BEFORE THE SECURITIES APPELLATE TRIBUNAL

MUMBAI

In the matter of:

Appeal No.15/2002

Dr. Vijay Mallya **Appellant**

Vs.

1. The Chairman

Securities & Exchange Board of India

2. Securities & Exchange Board of India **Respondents**

Appearance:

Shri Aspi Chinoy,

Sr.Advocate

Shri N. H. Seervai

Advocate

Shri Atul Munim

Advocate

Shri Jai Munim

Advocate

Shri Ranjit Shetty

Advocate

I/b Crawford Bailey & Co. **For Appellant**

Shri R.A. Kapadia,

Sr.Advocate

Shri Kumar Desai

Advocate

I/b. Maneksha & Sethna

Mr. Santosh Shukla

Asstt. Legal Adviser,

SEBI **for Respondents**

ORDER

The present appeal is directed against the Respondent's order dated 19.2.2002. As per the said order the Appellant 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 also in violation of certain provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1994 (the 1994 Regulations) and Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (the 1997 Regulations). By the impugned order the Appellant "and the persons acted in concert if any with him,", were directed to:

> "Disinvest shares in the Target Company acquired in violation of the Listing Agreement and the 1994 Regulations (i.e. beyond 21.38% held prior to the acquisition in violation of the

Regulations)through an offer for sale to public in terms of an offer document subject to the following:

a. that for the purpose the Appellant appoint a registered merchant banker;

b. that the offer price shall be 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 the Appellant and "persons acted in concert, if any" with him to 21.38%, held prior to the acquisition in violation of the regulations;

d. that the offer document for the purpose shall be filed with SEBI within 3 months from the date of the impugned order.

It was also ordered to initiate adjudication proceedings against the Appellant and the "persons acted in concert, if any, with him", under section 15A and 15H of the Securities and Exchange Board of India Act, 1992. (the SEBI Act).

The Target Company is a public limited company. Its core business is the manufacture of alcoholic beverages such as whisky, brandy, vodka etc. The Target Company's paid up capital is Rs.9,52,23,230 comprising 95,22,323 equity shares. Face value of each share is Rs.10/- The shares are listed on National Stock Exchange, Delhi Stock Exchange, Bangalore Stock Exchange, and Ahmedabad Stock Exchange. "Chhabria Group" and "Mallya Group" are stated to be holding substantial quantum of shares in the Target Company.

According to the Respondent the order is based on the following facts:

a. The Appellant acquired 121495 shares representing about 1.3% of the share capital of the Target Company. As a result thereof the Appellant's holding in the Target Company's capital increased from 21.38%(according to the Appellant it is

21.83%) to 23.25% by 30.11.1994.

Other promoters of the Target Company increased their total shareholding from 0.87% in January 1993 to 2.41% during the year 1994.

By 31.12.1994, the holding of shares in the capital of the Target Company by the Appellant along with persons acting in concert (PAC) increased from 21.38% to 25.66%. But no public offer was made complying with the requirements of clause 40A and 40B of the Listing Agreement.

b. The Appellant, through a scheme of merger and acquisition of 4 companies– viz. East Coast Investments Ltd. (East Coast) Endeavour Investments Ltd., (Endeavour), Golden Investments Ltd., (Golden) and Consolidated Investments Ltd., (Consolidated)-- with United Breweries Ltd., (UBL) which is a Mallya group company, acquired 2,49,950 shares of the Target Company representing approximately 2.5% of its paid up capital during December 1994 and September 1995. But no open offer in terms of regulation 10(2) of the 1994 Regulations was made.

c. The Appellant by a stratagem of granting interest free loan to Prasam Trading and Finance P. Ltd., (Prasam) acquired 2,50,000 shares of the Target Company representing approximately 2.52% in the year 1995, in violation of regulation 10 of the 1994 Regulations;

d. The Appellant did not file declarations as required under regulation 6 and 8 of the 1994 Regulations and the 1997 Regulations.

According to the Appellant the pattern of acquisition is as follows:

a. UBL and Mc Dowell & Co. Ltd.(Mc Dowell) acquired 1,21,495 shares of the Target Company between December 1993 and before 4.11.1994 i.e. the date of the 1994 Notification –(In fact the Notification was published on

7.11.1994)

b. 1,32,280 shares of the Target company were acquired by those persons related to the promoters viz. (i)Majunta Investments P. Ltd. (ii)Star Investments P. Ltd.(iii)M. K. Diwanji (iv) P.S. Gandhi (v) Amit Gupta, (vi) S.D. Lalla (vii) Dara P. Lalla (viii) Phiroze D. Lalla (x) Rati P Lalla and (xi) Z.V. Rekhi (Related Persons) between December 1993 and before 4.11.1994.

c. 2,49,950 shares of the Target Company were acquired by UBL during the period December, 1994 to September, 1995 from four companies viz. Golden Investments Ltd. Endeavour Investments Ltd., East Coast Investments Ltd., and Consolidated Investments Ltd., consequent to amalgamation of these companies with UBL.

d. "Acquisition" of 1,96,300 shares of the Target company (not 2,50,000 shares as stated in the show cause notice dated 8.1.1999 by Prasam Trading & Finance P. Ltd.,

e. The Appellant was not required to make disclosures/declarations as alleged.

According to the Appellant none of the said acquisitions attracted compliance of clause 40A and 40B of the Listing Agreement or the provisions of the 1994 Regulations/1997 Regulations. Both the parties had made oral submissions through their counsel. They had also filed written submissions. Shri Aspi Chinoy, learned Senior Counsel appeared for the Appellant. For the Respondents Shri Rohit Kapadia, learned Senior Counsel appeared.

Submissions on behalf of the Appellant:

Referring to the show cause notice dated 8.1.1999 addressed to the Appellant and the Appellant's reply thereto dated 25.1.1999 it was submitted that the 'acquisition' of shares of the Target Company allegedly made by the Appellants can be put in three groups for reference purpose i.e.(A) 121495 shares + 132280 shares; (B) 249950

shares; (C)196300 shares. Shares referred to at (A) were acquired prior to the notification of the 1994 Regulations. The shares referred to at (B) and (C) were acquired during the currency of the 1994 Regulations. Since shares referred to at (A) were acquired before the notification of the 1994 Regulations, the 1994 Regulations has no application to the said acquisition. With reference to the alleged breach of clauses 40A and 40B of the Listing Agreement, it was submitted that Clause 40A was not attracted, as the same would apply only if the acquirer held less than 5% or less than 10% in the Target Company's capital, that UBL held more than 10%. Mc Dowell's holding in the Target Company in 1994 never exceeded 5%. Clause 40B applies in cases of takeover of management and control, that in the present case UBL and Mc Dowell were at all material times in management and control of the Target Company, and accordingly clause 40B is inapplicable. In terms of clause 40B(2)(b) a public announcement of a take over offer is required to be made both by the offeror company and the offeree company when the acquirer secures 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, that clause 40B(2)(b) relates to acquisition of control by acquiring shares of controlling group. It is not the Respondent's charge that the Appellant had acquired shares of the controlling group. The text of clause 40(B)(2)(a) was referred to and submitted that the said clause applies only if any person acquires in his own name or in the name of any other person, securities carrying 10% or more of the total voting rights of the offeree company. Thus the clause would apply if any person and his benamies acquire 10% or more of the total voting rights, that the Respondent has also stated in its order that if the shares were acquired by the Appellant in other names, the same will be covered under this clause. The question is whether the Appellant was holding shares through benamies. A benami is a name lender, a person who has not paid consideration for acquiring the property and who has no beneficial interest in the property, that in the case of a benami purchase, the purchase consideration flows not from the benami, but from the real owner and the property is acquired by such real owner in the name of the benami, that the concept of benami acquisition under clause 40B(2)

(a) is a totally distinct concept from acquisition by persons acting in concert as defined in regulation 2(d) in the 1994 Regulations. The show cause notice does not even allege that the acquisition of 121495 shares or 132280 shares was a benami transaction. In fact it was not the Respondent's case also that the said shares were acquired or held benami. The 121495 shares were acquired by UBL and Mc Dowell, both listed companies, out of their own funds and they were throughout the legal as well as the beneficial owners of these shares and therefore no question arises or survives of these 121495 shares being acquired by the Appellant or of clause 40B(2)(a) being attracted to such acquisitions by the said two listed public limited companies.

With reference to the Respondent's contention that as the Appellant controls the management of UBL and Mc Dowell, the corporate veil should be lifted and it should be held that such acquisition of shares by the two companies were acquisitions of the Appellant, it was submitted that these two companies are listed public companies, which have been in existence for many years and have a large number of share holders including Financial Institutions, that they have flourishing business, large turnovers and large assets, that it is not the Respondent's case that these companies had been recently incorporated and/or that they are a sham or mere device used by the Appellant to circumvent the Regulations or the Listing Agreement for acquiring the Target Company's shares, that although such companies might be part of the UB Group and under the overall management and control of the Appellant, there is no basis for the Respondent to allege that their assets/shareholding can be treated as the Appellant's assets or shareholding.

Regarding 1,32,280 shares acquired by persons related to the promoters it was submitted that the Respondent has not disputed that such persons acquired the shares from their own funds and are the legal and beneficial owners thereof and as a result such persons increased their holding from 0.87% to 2.41%. Once it is concluded that it was not a benami holding, clause 40(B)(2)(a) has no application.

The Respondent's conclusion that the acquisitions made by UBL and Mc Dowell be deemed to have been made by the Appellant acting in concert with the said two companies and that the shares were acquired

by the Appellant in the name of the said companies – benami holding – can not go together as persons acting in concert can not be considered as a benami.

With reference to the acquisition of 2,49,950 shares, the fact that these shares were acquired by UBL is undisputed. It was submitted that the four companies i.e. East Coast., Endeavour, Golden and Consolidated, held shares in Sona Distilleries Ltd. In 1992, Sona Distilleries merged with the Target Company, pursuant to a Scheme of Amalgamation approved by the Hon'ble Bombay High Court under section 391/394 of the Companies Act, that under the Scheme the erstwhile shareholders of Sona Distilleries got in lieu of one share of Sona Distilleries, five equity shares of the Target Company and 10 Fully Convertible Debentures (FCD) of Rs.75/- each which were automatically and compulsorily convertible into five shares of the Target Company after three years – i.e. in August 1995. In 1994 and 1995 (prior to August 1995) the said four companies merged with UBL pursuant to a Scheme of Amalgamation approved by the Hon'ble High Court of Karnataka and the Hon'ble High Court of Tamil Nadu under section 391/ 394 of the Companies Act, that under the said Scheme of Amalgamation all the assets including the entitlement to the shares of the Target Company on conversion of FCDs and liabilities of the said four companies were statutorily vested in UBL, and accordingly in August 1995 UBL received 2,49,950 shares against conversion of the said FCDs. It is not in dispute that UBL received the FCDs and on their conversion the said shares, pursuant to the said Scheme of Amalgamation approved by the said High Courts under section 391/394 of the Companies Act. The shares so received are therefore, entitled to exemption in terms of clause 3(e) of the 1994 Regulations which gives exemption to acquisition of shares "pursuant to a scheme of amalgamation under section 391/394 of the Companies Act". Countering the Respondent's contention that the acquisition was not an exempted one under clause 3(e) as the said clause only covered acquisition through amalgamations "involving the target company" it was submitted that the Respondent by giving such an interpretation is seeking to add words to and alter/limit the ambit and content of the plain language meaning of clause 3(e), that the Respondent is seeking to radically alter and restrict the plain language of clause 3(e) only on

the basis of its alleged "intention" that the alleged "intention" is contrary to the plain terms of the clause. Moreover, such an interpretation would result in denying the exemption to those who on the plain language of the clause, are clearly entitled to such exemption, that any such restricted interpretation would have the effect of retrospectively exposing, those who have acted upon the plain language and purport of the exemption clause, to penalties and sanctions for having violated the Regulations, that such an interpretation is incorrect and can not be permitted to alter and restrict the plain language and import/ambit of clause 3(e). Under clause 3(1)(j)(ii) of the 1997 Regulations, which embodies the equivalent exemption of clause 3(e) of the 1994 Regulations, SEBI has on numerous occasions exempted acquisition of shares of Indian target companies by foreign companies which had taken place pursuant to a Scheme of merger or Amalgamation between two foreign companies, not involving the target company, that in these circumstances there could be no basis for any intent to deny the exemption under clause 3(e) to a similar acquisition of shares by an Indian company of the shares of a target company, pursuant to a Scheme of Amalgamation between two Indian companies not involving the target company.

With reference to acquisition of 2,50,000 shares (according to the Appellant only 1,96,300 shares) the Appellant had submitted that as per the Respondent's version in the show cause notice UBL had given an interest free loan of Rs.1.25 crore to Prasam, a company belonging to LKP Group which has long standing business relations with the Appellant, in 1995 and that Prasam utilised the said amount for acquiring 2.5 lakh shares of the Target Company, and the said acquisition has been viewed as an acquisition by the Appellant and UBL acting in concert with Prasam. It was submitted that the Respondent's conclusion is based on an assumption that UBL had given an interest free loan to Prasam, that the said assumption is baseless as UBL had not given any loan or advance as alleged. LKP Group had long standing business relations with UBL inasmuch as LKP as stock broker had over a number of years bought and sold shares for UBL in various companies and in respect of such transactions amounts had been from time to time debited and credited to an open running account maintained by LKP Group, that the amount treated by

the Respondent as loan were in fact the amounts standing in the running account with LKP Group. Prasam had also informed the Respondent in response to a query that it had not acted in concert, that there was no understanding or agreement between Prasam, Mallya or UBL to acquire shares of the Target Company, further that it had bought and sold shares of the Target company by way of its own investments and in the usual course of its business. In support of the submission that it was buying, selling shares by way of its own investment, sale of 1,57,200 shares of the Target Company in 1995-96 was cited. According to the Appellant the Respondent has not taken into consideration the submission the Appellant made before SEBI's Chairman, that it was not open for SEBI to come to any finding without considering or dealing with the same. The fact that Prasam had during the relevant period sold 1,57,200 shares of the Target Company totally negated any question of Prasam having acted in concert with the Appellant or UBL to acquire shares of the Target Company. In such circumstances merely because Prasam belonged to the LKP Group, and the LKP group had long standing business relationship with UBL could not lead to any inference/finding of Prasam having acted in concert with them. Respondent's finding in this regard is contrary to the facts and evidence on record and is without any basis, that in fact the conclusion arrived at by the Respondent is negated by the undisputed facts on record. The Respondent has not rebutted any of the versions of the Appellant but relied only on the fact that the amount outstanding in the said running account was interest free, ignoring that outstandings in running accounts by their very nature do not bear interest. The Respondent had admitted that the Appellant or UBL had no control over Prasam, that the allegation being only that Prasam had acted in concert, a direction to disinvest shares acquired by Prasam could not be given in the absence of Prasam in the proceedings and that it would be impossible for the Appellant to disinvest the shares acquired by Prasam.

Regarding the charge of not making of Disclosures/Declarations under regulation 6(1) and 8(1) of the 1994 Regulations / the 1997 Regulations, it was submitted that the said regulations of the 1994 Regulations only cast an obligation on any person who holds shares, to file a declaration, that it is undisputed that the Appellant personally

holds no shares in the Target Company. The shares are held by UBL and Mc Dowell and they have filed the requisite declarations under the relevant regulations in respect of the shares held by them. The word 'holds' is not defined in the Regulations, and as such as per regulation 2(2) the definition applicable would be the one provided in the Companies Act, that under the Companies Act the word "holder of the shares" is treated as being synonymous with member – i.e. a person whose acquisition have been registered in the Register of Members by the company. The Hon'ble Bombay High Court (DB) in its Judgement in Shirish Finance & Investment P. Ltd., Vs M. Sreenivasulu Reddy (2002) 35 SCL 27 (Bom), the concept of "holder of shares" has been extended to a person who has acquired shares but not yet lodged the same for registration, that in any case, the concept of 'holder of shares' can never be extended to cover a person who has neither got registered any share transfers, nor even acquired any shares. The mere fact that the Appellant controls the management of UBL or Mc Dowell would not make him the holder of shares which are acquired by and held by such companies, that there was no requirement for the Appellant to make any declaration under the 1994 Regulations as contented/held by the Respondent in its order.

On the Respondent's order under regulation 44(c) of the 1997 Regulations/Regulation 39(c) of the 1994 Regulations, the Appellant without prejudice to his contention that the subject acquisitions are not in violation of the requirement of the Listing Agreement and or the Regulations on substantial acquisition of shares and takeovers, submitted that although the Respondent has in terms of the express language of regulation 39 (c)/44 (c) power to order disinvestment of shares acquired in breach of the provisions of the Regulations, such disinvestment at par might not be to the public at large. Disinvestment of shares at par value through a public offer will depress share prices and be prejudicial to the interest of the small shareholders, that in keeping with the underlying object of the Regulations, the disinvestment of shares at par, if any, ought to be by way of an offer for sale on "rights basis" to the small existing share holders of the Target Company to the exclusion of Chhabrias and Mallya Groups.

The Appellant in his written submissions referring to certain

submissions stated to have been made on behalf of the Appellant in Appeal No.13/2002 in the said appeal proceedings had submitted on the binding nature of the Hon'ble Bombay High Court's order in Shirish (supra) on the Appellant in Appeal No.13/2002. In my view the said submissions are extraneous to the present appeal. As appeal no.13/2002 is to be decided on the basis of the facts and law as pleaded by the parties in the said appeal, I do not consider it necessary to take cognizance of the Appellant's said submission with reference to appeal No.13/2002, in the present appeal.

Submissions on behalf of the Respondent (SEBI)

Show cause notice issued to the Appellant on 8.1.999 was referred to. It was submitted that the show cause notice was issued to the Appellant. Appellant is the man behind UBL and Mc Dowell. This fact has been admitted by the Appellant also as is evident from his letter dated 27.1.1999 addressed to the Respondent, that in the letter it has been stated that "Both UB Ltd. , and I are vitally interested and affected parties – being in management and control of Herbertsons Ltd.," From the facts on record it is clear that the Appellant is the person in control and management of the Target Company. It was submitted that the scope of the expression 'the holder of shares' need be understood in the said context. The definition of the expression "acquirer" and "person acting in concert", as provided in the 1994 Regulation was also referred to substantiate that the acquirer is the real person who acquires or agrees to acquire shares. Filing the declaration under regulation 6 and 8 by the acquirer is to know as to who is the acquirer and as such the real acquirer has to declare the same and not the front companies. The Respondent referred to the observation made by the Hon'ble Bombay High Court (DB) in Shirish that "on a contextual and purposive interpretation, and having regard to the object to be achieved by the Act and the regulations, the words "who holds shares" must be given a construction so as to include a 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" "……The object of the Regulation 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." The purpose of making declaration and obligation to make declaration by the holders of shares is thus clear and that the Appellant can not escape from his obligation from complying with the requirements of the regulations.

In terms of section 11(1) of the SEBI Act, it is the mandatory duty of the Respondent 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 restrictive. Section 11(2) provides for certain specific measures that one of such measures is to provide for "regulating substantial acquisition of shares and takeover companies", and also "calling for information from, undertaking inspection, conducting enquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market, intermediaries, and self regulatory organisations in the securities market". In M Z Khan V SEBI (AIR 1999 Del 164) the Hon'ble Delhi High Court has inter alia held that under section 11 of the SEBI Act, the SEBI has the power 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 power is of a very wide nature and is not hedged in by any restrictions. The Respondent is empowered to issue direction under section 11B of the SEBI Act in the interest of investors or for orderly development of securities market to any person or class of persons referred to in section 12 or persons associated with the securities market.

Even under clauses 40A and 40B of the listing agreement, in case of substantial acquisition of shares, SEBI has been given power to grant exemptions, prescribe details to be contained in the offer document, specify the agencies in case of whose acquisitions clauses 40A and 40B shall not apply. Also the details, information and documents/announcement about the offer are also to be lodged with SEBI. In terms of section 11(2) (h) of the SEBI Act, the Respondent has powers to regulate substantial acquisition of shares and takeover of companies. It is clear that regulation of substantial acquisition of shares and takeovers is not subject to framing of any Regulations in this

regard. 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. In any event SEBI has statutory powers to regulate substantial acquisition of shares and takeover of a company even at a time when no regulations relating to substantial acquisition of shares and takeovers were framed by SEBI. The existing clauses 40A and 40B of the listing agreements could be used as a guideline for exercise of its said statutory powers. In this regard the view is held by the Hon'ble Supreme Court in U.P. State Electricity Board (1985) 2 SCC 16) and Surinder Singh V/s Central Government (1986) 4 SCC 667) were referred to. In the circumstances SEBI is entitled to take cognizance of and pass necessary orders in respect of substantial acquisition of shares and takeovers effected even prior to the 1994 Regulations was notified.

Regulation 2 provides certain definitions and inter alia uses the expression "*unless* the *context otherwise requires".* This enables the Court to give contextual and purposive interpretation of the words used in the Regulations so as to ensure that object and purpose of the Regulations are achieved and not defeated. Hon'ble Supreme Court's decision in K. V. Muthu Vs. Angamuthu Ammal (AIR 1997 S.C. page 628) was referred and stated that wherein the Hon'ble Supreme Court had 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 the Act. The construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted. While interpreting the scope and reach of the Regulations one is required to keep in view the purpose of the regulation, rather than going by a mechanical literal interpretation of the regulations.

In terms of the definition provided in the Regulations, "acquirer" means any person who acquires or agrees to acquire shares in a company either by himself or with any persons acting in concert with the "acquirer" Under the definition, the acquirer is a person who (i) acquires shares by himself (ii) agrees to acquire shares by himself (iii) acquires shares with any person acting in concert with the acquirer (iv)

agrees to acquire shares with any person acting in concert with the acquirer. It was submitted after referring to the definition of the expression "person acting in concert" that the first part of the definition is an "exclusive definition" but the second part i.e. after the word "includes" is an "inclusive definition", that 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" referred to in explanation (B) is not restricted to "relative" as defined under section 6 of the Companies Act, 1956 as set out in (A). In Shirish (supra) Hon'ble Bombay High Court had inter alia held that the definition of the expression "acquirer" includes persons acting in concert with him and the acquisitions by persons acting in concert with the acquirer will have to be considered as acquisitions by the acquirer himself i.e. the acquisitions made by the acquirer and 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. The Hon'ble Court had 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.

In the facts of the case and taking into consideration the definition of the word acquirer and the person acting in concert, it is clear that the Appellant was acting in concert with companies owned and controlled by him for the common objective of substantial acquisition of shares and voting rights of the Target Company.

With reference to the scope of regulation 3(e) it was submitted that requirements of making public announcement provided in regulation 10 is not applicable to acquisition of shares pursuant to a Scheme of arrangement or Amalgamation under section 391/394 of the Companies Act. But the regulation contemplates an acquisition of shares of the target company pursuant to a Scheme of arrangement or Amalgamation involving the target company. In the Scheme of Amalgamation referred to in the instant case, the Target Company was not involved and as

such the exemption provided under regulation 3(e) would not be available.

There is no procedure provided for the commencement of the inquiry. The moment some evidence / information becomes available to the Respondent relating to breach of the SEBI Act or regulations the Respondent is entitled to proceed further on the basis of such evidence to make further enquiries into the matter and as such at that stage itself such inquiry must be deemed to be commenced The Respondent had commenced inquiry when it issued the letter dated 09.06.95 to the Target Company seeking certain details. As no strict procedure is prescribed for holding an inquiry under the Act or regulations in respect of substantial acquisition of shares and takeover of companies, the principles of natural justice are followed and the date of commencement of the inquiry would be the date on which the Respondent took cognizance of the violations and proceeded in the matter to gather further information and evidence. The Hon'ble High Court of Bombay in Shirish (supra) has also held the same view In the circumstances the Respondent had commenced inquiry when it issued the letter dated 9.6.1995 to the Target Company seeking certain details. Since an inquiry was pending at the time of repeal of the 1994 Regulations, under regulation 47 of the 1997 Regulations SEBI is empowered to continue and complete the said inquiry and pass necessary orders in respect thereof under the 1997 Regulations.

Regulation 47(2) of the 1997 Regulations "on repeal and saving" was referred to. The saving clause in regulation 47(2) provided that not with standing the repeal of the 1994 Regulations 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 said regulations shall be deemed to have been done or taken under the corresponding provisions of these regulations;

The words "anything done" would include "anything omitted to be done" under the Regulations, that under the provisions of 1994 Regulation, once a person crosses the threshold limit of 10%, public offer is required to be made as per the provisions of the said regulations, that the Appellant acquired the shares of the Target

Company in breach of the 1994 Regulations, but omitted to make the public offer in accordance with the said Regulations and therefore under the provisions of Regulation 47, SEBI was entitled to proceed against the Appellant. In this context Hon'ble Supreme Court in Nar Bahadur Bhandari Vs. State of Sikkim (1988 (5) S.C.C. 39) was referred to where the Hon'ble Supreme Court inter alia had held that by legal fiction an Act comes into force when anything was done or action was taken under or in pursuance of an old Act. In Public Prosecutor, Madras V/s R. Raju (AIR 1972 S.C. 2504) the Hon'ble Supreme Court had 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.

The word "enquiry" under Regulation 47(2) does not necessarily mean formal enquiry commencing with a Show Cause Notice. Enquiry as held by the Hon'ble Bombay High Court in Shirish (supra) 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 the 1994 Regulations and the 1997 Regulations. 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 Regulations.

The Appellant has not disputed the facts relating to acquisition of shares to the tune of approximately 1.3% of the Target Company by UBL and Mc Dowell, approximately 1.54% of the Target Company by persons related to the promoters, approximately 2.5% of the Target Company by UBL through four promoter companies i.e. Golden, East Coast, Endeavour, and Consolidated and approximately 2.06% by Prasam

With regard to acquisition of 1.3% of the Target Company's shares by promoters following submission was made:

The fact that the Target Company is a subsidiary of UBL and that UBL is a company under the control of the Appellant has not been disputed. The fact that McDowell is also a company under the control of the Appellant remains undisputed. In December 1993 the Appellant had

transferred approximately 27% of his shareholding (held in the name of various investment companies) in the Target Company to Kishore Chhabria group. After this transfer the Appellant along with other promoters were left with 21.38% holding in the capital of the Target Company.

The Appellant along with persons acting in concert with him purchased 1,21,495 shares (around 1.3%) of the Target Company thereby increasing his holding to 23.25%. The said acquisition having been made at the instance of the Appellant, the acquisition is contrary to the provisions of clause 40A and 40B of the Listing Agreement and would therefore trigger the application of the provisions of clauses 40A and 40B.

With reference to the Appellant's contention that even though Regulation 2(d) of the 1994 regulations would apply, clause 40(B)(2)(a) of the Listing Agreement would not apply since the acquisition by UBL and McDowell was not a benami transaction, it was submitted that acquisitions made by the Appellant using his other companies cannot be seen in isolation. The provisions of the then existing clause 40(B)(2)(a) of the Listing Agreement, inter alia, includes any acquisition made by "any person in his own name or in the name of any other person". Thus, if the shares were acquired by the Appellant in other names, the same will be covered under this clause, that the contention that the provisions of the then existing clause 40(B)(2)(a) of the Listing Agreement would have no applicability to the acquisition of shares by other persons using their own funds and of which they became the legal and beneficial owners is misconceived. The findings recorded in the impugned order in this regard were reiterated. The requirement of clause 40(B)(2) of the Listing Agreement attracted the acquisition of shares made by the Appellant in other names.

With regard to acquisition of 1.54% of the Target Company's shares by persons related to the promoters, it was submitted that :

It has not been disputed that the persons set out in List I of the appeal book, are persons related to the promoters. Between December 1993, and prior to 7th November, 1994 (the latter being the date when the

1994 Regulations came into force) the said related persons of the promoters increased their holding in the Target Company from 0.87% to 2.41% i.e. they acquired additionally 1.54% of the Target Company's capital. This increased the Appellant's effective aggregate shareholding to 25.66% in the Target Company's capital. The said acquisition, having been made by the related persons at the instance of and/or in concert with the Appellant, would attract the requirement of clauses 40A and 40B of the Listing Agreement.

With reference to acquisition of 2.5% share capital of the Target Company by UBL through four promoter companies it was submitted that:

Pursuant to an order dated 22nd July, 1992 passed by the Hon'ble Bombay High Court sanctioning a Scheme of Amalgamation, Sona Distilleries Ltd., ("**Sona"**) was amalgamated with the Target Company . On 11th August 1992 in compliance with the Amalgamation Scheme, the Target Company allotted shares and FCDs to the shareholders of Sona including the four companies namely Golden, East Coast, Endevaour and Consolidated. The said four companies subsequently, consequent to the Scheme of Amalgamation sanctioned by the courts merged with UBL which in turn is a promoter company of the Target Company. With effect from 11th August 1995 the FCDs allotted to the said four Companies were converted into 2,49,950 shares (approximately 2.5%). In that context no public offer was made, though it was required to be made.

Countering the Appellant's contention that by virtue of Regulation 3(e) of the 1994 Regulations, nothing contained in chapter III of 1994 Regulations relating to Takeover would apply in relation to acquisition of shares of the Target Company pursuant to a Scheme of Arrangement or Amalgamation, it was submitted that clause 3(e) of the 1994 Regulations is restricted to acquisition of shares of the target company as a result of merger or amalgamation of the target company with other company but in the Scheme of Amalgamation referred to in the instant case, the Target Company is not involved. Since the Target Company

has not been amalgamated/merged and the shares of the Target Company had been acquired by UBL pursuant to the merger of the said four companies with UBL, regulation 3(e) of the 1994 Regulations would not be applicable and therefore, acquisition of 2,49,950 shares constituting 2.5% of the share capital of the Target Company made on 11th August, 1995 would be covered under regulations 10(2) and 9(3) of the 1994 Regulations as the Appellant and the persons acting in concert with him were already holding 25.66% of the Target Company's capital at that time, that further acquisition was not to be made without a public announcement.

With regard to acquisition of 2.06% shares of the Target Company by Prasam it was submitted that:

UBL gave an interest free loan of Rs.1.25 crores to Prasam and Prasam utilized the money so received for the purpose of acquiring 2.06% shares of the Target Company. The loan given in 1995 remained outstanding even in June, 1998. Prasam is an associate company of LKP Shares & Securities Ltd., (LKP). LKP has a long standing business relation with the Appellant. The Appellant acting in concert with UBL and in collusion with Prasam acquired around 2.06% shares of the Target Company by adopting a stratagem of granting interest free loan to Prasam to purchase the shares. The Appellant in his letter dated 25.1.1999 addressed to SEBI(i.e. in reply to the show cause notice) has not denied the fact of having advanced a sum of Rs. 1.25 crores to Prasam by UBL. In view of the business relationship that existed between the Appellant (through UBL) and Prasam (through LKP) they will be deemed to be persons acting in concert in terms of regulation 2 (d) of the 1994 Regulations. Since the said acquisition of 2.06% of the Target Company's shares by the Appellant when aggregated with the shares already held by him carry more than 10% of voting of right in the capital of the Target Company, the provisions of regulation 10(2) of the 1994 Regulations attracted. Since the acquisition was made without making public announcement as required under regulation 10(2) of the 1994 Regulations, the Appellant violated the said regulations.

As is clear from the facts of the case and also in view of the fact that the factors relating to acquisition were not disputed by the Appellant,

the question of SEBI initiating investigation under regulations 33 and 34 and then acting on the basis of any such investigation report under regulations 35 to 37 did not arise. The Tribunal in Rhodia SA V SEBI (2001) 34 SCL 597) had held, inter-alia, that exercise of powers under regulation 44 are not relatable or confined to findings of any investigation under provisions of regulation 33 to 37 of the 1997 Regulations. SEBI is empowered to exercise powers under Regulation 44 read with Section 11B of the SEBI Act to pass the impugned directions. The Appellant's contention that his case was covered under regulation 42(2) of the 1997 Regulations is misconceived. 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 section 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.

The Regulations contemplate that the purchase of shares beyond the prescribed limit requires such a person to do various things as set out in the Regulation. Failure to comply with the specific requirements as set out in the Regulations renders the purchase of shares beyond the stipulated limit illegal and void as has been so held by the Hon'ble Bombay High Court in Shirish.(supra) It is impractical that the shares purchased in breach of the said Regulations could be sold back and consideration paid received back from the sellers of the said shares. Directions to sell shares purchased in breach of the regulations have been passed by SEBI. The impugned directions under regulation 44 of the 1997 Regulations are passed to remedy the situation of illegal acquisition of shares by the Appellant. The said directions are not penal in nature but to remedy a situation created by purchase of shares beyond the specified limit. The Hon'ble Supreme Court's decision in Delhi Development Authority V/s/ Skipper Construction Co. (P) Ltd. (AIR 1996 S.C. 2005 D) was cited.

The Respondent's Counsel endorsed the Appellant's suugestion that the direction to disinvest the shares be modified to the effect that the disinvestment of the shares be made among the existing small shareholders of the Target Companay.

The Respondent submitted that for the reasons stated by it the

impugned order be upheld.

Findings:

The Respondent, based on its perception has come to the conclusion that acquisition of shares of the Target Company, made prior to 7.11.1994 covered under the impugned order was in violation of the terms of clause 40A and 40B of the Listing Agreement and the acquisitions made after 7.11.1994 were in contravention of the provisions of regulation 10 of the 1994 Regulations. The Listing Agreement referred to is the agreement entered into by the Target Company with the stock exchanges for the purpose of getting its shares listed on the stock exchanges. The regulation alleged to have been violated is regulation 10(2). Based on the conclusion that the acquisitions are in violation of the terms of the Listing Agreement and the provisions of regulation 10(2) the impugned direction was issued. The impugned direction is in two parts. First part of the direction requires the Appellant to disinvest the shares acquired in violation of the requirements of the Listing Agreement/ the provisions of the 1994 Regulations to the public at the face value of the share or at the lowest price at which the shares were acquired, whichever is lower. The second part of the direction is to initiate adjudication proceedings against the Appellant 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. Sections 15A and 15H provide monetary penalties for non compliance of the regulations stated above.

As per the factual position furnished by the Respondent, the total holding of the Appellant in the Target Company's paid up share capital as a result of the acquisition during the period covered in the order had increased to 30.68% from 21.38%. In that context about 9.30% shares of the Target Company (i.e. about 8.9 lakh shares) are required to be disinvested at the face value of the share, which is rupees ten per share, in the open market, in one go.

The quantum of shares acquired, and the period during which the acquisitions were made are not in dispute. The acquisitions, for the purpose of deciding the present appeal, based on the time band can be

put under two groups:

i. Acquisitions prior to the notification of the 1994 Regulations i.e. prior to 7.11.1994

ii. Acquisitions during the currency of the 1994 Regulations i.e. from 7.11.1994 to 20.2.1997

The 1994 Regulations came into effect from 7.11.1994.

As per the impugned order 253775 shares were purchased prior to the notification of the 1994 Regulations. This comprised 121495 shares purchased in the name of UBL and Mc Dowell Ltd., and 132280 shares purchased in the name of the persons related to promoters of the Target Company. 249950 shares were received on 11.11.1995 by UBL pursuant to conversion of the FCDs held by four companies which were amalgamated with it 2,50,000 shares were purchased by Prasam, an LKP group company, in the year 1995. Thus the total number of shares acquired before the 1994 Regulations came into force was 253775 and the total number of shares acquired during the currency of the 1994 Regulations was 4,99,950.

According to the Respondent, the Appellant himself having admitted that UBL and Mc Dowell are companies controlled and managed by him, it can be safely concluded that the said two companies and the Appellant by acting in concert acquired 121495 shares in the Target Company. As per the Respondent's version even though the 1994 Regulations was not in position when the Appellant acquired 253775 shares, i.e. 121495 shares acquired in the name of UBL and Mc Dowell and 132280 shares acquired in the name of the related persons, by virtue of the powers vested in it in terms of section 11, particularly under regulation 11(2) (h) and section 11B of the SEBI Act, the Respondent is empowered to take appropriate action in respect of acquisition of shares in violation of the terms of clause 40A and 40B of the Listing Agreement.

Clauses 40A and 40B of the Listing Agreement stated to have been violated by the Appellant 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 securities already held by such person, exceeds or shall exceed in the aggregate 5% of the voting capital of the company, the stock exchange shall be notified within two days of such acquisition or such agreement 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 whenever 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, securities which, when aggregated with securities already held or acquired by such person, shall carry 10% or more of the total voting rights of the offeree company, or

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 ……."

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 40. In April 1990 the said clause 40 was amended by substituting clause 40A and clause 40B. In fact clause 40A and clause 40B were put in the listing agreement even before the SEBI Act came into force in 1992.

The SEBI Act was enacted in the year 1992. It came into force from 30.1.1992. The object of the legislation as per the preamble to the SEBI Act is "to provide for the establishment of a Board to protect the interests of the investors in securities and to promote the 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 a "Board" by the name of "The Securities and Exchange Board of India" (SEBI) for the purposes of the Act. Powers and functions of SEBI are stated under chapter IV of the SEBI Act. There were four sections (at the relevant period) under Chapter IV - i.e. section 11, 11A, 11AA and 11B. Section 11 is on Functions of the Board. Section 11A is on matters to be disclosed by companies in the context of issue of capital. Section 11 AA relates to Collective Investment Scheme. Section 11B is on SEBI's Power to issue directions.

According to section 11 "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 specific 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. The purpose for which such directions can be issued and the persons to whom such directions can be issued has been specified in section 11B. The scope and reach of the section has been well defined, as could be seen from the text of the section extracted below:

> " 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 may be appropriate in the interests of investors in securities and the securities market."

As stated earlier section 11A referred to in clause (b) is on disclosure by companies on matters relating to issue of capital, transfer of securities and other matters incidental thereto.

It is noted that section 11B was incorporated in the SEBI Act with effect from 25.1.1995 vide "Securities (Laws) Amendment Act, 1995". It has no retrospective application.

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 on the Appellant. The said 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 under the Act. Section 15T provides for appeal to the Appellate Tribunal by any person aggrieved by an order made by SEBI or an order made by the adjudicating officer under the Act. In terms of section 15T(4) on receipt of an appeal the Appellate Tribunal is empowered, after giving the parties to the appeal, an opportunity of being heard, to pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.(emphasis supplied)

Chapter VI A was also incorporated in the SEBI Act with effect from 25.1.1995.

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

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

As stated earlier, SEBI 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, SEBI had put in position a set of regulations titled "Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994" The Regulation was published on 7.11.1994 in the Gazette of India. The Regulations came into force from the said date.. Since the 1994 Regulations 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 amendments in the Regulations with a view to strengthening

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 would be impracticable to devise regulations in such detail as to cover the entire range of situations, which could arise in the process of substantial acquisition of shares and takeovers. The committee viewed that instead there should be a set of General Principles which should guide the interpretation and operation of the 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 on the Substantial Acquisition of Shares and Takeovers 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 the 1994 Regulations or the 1997 Regulations should be by taking into consideration the objective of the Regulations as well as the general guiding principles formulated by the committee. While considering the sustainability of the impugned order one has to keep in

view the aforesaid requirement as well.

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

> **Regulation 2(1)(b)**-- "acquirer" means any person, who acquires, or agrees to acquire shares in a company either by himself or with any person acting in concert with the acquirer.
>
> **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 through negotiation.—(1) Any acquirer who holds shares carrying ten per cent or less of voting rights in the capital of the company shall not through negotiations acquire any further shares, which, when taken together with his existing shareholdings would carry more than ten per cent of the voting 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 any 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 the company, shall not acquire any further shares in the company from the open market unless, such acquirer makes a public announcement of intention to acquire shares in accordance with the 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

Regulation 44 of the 1997 Regulations empowers SEBI to issue directions. Text of the said regulation is as follows:

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.

The 1994 Regulations was repealed on 20.2.1997 by the 1997 Regulations. Regulation 47 is on "repeal and saving" which is as follows:

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, 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 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.

The Respondent had submitted that section 11 and section 11B vest in SEBI the requisite authority and jurisdiction to deal with acquisition of shares made in violation of clause 40A and clause 40B of the Listing Agreement, even if the acquisition was made before the notification of the 1994 Regulations, that these clauses have recognised SEBI's role in regulating substantial acquisition of shares. According to the Respondent since section 11(2) (h) empowers SEBI to take measures to regulate substantial acquisition of shares and takeovers, SEBI in exercise of the same could regulate substantial acquisition of shares and takeovers even in the absence of any Regulation in position. Shri Kapadia, learned Senior Counsel, in support of the said submission had cited two decisions of the Hon'ble Supreme Court i.e. -- in U. P. State Electricity Board V City Board, Mussorie ((1985) 2 SCC-16)) (ii) Surinder Singh V Central Government ((1986) 4 SCC 669).

The basis on which the Appellant has been held liable for violation of clause 40B (2)(a) of the Listing Agreement has been stated in the show cause notice dated 8.1.1999 issued to the Appellant. As per the said notice the Appellant raised his holding in the Target Company from 21.38% to 23.25% by November 30,1994, "by purchasing 121495 shares (around 1.3% shares). Other persons related to the promoters of HL (i.e. the Target Company) increased their holding from 0.87% in January 1993 to 2.41% during the year 1994. Thus, by December 31, 1994 you (the Appellant) along with the other promoters and other persons related to the promoters had increased their share holding in HL from 21.38% to 25.66%. It appears that this acquisition of approx. 3.6% was made without making any public offer". From the material available on record it is noted that the while 132280 shares were

acquired by the related persons, 121495 shares were acquired by two companies i.e. UBL and Mc Dowell. The total number of shares acquired in the said transaction was 253775. It has been admitted by the Respondent that these acquisitions were made prior to the notifications of the 1994 Regulations. The Respondent's finding holding the Appellant guilty of violating clauses 40A and 40B as recorded in the impugned order is very cryptic, as could be seen from the following portion extracted below:

> **" 7.2. Acquisition resulting in increase of holding from 21.38% to 25.66% -** I find that after selling 27% of its shareholding in HL to KRC in 1993, VM was left with 21.38% holding in HL. VM, thereafter, increased his holding to 23.25% from 21.38% before 4th November, 1994. Further, I find that other promoters of HL increased their holding from 0.87% in January 1993 to 2.41% during the year 1994. Thus, total holding of VM and PAC increased to 25.66% from 21.38%.

2. VM has claimed that he is not the promoter of HL. I find that he admits that HL is under the control and management of UBL & McDowell Ltd., which are under the control and management of VM. Further, VM in his letter dated 27/01/99 has submitted in the context of SCN to MDC/KRC, that both UBL and VM are interested and affected parties - being in management and control of HL. Thus, VM has admitted that he holds control over the affairs of HL. The acquisitions made by UBL & McDowell Limited, therefore, be deemed to have been made by VM acting in concert with them.

3. It is not true that there was no concept of persons acting in concert under clause 40(A) & 40(B) of LA. The acquisition made by VM using his other companies cannot be seen in isolation. The clause 40(B)(2)(a) of LA, inter alia, includes any acquisition made by "any person in his own name or in the name of any other person". Thus, if the shares were acquired by VM in other names, the same will be covered under this clause.

4. VM and PAC held 21.38% in the year 1993 and with further acquisition the holding of VM and PAC reached 25.66%. The acquisition, when aggregated with the shares already held shall carry more than 10% of the voting rights of HL, VM should have complied with the requirements of aforesaid clauses of Listing Agreement. Clause 40B (2)(a) of the Listing Agreement provides that a public announcement shall be made by offeror and offeree when shares acquired by such persons carrying 10% or more of the total voting rights of offeree company. This clause will be applicable even in case the acquirers were holding in excess of 10%. Thus, the above acquisition is in violation of the requirement of provisions of Listing Agreement.

5. As the acquisition is reported to have been made prior to the notification of SEBI (SAST) Regulations, 1994, i.e. before 4th November 1994, the provisions of the said Regulations would not be applicable."

(VM: Appellant; HL : Target company; MDC: MD Chhabria; KRC: K R Chhabria; PAC: Person Acting in Concert; LA : Listing Agreement)

According to the Respondent's own version since the Appellant was already holding 21.38% shares in the capital of the Target Company at the time of the acquisition of shares referred to in para 7.2 of the order, clause 40A can not have application. It is not the Respondent's case also that 40A has been violated. On a perusal of clause 40B (the text of clause 40B has already been furnished in the earlier part of this order) it could be seen that it is in the nature of an undertaking given by the company seeking listing of its securities, for continuous listing.

Clause 40B(1) makes it clear in the following words – "The company also agrees that it is a condition for continuous listing that whenever a takeover offer is made to or by it whether voluntarily or compulsorily the following requirements shall be fulfilled". These requirements are spelt out in the succeeding clauses. For the time being we are concerned about the requirement in clause 40B(2)(a) – that "a public announcement of a takeover offer shall be made both by the offeror

company and the offeree company when any person in his own name or in the name of any other person acquires ……..securities which, when aggregated with securities already held or acquired by such person shall carry 10% or more of the total voting capital of the offeree company". It is thus clear that this clause attracts only when a person(s) in his own name or in the name of any other person acquires such quantum of the securities affecting the voting rights as stipulated in the clause. It is to be noted that as per the clause if the acquisition results in increasing the voting rights as specified in the clause, a public offer is required to be made. But the obligation to make the public offer is clearly fastened on the offeror company and the offeree company. The reason why the obligation is not fastened on any person other than a listed company is obvious. It may not be forgotten that the listing agreement is between the company seeking listing of its securities and the concerned stock exchange. Third party is not privy to the listing agreement. The stock exchange can not therefore enforce the said condition on a party which is not privy to the listing agreement. The consequence of failure to fulfil the said condition is also clear – that is delisting of the concerned company's shares. This strengthens the view that the obligation to fulfil the terms of clause 40B is only on listed companies and not on any other person.

As stated earlier, the clause is applicable to the acquisition made by any person in his own name or in the name of any other person. The Respondent has admitted that 121495 shares were acquired by UBL and Mc Dowell Ltd., and 132280 shares by the related persons. But, according to the Respondent these acquisitions are deemed to be made by the Appellant for reasons stated in para 7.3 and 7.4 of the order extracted above. It is not the Respondent's case that the shares were acquired by UBL, Mc Dowell and the related persons from out of the funds provided for the purpose by the Appellant. The Respondent has ignored the fact that UBL and Mc Dowell are public limited companies, listed on the stock exchanges and their shares are held by public, including public financial institutions. These companies are not dummies of the Appellant. There is no reference in the order as to on what basis the shares acquired by the related persons can be considered as the shares acquired by the Appellant in his name. The Respondent's finding is based on its perception that the Appellant, UBL, Mc Dowell

and the related persons were acting in concert.

It appears that the Respondent has misconceived the scope of the definition of the expression "person acting in concert" given in regulation 2(d). The definition does not suggest that the shares acquired by the persons acting in concert be treated as the shares held by the acquirer. Regulation recognises collective acquisition for the purpose of computing the quantum of shares for the purpose of compliance of the regulation. The definition does not state that the shares acquired by the persons acting in concert are the shares acquired on behalf of the acquirer or for the acquirer in the name of the persons acting in concert with him. Regulation 40(B) (2) (a) does not take cognizance of any acquisition of shares by persons acting in concert. It recognises the acquisition by any person in his own name or the acquisition by that person in the name of any other person. This includes benamis also. Shares acquired by the persons acting in concert are not considered as shares acquired by the acquirer, held in their name.

In the instant case except holding that UBL Mc Dowell and related persons and the Appellant were acting in concert no evidence has been brought on record by the Respondent to show that the shares were acquired by the Appellant in the name of the said persons. On the contrary, in the absence of any such evidence, the inference could be that they had acquired the shares on their own in their names. Since the Respondent has failed to establish that clause 40B(2) (a) is attracted to the case, the question of any consequential action against the Appellant in this regard does not arise. In fact the Respondent in its order has rightly observed that "if the shares were acquired by VM in other names the same will be covered under this clause" i.e. clause 40B(2)(a). But the fact is that the Respondent has not established that the shares were acquired by the Appellant in other’s name, and this failure is fatal to its case. It is noticed that the Respondent had not issued show cause notice to UBL, Mc Dowell and the related persons in this regard. In fact it appears that the Respondent itself is not certain as to whether any person had acted in concert with the Appellant. In the order direction is to the Appellant "and persons acted in concert, if any, with him." So is the case in the order directing to initiate adjudication proceedings for violation of section 15A and 15H of the SEBI Act. For the reasons

stated above, the Respondent's allegation that the Appellant acquired shares without complying with the requirements of clause 40B(2)(a) is untenable.

For the failure, if any, in complying with the requirements of the Listing Agreement, the Target Company, which has executed the listing agreement and the offeror companies who acquired the shares alone are liable and their obligation can not be transferred to the Appellant and the Appellant can not be proceeded against as there was no failure on his part.

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. Listing Agreement is between a company and the concerned stock exchange. 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, the Appellant cannot be subjected to any action under the SEBI Act in relation to the shares acquired prior to 7.11.1994 even if it is found that the requirements of clause 40A and 40B of the Listing Agreement were not complied with in respect of the acquisition of shares of the Target Company. In fact in the notice dated 8.1.1999, the Respondent alleging violation of the provisions of clause 40B(2)(a) of the Listing Agreement had called upon the Appellant to show cause as to why action should not be initiated against him under the provisions of section 23(2) of the SCRA. Section 23(2) of the SCRA provides penalties. According to the said section "any person who enters into any contract in contravention of the provisions contained in section 15 or who fails to comply with the provisions of section 21 or with the orders of or section 22 or with the orders of the Securities Appellate Tribunal shall on conviction be punishable with fine which may extend to one thousand rupees. According to new section 21 as incorporated in SCRA with effect from 25.1.1995 "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". Again the liability is on the company on whose application the shares are listed. However, the order is silent about the

action, if any, taken under the said section 23 (2). 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 SEBI Act and direct disinvestment of shares. 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 even prior to the bringing into force of 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 expressly 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 SEBI Act, SEBI is empowered to make regulations for the purposes of the SEBI Act. SEBI Act does not provide for making regulations for the purposes of SCRA. Section 11(2)(h) is therefore, not available to take action for a matter coming under the purview of SCRA. The allegation is that the Appellant breached the Listing Agreement. Listing Agreement being in 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. The observation made by the Hon'ble Delhi High Court in M.Z. Khan (supra) is of no support to the Respondent's submission that under section 11 it has ample powers to issue the impugned order. The observation made by the Hon'ble High Court cited by the Respondent is in the context of the SEBI's powers to issue interim order. The Court did not hold that section 11 can be used to deal with the violation of the provisions of other statutes like SCRA. The context in which the Hon'ble Court made the said observation is clear from the following paragraph in the order:

> "18. Thus, it is clear that the Board has the power to carry out investigations and to take action in accordance with the Regulations against the one who violates the Takeover

> Regulations, namely, acquirer, the seller, the target company, the merchant banker, as the case may be. In this context a question also arises for consideration as to whether the Board has the power to pass interim order. It seems to me that the SEBI has power to pass interim orders before and during the inquiry or investigation to effectuate the purpose of the SEBI Act and the Regulations. Under Section 11 of the SEBI Act, the SEBI has the power to protect the interests of the investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit. The power is of a very wide nature and is not hedged in by any restrictions. This power will embrace the power to issue interim orders. The SEBI in a fit case can pass interim orders in the interests of investors and to promote the development of and to regulate the securities market. Under the same provision, it can frame regulations as well for the same purpose. The final orders after the inquiry are contemplated under Section 11-B of the Act and at that stage it can issue such directions to any person referred to in the section as may be appropriate in the interest of investors and securities market. Both under Sections 11 and 11-B the duty is cast on the Board to protect the interests of the investors in securities and to promote and regulate the securities market. If at the initial stage it becomes necessary to pass an interim order, the SEBI has been endowed with such a power under Section 11 of the Act. In case the provisions of Section 11 are construed in a restrictive manner, the interests of the investors in securities and development and regulation of securities market will suffer."

It is also noted that section 11B was brought on the Statute Book only with effect from 25.1.1995. It has no retrospective application. Therefore, section 11B can not be used to issue the impugned direction which adds on to the obligation of the Appellant. It is seen that the 1994 Regulation was put in position on 7.11.94. The provisions of the said Regulations 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 the1994 Regulations. In fact the said Regulations was not even in existence at the time when the acquisition in question was made. It is not SEBI's case that 253775 shares of the Target Company were acquired in violation of the 1994 Regulations.

In the light of the above discussion I am of the view that the Respondent has no jurisdiction or authority to direct the Appellant to disinvest the shares acquired allegedly without complying with the requirements of clause 40A and 40B of the Listing Agreement.

With reference to the "acquisition" of 249950 shares, the Appellant's contention is that it is saved in terms of regulation 3(e) of the 1994 Regulations, as the said regulation exempts shares acquired pursuant to a Scheme of arrangement or Amalgamation under section 391/394 of the Companies Act. According to the Respondent regulation 3(e) of 1994 Regulations is restricted to acquisition of shares of the Target Company as a result of merger or amalgamation of Target Company with other company, that in the Scheme of Amalgamation in the instant case, the Target Company was not amalgamated/merged. According to the Respondent shares of the Target Company had been acquired by UBL pursuant to the merger of the four companies with UBL and hence regulation 3(e) has no application.

It is noticed from the material available on record that pursuant to an order dated 22.7.1992, passed by the Hon'ble Bombay High Court under section 391/394

of the Companies Act, 1956, Sona Distilleries Ltd., (Sona) was amalgamated with the Target Company. Pursuant to the said amalgamation the shareholders of Sona, which included Golden, Endeavour, East Coast and Consolidated, were issued 5 equity shares in the Target Company at a premium of Rs.5/- per share and 10 FCDs of Rs.75/- each to be automatically converted into 5 equity shares of Rs.10 each at a premium of Rs.5/- per share for every one equity share held in Sona. These FCDs were to be converted to shares by 11.8.1995. On 11.8.1992, pursuant to the said Scheme of Amalgamation the Target Company allotted equity shares at a premium of Rs.5/- together with

FCDs to the said four companies as follows:

	No. of shares allotted	No. of CDS allotted
Endeavour	4,995	9,990
East Coast	10,000	20,000
Golden	5,000	10,000
Consolidated	5,000	10,000
Total	24,995	49,990

It is noticed that pursuant to orders passed by the Hon'ble High Court, Karnataka and Hon'ble High Court, Madras (28.7.1995 and 23.3.1995 respectively), the said four companies in terms of a Scheme of Amalgamation, merged with UBL, under section 391/394 of the Companies Act. These four companies amalgamated before the FCDs were converted to shares. FCDs were due to be converted to shares only by 11.8.95. The 49,990 FCDs allotted to the aforesaid four companies vested in UBL pursuant to their amalgamation with it were got converted into 249950 shares on 11.8.1995, and accordingly the shares were issued to UBL.

According to regulation 3(e) of the 1994 Regulations "Nothing contained in Chapter III of these regulations shall apply to acquisition of shares pursuant to a Scheme of Arrangement or Amalgamation under section 391 and 394 of the Companies Act, 1956". Regulation 10 is one of the regulations coming under the said Chapter III. According to regulation 10(2) an acquirer who on the date of the commencement of the 1994 Regulations holds shares which carry more than ten per cent voting rights in the capital of the company, shall not acquire any further shares in the company from the open market unless such acquirer makes a public announcement of intention to acquire shares in the open market in accordance with the regulations. According to the Respondent since the Appellant was holding 21.38% shares in the Target Company, any further acquisition of shares by the Appellant warranted compliance of the requirement of making public announcement. It is not disputed that the Appellant was holding 21.38% shares in the capital of the Target Company

According to the Respondent regulation 3(e) refers to acquisition of

shares of target company as a result of merger or amalgamation of target company with other company, that in this case prior to the stipulated date of conversion of FCDs i.e. 11.8.1995, the four companies only merged with UBL, and not the Target Company, that since in the Scheme of Amalgamation referred to in the instant case the Target Company is not involved, acquisition of 2,49,950 shares by the Appellant acting in concert with UBL did not come under the exemption provided in regulation 3(e). In the order it has been stated that "although the acquisition is said to be on account of operation of law, the acquirer ought to have sought exemption from the Board or complied with the Regulations, but has not done so. As the acquisition has been made through the said four companies (by the Appellant along with persons acting in concert) the provisions of regulation 10(2) and 9 (3) are attracted. Thus the acquisition is in contravention of regulation 10(2) and 9(3) of the Takeover Regulations, 1994."

On a careful reading of the provisions of regulation 3(e) it is difficult to subscribe to the Respondent's contention that the exemption is available only in the event of the amalgamation of the target company. In my view, in the case of amalgamation of a company (transferor company) with another company (transferee company) the shares allotted by the transferee company to the shareholders of the transferor company pursuant to the Scheme of Amalgamation sanctioned by the Court, can not be treated as acquisition of shares by those shareholders. Those shares are in effect devolved on the shareholders of the transferor company. On a perusal of the scheme of the 1994 Regulations it appears that the obligation to make public announcement to purchase not less than 20% of the paid up capital of the target company is on the acquirer. Acquirer means, as per the definition "any person who acquires or agrees to acquire shares in a company either by himself or with any person acting in concert with the acquirer." To "acquire"according to Blacks Law Dictionary means to gain any means usually by ones own exertions." According to Websters Dictionary 'acquire' means "to gain for oneself through ones action or efforts." Hon'ble Supreme Court in Devidas V State of Punjab (AIR 1967 1895) had held that "Acquisition is the act by which a person acquires property in a thing." "Acquire" is to become the owner of the property. One can, therefore, acquire a property either by voluntary or

involuntary transfer". The question to be considered is that any type of acquisition irrespective of whether it is voluntary or involuntary would be subject to the 1994 Regulations ? On a perusal of the scheme of the Regulations in my view involuntary acquisition of shares, as a result of amalgamation of companies, is outside the purview of the Regulations. Normally voluntary acquisitions attract compliance of the Regulations. This view is fortified from the wording of the definition of the expression "acquirer" and "persons acting in concert" in the 1994 Regulations. Regulation 14 of the 1994 Regulation also supports the view that only voluntary acquisitions are governed by the Regulations. According to the said regulation. "A public announcement of intention to acquire shares referred to in regulation 10 shall be made either immediately before the acquisition of any shares which would increase the existing shareholdings of the person making the announcement beyond ten percent or in case his existing shareholding is already beyond ten per cent, any time before the person seeks to acquire any shares in order to increase his existing shareholding."

If an interpretation is given that even involuntary acquisition is also covered under the Regulations, that would create certain anomalous situations. Take the case like the instant one where a person gets 20% shares consequential to amalgamation of two companies. He can not be expected to acquire another twenty percent of the company's share capital spending out of his pocket as the acquisition of shares was not made by him willfully. He only received the shares as a result of an order of the court sanctioning the amalgamation. He as an individual had little say in the matter as the scheme of amalgamation was approved by the majority of the shareholders. It is possible that the person might have even voted against the resolution. But when the court sanctioned the amalgamation and as a result the shares are issued to him-- even though he had voted against the resolution – he has no choice but to accept the shares so issued. But if SEBI's interpretation is accepted still he will be required to make a public announcement. Acquisition of 20% shares from the other share holders requires funds. In case he fails to make public announcement to acquire 20% of the company's shares, he could be penalised. So to escape the penal consequences would be to refuse to accept the shares legally so devolved on him and suffer the consequential loss as a result of such

refusal. This is not investor protection. It is just the opposite. Certainly this is not the objective of the Regulation. This is not what the Regulation envisages. Who ever voluntarily acquires shares - by one's action or effort - alone are required to make public announcements to acquire shares and not those persons who without any involvement in any manner receives shares as in the case of amalgamations or mergers made on the basis of the schemes approved by the shareholders and sanctioned by the Court. For the reasons stated above, in my view 2,49,950 shares received by UBL as a result of the amalgamation of the four companies with it is exempted in terms of regulation 3(e) and the shares so received can not be considered as acquisition warranting a public announcement to acquire shares from the other shareholders of the Target Company.

Next lot involves acquisition of 2,50,000 shares (2.52%) (196300 shares - 2.06% - according to the Appellant) by Prasam. According to the show cause notice UBL gave interest free loan of Rs.1.25 crores in the year 1995 to Prasam which remained outstanding even in June, 1998, that Prasam utilised these monies for acquiring around 2.5 lakh shares of the Target Company. According to the Respondent the Appellant acting in concert and in collusion with UBL acquired the said shares adopting a stratagem of granting interest free loan to Prasam. Prasam, according to the Respondent is a company belonging to LKP Shares and Securities Ltd., which has got long standing relationship with the Appellant, that in view of the " business relationship existed between the Appellant and Prasam through LKP Shares and Securities Ltd., they are deemed to be persons acting in concert in terms of regulation 2(d) of the 1994 Regulations." It is noted that the Appellant had denied giving any loan or advance to Prasam. Even according to the Respondent, it was UBL which had given Rs.1.25 crores to Prasam. It is in the said context the Appellant's version gains credibility. According to the Appellant LKP Group had long standing business with UBL and LKP Group as brokers had over a number of years bought and sold shares for UBL in various companies, that in respect of such transactions amounts had been from time to time debited and credited to an open running account maintained by LKP Group, that the amounts referred to by SEBI as a loan were in fact the amounts standing in such a running account with LKP, that the outstandings in

the running account by their very nature do not bear interest. The Appellant had submitted that the Appellant and Prasam can not be considered as persons acting in concert, that during the relevant period Prasam had in fact sold 1,57,200 shares of the Target Company, that the Respondent has not dealt with any of these facts in its order.

The Respondent in its order has stated that:

> "In view of the business relationship existed between VM (Appellant) (through UBL) and PTFL (Prasam) (through LKP Shares and Securities Ltd.,) they will be deemed to be PAC in terms of 2 (d) of the 1994 Regulations.
>
> In my view this is an erroneous conclusion. According to regulation 2(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 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 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.
>
> ....."

There is nothing on record to show that there existed an agreement or understanding by Prasam with the Appellant to acquire shares of the

Target Company for a common objective or purpose of substantial acquisition of shares. On the contrary the factual position as noted by the Respondent in its order indicates that when the Appellant was allegedly acquiring shares. Prasam was selling the Target Company's shares. It had sold 1,57,200 shares. Respondent in its order has not dealt with this aspect. All those persons buying and selling shares are not to be considered as persons acting in concert. "Commonality of objective and community of interest" is the relevant factor which decides as to whether the person while acquiring shares was acting in concert with any other person. SEBI has totally ignored this crucial aspect in arriving at the conclusion that the Appellant and Prasam were acting in concert. The basis on which SEBI has come to the conclusion that the Appellant and Prasam acted in concert is that in view of the "business relationship existed between the Appellant and Prasam through LKP Shares and Securities Ltd., they are deemed to be persons acting in concert in terms of regulation 2 (d) of the 1994 Regulations." Regulation 2(d) does not give any scope for such an interpretation. It is not the business relation that matters. It is the common objective of acquiring substantial shares that matters. Further the Appellant's submission on the nature of the transactions UBL had with LKP group, put forth before the Respondent does not appear to have been examined by the Respondent. In any case in the order there is no indication of having considered those submissions.

It is to be noted that the definition of the expression acquirer provided in regulation 2(1)(b) does not stipulate that the acquirer and the person acting in concert should acquire shares simultaneously. Acquisition can be in different spells. But nexus of the acquirer and the person acting in concert is relevant. That nexus as Bhagwati Committee put is "the commonality of objective and 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. But in the instant case the Respondent has failed to establish that the Appellant and Prasam had common objective of making substantial acquisition of shares of the Target Company. In fact Prasam had contested the Respondent's version that it was acting in concert with the Appellant. The Respondent has also failed to establish its contention that Prasam was acquiring shares of the Target Company

at the behest of the Appellant.

In the absence of reasonably convincing evidence to support the Respondent's contention that the Appellant had acted in concert with Prasam, it is not possible to take into consideration the shares acquired by Prasam also as an acquisition of shares by a person acting in concert with the Appellant.

The Respondent in its written submission had submitted that a direction issued under regulation 44 of the 1997 Regulations/regulation39 of the 1994 Regulations need not be preceded by an investigation and procedure prescribed to be followed for ordering investigation and for taking action on the investigation report is not applicable where the directions are issued under regulation 44. In support of this, the Respondent had cited this Tribunal's decision in Rhodia SA V SEBI (2001) 34 SCL 597). It is true that this Tribunal in Rhodia, in the light of the facts and circumstances specific to the said cased had observed:

> "The Appellant's contention that SEBI has not followed the investigation procedure provided in Chapter V of the Regulations and as such the directions issued under regulation 44 are legally untenable is also not correct. The impugned order is relatable to the application for exemption filed by the Appellant. Such applications are dealt with in the manner provided in regulation 4 and not under Chapter V. The procedure set out in regulation 4 has been complied with. The power to issue directions under regulation 44 is not confined to the findings of the investigation under regulation 38, as is evident from the text of the regulation. It's scope is wide and also its reach."

The scope of regulation 44 was thus interpreted by the Tribunal in Rhodia. However, it is noticed that the Appellant had not challenged the order on the ground that it was issued by the Respondent without following the requirements of the procedure prescribed.

The Respondent had of its own further submitted that it is empowered to issue the impugned order under regulation 44 of the 1997 Regulations, though the 1994 Regulations has already been repealed. In

fact the Appellant had not challenged the Respondent's power to issue the impugned order under regulation 44 of the 1997 Regulations.

As stated earlier the 1994 Regulations brought into force on 7.11.1994 was repealed by the 1997 Regulations brought into force on 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 these regulations;

b. An 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."

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. The words anything done means anything omitted to be done also. If the Respondent is of the view that the Appellant had not acted in accordance with the then existing provisions of the regulations i.e. 1994 Regulations, the Respondent, is empowered in terms of regulation 47 (2) to proceed against the Appellant. The intention of regulation 47(2) is not to disenable the Respondent to initiate default action against

those persons who had violated the 1994 Regulations. There is no bar of limitation under the regulations in this regard. In view of the said legal position I do not consider it necessary to enquire into the details to find out as to whether the Respondent had actually initiated any enquiry during the currency of the 1994 Regulations. In this context, it is noted that the Appellant has not challenged the order on the ground that the order was issued without authority as the Respondent had no power, to issue the impugned order in view of the repeal of the 1994 Regulations.

The Respondent vide its order dated 19.2.2002, in addition to the direction to divest the shares acquired by the Appellant, had also ordered to initiate - Adjudication proceedings against the Appellant and persons acted in concert, if any, with him under section 15A of the SEBI Act for violation of the provisions of Regulation 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 identified which would attract monetary penalty. Section 15I empowers SEBI for the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G and 15H to appoint an adjudicating officer for holding inquiry for the purpose of imposing penalty. In terms of section 15T of the SEBI Act any person aggrieved by an order of the Adjudicating officer is entitled to prefer an appeal to the Securities Appellate Tribunal, and the Appellate Tribunal is 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 in exercise of that power has ordered 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 in the decision taken by SEBI to initiate adjudication proceedings against the Appellant under section 15A and 15H of the SEBI Act. If the Appellant, for any reason feels aggrieved as a result of the order passed by the adjudicating officer, he is 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.

The Appellant had denied any violation of the Regulations by him warranting the impugned direction from SEBI. However, without prejudice to the said contention the Appellant had submitted that the disinvestment of shares at par through a public offer as directed by SEBI will depress share prices and be prejudicial to the interest of the small shareholders of the Target Company. The Appellant had therefore submitted that keeping in view the underlying object of the Regulations, the disinvestment of shares at par, if any, ought to be by way of an offer to sale on "right basis" to the small existing shareholders of the Target Company and both the contesting groups of shareholders (i.e. Chhabria and Mallya) be excluded from any such order. The Respondent had also submitted that the impugned directions be moulded in such a way so that the shares may be sold in disinvestment 'on rights basis' to the small share holders of the Target company instead of selling them in the open market. In this context it is to be noted that the Regulations on substantial acquisitions of shares and Takeovers does not differentiate shareholders as small shareholders and big shareholders. Benefit of public offer has to be available to all the shareholders irrespective of the size of their holding, except the acquirers and the persons acting in concert. This position has been clearly stated by Bhagwati Committee in its report 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 take overs". It is also to be noted that "equality of treatment and opportunity to all shareholders" and "protection of interests of shareholders" are two guidelines set out by the committee. The issue is only academic in the instant case.

For the reason that the Respondent has failed to establish that the Appellant had acquired shares of the Target Company in violation of the terms of the Listing Agreement and the provisions of the 1994 Regulations, the question of issuing directions to the Appellant to disinvest his shareholding in the Target Company to "remedy the situation" does not arise.

Therefore, I do not consider it necessary to examine the sustainability

of the direction requiring the Appellant to make disinvestment of the shares acquired beyond 21.38% of the paid up capital of the Target Company.

In the light of the above discussion, the Respondent's order directing the Appellant to disinvest the shares of the Target Company held by him is not to be sustained.

The appeal is disposed of in the above lines.

sd/-

Mumbai
1st August, 2003

C. Achuthan
Presiding Officer