisions of the regulation the persons concerned can be prosecuted and also subjected to monetary penalty. Person can not get away from the penal consequences even if a direction to make a public offer is made. Whether SEBI's direction to the Appellants to disinvest their holding in the open market is a measure to protect the interest of investors in securities or is in the interest of securities market need be considered for the purpose of determining the validity of the order.

The Appellants were holding 47.48% of the shares in the Target Company. The direction is to sell shares held in excess of the limit prescribed in regulation 10(2) i.e. the holding in excess of 10% of the Target Company's capital. If SEBI's direction to disinvest the shares held by the Appellants is effected, about 38% of the equity shares of the Target Cmpany will have to be offloaded in the market for sale at the rate of Rs.10/- per share. Target Company's paid up capital consists of 95,22,323 shares -- 38% of the same means about 36 lakh shares. One need not be a stock market expert or financial wizard to guage the adverse consequences of offloading such a huge quantity of shares in one go at such a price for sale in the

acquirers to make post facto public announcements. It is also noted that except in the case of acquirers of shares of the Target Company, SEBI had never issued such a direction to any other acquirer of shares of any other company to disinvest the shares acquired by them though acquisition was found in violation of the regulations relating to substantial acquisition of shares and takeovers. Obviously, SEBI was all along considering that a public offer by the acquirer is a measure to benefit the shareholders of the Target Company and accordingly used to direct the acquirers to make post facto public offer in those cases if found that the acquisition was made without complying with requirements of the governing regulation. SEBI has not stated any reason to treat the instant case on an entirely different footing. If SEBI's direction to sell such huge quantity of shares @ Rs.10/- is effected, it would considerably bring down the price of the shares which is at present around Rs.40/-. This undoubtedly would adverselly affect the interests of the existing shareholders. It is to be noted that the provisions to make the public offer provided in the Regulation is meant to benefit the shareholders of the target company and not the public at large, at the cost of the shareholders of the Target Company. The Regulation also ensures that best price is paid to the shareholders of the Target Company participating in the public offer. In the event of disinvestment of shares in the open market, anybody is entitled to buy the shares. Taking into consideration all the relevant facts and in particular the interest of the shareholders of the Target company, the appropriate course, as SEBI has been following consistently, was to direct the Appellants to make a public offer to acquire the shares of the Target Company in accordance with regulations instead of asking them to sell the shares acquired by the Appellants in the open market. It is noted that by SEBI's own

SEBI's direction is not in tune with the objective of the Act and the Regulations and duty cast on SEBI to protect the interests of investors. Since it has been established that the Appellants have violated the requirements of regulation 10(2) they cannot escape from the obligation towards the shareholders of the Target Company and the attendant penal consequences. Even at this belated stage they can be directed to meet their obligation to benefit the shareholders of the Target Company and also to compensate the shareholders for the loss they have sustained. I do not think at this point of time remanding the matter to SEBI for the purpose, will be of any use but cause only further delay in providing the benefit to the shareholders for which they are entitled. The Tribunal is empowered to modify the impugned order. Accordingly it is felt that the impugned direction need be modified to be in tune with the objective of SEBI Act and Regulations regulating substantial acuisition of shares and Takeovers.

For the reasons stated above, the Appellants are directed to make a public offer to acquire shares of the Target Company in terms of the regulations. The referal date for the purpose of fixing the price in the public offer would be 27.10.1994 i.e. the date on which the first lot of additional shares, over and above the 27.21% held by KRC, were acquired in the name of IMFA. 27.10.1994 is to be treated as the date on which regulation 10(2) triggered. 120 days available to the Appellants for the completion of the offer process in that case would have been over by 24.2.1995.The due date for making payment to the eligible participants in the offer was thus 24.2.1995. Since the Appellants did not make the requisite public offer as per the said time frame, the shareholders participating in the public offer

public offer, as directed to be made by this order. The order is modified for the purpose stated above as follows:

That part in para 14.3.1 of the impugned order is modified as follows.

14.3.1

(i) The Appellants are directed to make public announcement to acquire the shares of the Target company as per the regulations within 3 months from the date of this order.

(ii) The referal date for the purpose of calculation of offer price shall be 27.10.1994.

(iii) The Appellants are directed to pay interest @ 15% per annum from 24.2.1995 till the date of actual payment of consideration for shares to be tendered in the offer directed to be made as per this order.

(iv) The interest is directed to be paid only to those persons who were holding shares of the Target company as on 25.1.1995 and continue to be shareholders and eligible to participate in the public offer to be made in terms of above direction, for the shares held in their name on 25.1.1995, tendered and accepted in the public offer directed to be made.

The order dated 19.2.2002 stands modified to the extent stated above.

The order as modified, is upheld.

The appeal disposed of in the above lines.

Sd.-
(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date:August 1 , 2003.