**BEFORE THE SECURITIES APPELLATE TRIBUNAL**
**MUMBAI**

**Appeal No. 73/2002**

**In the matter of:**

**1. Mr.Satyadeva Prakash Sinha**
**2. Ms. Renuka Sinha**
**3. Mr. Anant P. Sinha**
**4. Mr. Aditya P. Sinha**
**5. Ms. Mukta Sinha**
**6. Mr. Siddharth P. Sinha**
**7. Mr. Tanuj P. Sinha**
**8. Maurya Management Pvt. Ltd.**
**9. Banjari Holdings (P) Ltd.**
**10. Koilwar Holdings (P) Ltd.**
**11. Rammadan Holdings (P) Ltd.**
**12. Eureka Transporters & Traders Pvt. Ltd.**
**13. Aphar Investments (P) Ltd.**
**14. Punpun Investments (P) Ltd.**
**15. Bengal Bihar Investments Co. (P) Ltd.**
**16. Eastern Share Resources (P) Ltd.**
**17. Bihar Hotels Ltd.** **Appellants**

**Vs.**

**Securities & Exchange Board of India** **Respondent**

**Appearance:**

**Shri Bharat Merchant**
**Sr. Advocate,**
**Shri Utpal Joshi**
**Advocate** **for Appellants**

**Shri Santosh Shukla,**
**Asstt. Legal Adviser, SEBI**
**Shri Vinay Chauhan,**
**Legal Officer, SEBI** **for Respondent**

**ORDER**

The Respondent vide its order dated 31.5.2002 appointed an adjudicating officer for holding an enquiry into the alleged violation of the provisions of regulation 3(3) and 3(4) of the Securities and Exchange Board of India (Substantial Acquisition of shares and Takeovers) Regulations, 1997 (the Takeover Regulations) read with section 15A (a) and 15A(b) of the Securities and Exchange Board of India Act, 1992 (the Act) with reference to acquisition of shares of Jenson & Nicholson India Ltd. (the company) by the Appellants. On 31.5.2000 The company issued Optionally Convertible Debentures (OCDs) on preferential allotment basis to the promoters. The terms of issue of OCDs provided that 50% of the OCDs were compulsorily convertible into equity shares at the end of 18 months and the balance 50% at the end of 18 months at the exercise of the option by the investors. The OCDs allotted to the Appellants were converted into equity shares on 15.2.2001. As a result of the conversion the Appellants acquired 71,56,345 equity shares of Rs.2/- each in the company. Consequently the shareholding of the Appellants - i.e. the promoter group - in the company's paid up capital increased from 34.99% to 44.84%. The said acquisition, being by way of preferential allotment made in terms of section 81(1A) of the Companies Act, 1956, enjoyed exemption from complying with the requirements under Chapter III of the Takeover Regulations by virtue of the provisions of regulation 3(1) ( c ). However, according to the Respondent, the Appellants failed to report the details of the acquisition to the concerned stock exchange and the Respondent as required in terms of sub regulation (3) and (4) of regulation 3, respectively. It was in the said context the Respondent decided to adjudicate the matter and for the purpose appointed an adjudicating officer.

The adjudicating officer after conducting enquiry, viewed that the Appellants had failed to comply with the requirement of regulation 3(3) and 3(4) of the Takeover Regulations read with section 15A (a) and (b) of the Act. He imposed a sum of Rs.2,43,000/- and Rs.1,00,000/- as penalty for violation of regulation 3(3) and 3(4) respectively. The adjudicating officer's order dated 13.8.2002 holding the Appellants guilty of violating regulation 3(3) and regulation

3(4) and his order imposing monetary penalty is under challenge in the present appeal.

Shri Bharat Merchant, learned Counsel appearing for the Appellants submitted that the Appellants are the promoters of the company and they are also managing it. He submitted that they were holding about 35% of the paid up capital of the company even before they converted the OCDs, that on acquiring shares after conversion of the OCDs their holding in the company's capital increased to 44.84%. Shri Merchant submitted that as per regulation 3(1) ( c ) preferential allotment made in terms of section 81(1A) of the Companies Act is an exempted acquisition from the purview of regulation 10, 11 and 12, that the instant acquisition being by way of preferential allotment made by the company, the same enjoyed exemption in terms of regulation 3(1) ( c ), from complying with the requirements of regulation 10, 11 and 12. He referred to regulation 3(1) ( c ) and submitted that as required by the said regulation the Board of Directors of the company in their meeting held on 28.1.2000, passed a resolution for issue of the OCDs on preferential basis, that the shareholders in their extra ordinary general meeting held on 1/3/2000 approved the proposal for issue of the OCDs, on 29.5.2000 the OCDs were allotted, on 15.2.2001 the Appellants opted for full conversion of the OCDs allotted to them, they were allotted 71,56,345 shares of Rs.2 each. Consequently the Appellants' holding in the company's paid up capital increased from 34.99% to 44.84%. He submitted that the requisite report with details under regulation 3(4) was submitted to the Respondent on 11.12.2001.

Learned Counsel submitted that it is an admitted fact that the acquisition in question is exempted in terms of regulation 3(1) ( c) being preferential allotment. He submitted that the exemption is available to preferential allotment, made in pursuance of a resolution passed under section 81(1A) of the Companies Act and subject to the compliance of the requirement stipulated in the proviso to the regulation that :-

> "(i) Board Resolution in respect of the proposed preferential allotment is sent to all the stock exchanges on which the shares of the company are listed for being notified on the notice board;

(ii) Full disclosures of the identity of the class of the proposed allottee(s) is made, and if any of the proposed allottee(s) is to be allotted such number of shares as would increase his holding to 5% or more of the post issued capital, then in such cases, the price at which the allotment is proposed, the identity of such person (s), the purpose of and reason
for such allotment consequential changes if any, in the board of directors of the company and in voting rights, the shareholding pattern of the company and whether such allotment would result in change in control over the company are all disclosed in the notice of the general meeting called for the purpose of consideration of the preferential allotment"

Shri Merchant submitted that it is undisputed that in the instant case the requisite resolution was passed in terms of section 81(1A) of the Companies Act, that the requirement of sending the Board resolution in terms of clause (i) and making disclosure as required under clause (ii) was also fully complied with. In this context he referred to the copy of the resolutions and the notice filed along with the appeal. He submitted that in terms of regulation 3(3) the details of the acquisition is required to be notified to the concerned stock exchange atleast 4 working days in advance of the proposed acquisition. He submitted that the details required to be notified so, are substantially the same as required to be disclosed in the notice of the general meeting called for the purpose of consideration of the preferential allotment, as per clause (ii) of regulation 3 (I) ( c) and the company had forwarded a copy of the notice to the concerned stock exchanges. He further submitted that the purpose of furnishing the information to stock exchanges is to provide information to the public to ensure transparency and that purpose was served by making disclosures in the notice of the meeting and a copy of the notice was made available to the stock exchange also. He submitted that the object of the regulation is to ensure that such acquisition is not done in a clandestine manner detrimental to the interests of the shareholders and it is nobody's case that the instant acquisition was detrimental to the interest of the other shareholders. In this context Shri Merchant referred to this Tribunal's decision in Housing Development Finance Corporation Ltd., V Securities and Exchange Board of India (2000)28 SCL 289(SAT) and submitted that the Tribunal had observed that Takeover Regulation is not a penal regulation and default per se is not the dominant guiding principle for imposition of penalty, that it is the consequences of the default

that weighs in taking the decision to impose penalty and its quantum, that this observation made by the Tribunal is very relevant to the Appellants' case, as the Appellants had effectively complied with the requirement of regulation 3(3) and that in any case as a result of not separately notifying the stock exchanges, there was no adverse consequences of any nature on the investors or the securities market to warrant imposition of penalty.

It was further submitted that regulation 3(3) applies only in a case where the proposed acquisition exceeds 5% of the voting share capital of the company. According to the learned Counsel the concept of "acquirer" and "person acting in concert" as defined in regulation 2(b) and 2(e) has not been incorporated in regulation 3(3), that none of the Appellants, except Maurya Management P. Ltd. (Appellant No.8)had acquired shares exceeding 5% of the voting share capital of the company by reason of the preferential allotment, that regulation 3(3) is applicable only to cases of individual acquisition exceeding 5% of the voting share capital of the company. Since words "person acting in concert" have not been included in regulation 3 (3), the question of applying the said regulation does not arise to all the Appellants collectively and instead the issue would have to be judged individually qua each of the Appellants in order to assess the violation of the regulation. He submitted that regulation 3(3) applied only in cases of change in management and not to such a case where the acquisition was by the existing promoters of the company. He submitted that the requirement under regulation 3(3) was similar to regulation 7 that under regulation 7 disclosure by the acquirer is required to be made, once he acquires 5% or more of the share capital and that for further acquisition no further disclosure is necessary, that in the instant case the promoters being the Appellants were already holding 34.5% of the paid up capital of the company and as such no further intimation was required to be given under regulation 3(3), on acquiring further shares, that in any event assuming that the said regulations were applicable, the relevant disclosure had already been made in effect by the company under regulation 3(1)( c ).

Shri Merchant cited this Tribunal's observation in Yogi Sungwon V SEBI (2001)31

SCL 535 that

> "It is clear from the wording of regulation 3(4) and 7(1) etc. that what is contemplated in the regulation is not the total holding of the promoter group, but the holding of the individual".

With reference to the applicability of regulation 3(4) it was submitted that the regulation was not attracted in the facts of the case as the Appellants were already holding more than 15% of the total share capital of the company. Learned Counsel submitted that the said provisions are intended obviously at targeting the persons who are strangers to the company and not to those who are already having substantial control and management of the company. According to the Appellants, the said regulation is akin to and similar to regulation 10, and as the existing shareholding of the Appelants was already over 15% no intimation under regulation 3(4) was necessary. He submitted that in any case the report under regulation 3(4) was submitted to the Respondent vide letter dated 11.12.2001 by way of abundant caution.

According to the learned Counsel the conditionalities of regulation 3(3) and 3(4) would only apply if the Appellants were acquirers. Since the acquisition in the instant case has been by promoters as opposed to acquirers regulation 3(3) and 3(4) can not be made applicable to acquisitions simpliciter as it is by persons who are claiming the benefit of exemption under regulation 3(1) ( c ) The Appellants not being acquirers, the very precondition did not apply and therefore the question of invoking the provisions of regulation 3(3) and 3(4) does not arise and the question of levying penalty under section 15A does not arise. He submitted that neither of the requirements i.e. pre acquisition notification to the stock exchange nor post acquisition reporting to the Respondent applied in the instant case.

It was further submitted that there was no allegation that Appellants had made undue gains or that the interest of any of the investors had been adversally affected, by reason of such alleged non disclosure. Learned Counsel submitted that the adjudicating officer has ignored the factors required to be taken into consideration for the purpose of imposition of penalty as provided in section 15J of the Act that while adjudging the quantum of penalty the

adjudicating officer should have due regard to the fact as to whether any disproportionate gain or unfair advantage has been derived as a result of the default or whether any amount of loss caused to investors or group of investors.

With reference to the quantum of penalty of Rs.2,43,000 imposed by the adjudicating officer for violation of regulation 3(3) on the basis of Rs.500/- per day of default for 496 days, Shri Merchant submitted that the adjudicating officer has worked out the quantum of penalty on a continuing default basis ignoring the decision of the Tribunal in J. M. Financial & Investment Consultancy Services Ltd. V Ananta Barua (2001) 41 CLA 263 (SAT) that:

> "The failure under sub regulation (3) is not of a continuing nature after acquisition and therefore penalty cannot be decided on the basis of per day default post acquisition, as decided by the Adjudicating Officer. Sub regulation requires the acquirer to notify the requirements at least 4 days in advance of the date of acquisition. It is clear from the provisions of the said regulation that notifying stock exchange is a pre acquisition requirement. Therefore the decision to impose Rs.80,000 based on a per day penalty of Rs.2000/- for a period of 40 days after completion of the offence, is not legally tenable"

With reference to the imposition of penalty holding the Appellants guilty of non compliance of the requirement of regulation 3(4), Shri Merchant submitted that even if it is assumed that there was some delay in filing the said report, the delayed filing did not invite any penalty as the delay was of a technical nature and unintentional. In this connection he submitted that the adjudicating officer is required to decide the question of imposing penalty very judicially, that the adjudicating officer has not followed the said requirement. In this regard he cited the decision of this Tribunal in Smarat Holding V SEBI (2001) 29 SCL 417) which referred to the decision in Cabbot International Capital Corporation V SEBI (2001) 29 SCL 399) that :

> "In the case of Cabbot International Capital Corporation Vs. Adjudicating Officer, SEBI (Appeal No.24/2000 decided on 25.1.2001) this Tribunal considered the scope of section 15I and 15J in the context of unintentional failure on the part of the Appellant to comply with the requirement of regulation 3(4) and held:

"On a perusal of section 15I it could be seen that imposition of penalty is linked to the subjective satisfaction of the Adjudicating Officer. The words in the section that "he may impose such penalty" is of considerable significance, especially in view of the guidelines provided by the legislature in section 15J. "The Adjudicating Officer shall have due regard to the factors" stated in the section is a direction and not an option. It is not incumbent on the part of the Adjudicating Officer, even if it is established that the person has failed to comply with the provisions of any of the sections specified in sub section (1) of section 15I, to impose penalty. It is left to the discretion of the Adjudicating Officer, depending on the facts and circumstances of each case.

In this context, it is relevant to have a look at the clear cut guidelines provided by the Supreme Court in Hindustan Steel's case (supra). Para 7 from the judgement considered relevant in this context is extracted below:

" Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute".

The back ground of the said case leading to the above observation by the Court is as follows:

"In proceedings for assessment of tax under the Orissa Sales Tax Act, 1947, the Sales Tax Officer held that the Company was a dealer in building material, and had sold the material to contractors and was on that account liable to pay tax at the appropriate rates under the Orissa Sales Tax Act. The Sales Tax Officer directed the Company to pay tax due for ten quarters ending December 31, 1958, and penalty in addition to the tax for failure to register itself as a dealer. The Appellate Assistant Commissioner confirmed the order of the Sales Tax officer. In second appeal the Tribunal agreed with the tax authorities and held that the Company was liable to pay tax on its turnover from bricks and cement and steel supplied to the contractors. The Tribunal however substantially reduced the penalty imposed upon the company".

The observation of the Court cited above was in answer to the question "whether the Tribunal is right in holding that the penalties under section 12(5) of the Act (Orissa Sales Tax Act, 1947) had been rightly levied?"

The facts of the present case are reasonably comparable with the case cited

above. In the light of the clear observation of the Court as to when penalty for failure to carry out a statutory obligation could be imposed, it is to be seen as to whether the facts of the present case warranted penalty. The facts to be considered are whether there is anything to show that the Appellant acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. It is also to be seen that whether the breach flows from a bonafide belief of the Appellant that it was not liable to act in the manner prescribed by the statute.

In this context it is also relevant to know the significance of the expression "shall be liable to a penalty" appearing in the section 15A. The Supreme Court in Superintendent & Remembrancer of Legal Affairs to Govt. of West Bengal (supra) held that "the expression "shall be liable to a penalty" occurring in many statutes has been held as not conveying the sense of an absolute obligation or penalty but merely importing a possibility of such obligation or penalty".

As already stated above, in terms of section 15I whether penalty should be imposed for failure to perform the statutory obligation is a matter of discretion left to the Adjudicating Officer and that discretion has to be exercised judicially and on a consideration of all the relevant facts and circumstances. Further in case it is felt that penalty is warranted the quantum has to be decided taking into consideration the factors stated in section 15J. It is not that the penalty is attracted perse the violation. The Adjudicating Officer has to satisfy that the violation deserved punishment.

Supreme Court decision in Additional Commissioner of Income tax (supra), which is a reiteration of the ratio in the Gujarat Travancore Agency case(supra) relied on by the Respondent to show that it is not necessary to prove mens rea for imposing penalty is not relevant to the present case in view of the distinguishable nature of the relevant provisions under the Income Tax and the SEBI Act. These two decisions are with specific reference to provisions of section 271(I)(a) of the Income Tax Act. The said section 271 (1)(a) provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has <u>without reasonable cause</u> failed to furnish the return of income. Thus the burden is ultimately on the assessee to plead and prove the reasonable cause. Consequently no mens rea could arise at all. On the contrary there is no such requirement in section 15A.The section does not require pre-existence of a guilty mind to impose penalty. But the Act itself circumscribes the powers of the Adjudicating Officer in the field of imposition of penalty. The case law relied on by the Respondent is of no help to the Respondent to justify imposition of penalty against the Appellant in view of the facts and circumstances peculiar to this case, discussed in detail above.

It is not the case of the Respondent, that the Appellant had "acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation".

Shri Merchant submitted that the adjudicating officer has wrongly come to the

conclusion that the Appellant had violated the provisions of regulation 3(3) and 3(4) and has imposed penalty ignoring the settled principles.

Shri Santosh Shukla and Shri Vinay Chauhan representing the Respondent submitted that the adjudicating officer has established violation of the regulations by the Appellants and in that context the monetary penalty imposed by the adjudicating officer need be sustained.

The Learned representative submitted that the Takeover Regulations provide certain measures to regulate acquisition of shares and takeovers, that for certain reasons, the Regulations have exempted certain categories of acquisition from the purview of some of the substantive provisions. He submitted that the exempted categories of acquisitions have been specified under regulation 3, that one of such exempted acquisitions is acquisition of shares by way of preferential allotment made in pursuance of resolution passed under section 81 (1A) of the Companies Act, 1956 subject to fulfilment of the condition stipulated therein.

Learned representative further submitted that even though such of those acquisitions specified under regulation 3 are exempted from the purview of the substantive provisions like the one requiring the acquirer to make public offer, etc. the acquirer is required in terms of regulation 3(3) to notify the stock exchanges where the shares of the company are listed, the proposed transactions at least 4 working days in advance, in case the acquisition exceeds 5% of the voting capital of the company. He submitted that the object of notifying the stock exchange is to ensure that material information is provided to the stock exchanges, before such acquisition of shares takes place and the same is disseminated to shareholders / public at large, that such disclosure ensures transparency in the transactions and enables the shareholders to take informed decision on investment or disinvestment.

It was also submitted that all the 3 letters referred to by the Appellants stated to have been sent to the stock exchange precedes the date of the extra ordinary general meeting and at that point of time time there was no certainty as to whether the resolution will be carried

out. The reporting under regulation 3(3) and 3(4) is to be made when the acquisition was certain, that regulation 3(3) and 3(4) requirements are requirements to be complied with after complying with the prescribed conditions for availing exemption under regulation 3(1) ( c ). He referred to the notice of the general meeting relied on by the Appellants and submitted that what is mentioned in the notice and what happened subsequently was not one and the same, that the post notice action was at variance in specifics.

It was further submitted that in terms of regulation 3(4) the acquirer is required to submit a report along with supporting documents to the Respondent, giving all the details in respect of acquisition which would entitle him to exercise 15% or more of voting rights in the target company, that the said report is required to be submitted within 21 days of the date of acquisition, that the said reporting is meant to provide crucial information which enables the Respondent to ascertain whether the acquisition is an exempted acquisition under the regulation and if not, to take appropriate action in the interest of investors, that the requisite report under sub regulation 3(4) is not only important for ensuring transparency in acquisitions but it is also crucial from the point of view of the enforcement of the Regulations.

Countering the Appellants' contention that since the Appellants had complied with the requirements under regulation 3(1) ( c ) the same be treated as substantial compliance of the requirements of regulation 3(3) and 3(4), learned representative submitted that compliance of the requirements of 3 (1) ( c ) is only to enable the acquirers to avail exemption from the applicability of the provisions of regulation 10, 11 and 12, and the same is not a substitute for compliance of the reporting requirements under regulation 3(3) and 3(4). He submitted that regulation 3(1)(c) requires the Board resolution in respect of the proposed preferential allotment is to be sent to the stock exchanges and disclose certain details with reference to the proposed allotment in the notice of the general meeting called for the purpose of the preferential allotment, whereas, regulation 3(3) requires notifying the concerned stock exchange, the details of the proposed transactions as approved at the general meeting. Learned

representative submitted that the information required to be furnished under regulation 3 (3) is after passing the resolution in the general meeting of the target company and therefore, intimation under regulation 3 (1)(c) cannot be treated as notifying stock exchanges under regulation 3(3). He submitted that the object of notifying stock exchanges is to ensure that material information is provided to stock exchanges, to benefit the investors and non submission of the same defeats the very object of the said requirement. Learned representative submitted that the Appellant's claim that they are not under obligation to notify stock exchanges the acquisition as required under regulation 3(3) is untenable.

It was submitted that the Appellants have admitted that they are the promoters of the company and as a result of conversion of the OCDs on 15.2.2001, they collectively acquired 7156345 equity shares of the company and as a result their total holding increased from 34.99% to 44.84% (i.e. by 9.85%). Countering their contention that except one Appellant, the individual acquisition of shares by the other Appellants was less than 5% and therefore, compliance of regulation 3(3) is not attracted, learned representative submitted that the said contention is untenable and this Tribunal has rejected such contention and referred to the following observation by the Tribunal in Nagraj Ganeshmal Jain V P. Sairam (2001) 33 SCL 295 (SAT).

> "On a perusal of the definition of the expression 'acquirer' extracted above it is clear that any person who acquires or agrees to acquire shares or voting rights/control of the target company is an acquirer. The expression " any person" is of wide amplitude. A person becomes an acquirer by virtue of his action- who acquires or agrees to acquire shares etc. etc., Therefore it is difficult to agree with the Appellants contention that a promoter can never be an acquirer. A promoter could be considered as an acquirer or not would depend on the question as to whether he is a person who acquires or agrees to acquire shares etc. Identification is thus action related. In the instant case there is no doubt as to the acquisition of shares by promoters. By the Appellants own admission they had acquired 18.82% equity capital on 15.9.1997 and the said additional acquisition raised their holding in the company's capital from 52.95% to 71.77%. However, as per the information furnished by the Appellants vide letter dated 20.6.2001, none of them was individually holding even 5% or more shares in the company even after 15.9.1997. In that context it is relevant to see as to whether they were acting in concert and thereby their collective acquisitions need be taken into account.. In this context the Appellants contention that they are not persons acting in concert for the reason that they had no common objective or purpose of substantial acquisition of shares or voting rights or

gaining control over the target company need be examined. Shri Kinikar had also stated that the company is not a target company covered under the specific definition. The Appellants argument in this regard that they are not persons acting in concert is based on two grounds, that since they were already holding 52.95%, acquiring further 18.82% share capital is not a substantial acquisition and further that since they were already in control of the company, there was no question of acquiring control over the company again. In this context it is to be noted that the Appellants had admitted that the whole purpose of acquiring shares in the preferential allotment was to infuse funds to meet the financial requirements of the company. Even if their objective was to make available funds to the company, for that purpose they had acquired 18.82% shares in the company, which is substantial. The shares are acquired by the acquirers and the funds are received by the company. It is not a case of direct supply of funds. It is a case of subscription against the shares acquired by them. Even the Appellants have not denied the fact of acquisition of shares by them. It is incorrect to say that such substantial acquisition should be for gaining control and in a company where the control is already vested in the acquirers, the acquisition of further shares was of no relevance. There is no doubt that as Justice Bhagwati Committee put it, to be acting in concert with an acquirer " they must have commonality of objective and a community of interests which could be acquisition of shares or voting rights beyond the threshold limit or gaining control over the company and this act of acquiring shares or voting rights in a company must serve this common objective. Implicit in the concerted action of these persons must be an element of co-operation". (para 2.22 of the report). In the instant case there is no dispute as to whether there was an element of co.operation among the Appellants to acquire shares of the company. It is also evident that they had a commonality of objectives and community of interest in as much as they had decided to subscribe to the preferential allotment made by the company. The object of subscribing to the preferential allotment may not be to acquire control but to infuse funds. But the fact remains that the Appellants had acquired shares following the common objective of acquiring shares. Therefore in the light of the undisputed facts before me, I have no hesitation to hold that the Appellants are acquirers in terms of regulation 2(1)(b) read with regulation 2(1)((e). Now comes the question raised by the Appellants that since they are promoters and in control of the company how can they be treated as acquirers.? The Appellants contention that a person who is in control of the company cannot be an acquirer but only a promoter is not born out of any legal authority. The fact that in the regulation 2(1)(h) a promoter also includes " the person or persons who are in control of the company" does not mean that he cannot be an acquirer who "acquires or agrees to acquire shares or voting rights in a company". By virtue of a position to exercise control over a company, the person concerned is not debarred from acquiring shares in the company. In this context definition of control provided in the regulation is required to be looked into".

In this context the learned representative referred to the following observation made by this Tribunal in Modipon Ltd. V SEBI (2002 CC 677) that:

"The expression 'acquirer' and the 'person acting in concert with the acquirer' have been defined in the regulation. There is no hard and fast rule that a promoter can never be an acquirer or person acting in concert. If a promoter acquires or agrees to acquire

shares or voting rights or gains control over the target company he can be safely considered as an acquirer who in turn would be subject to the provisions of regulation 11. Likewise a promoter can be a person acting in concert provided he is found to cover within the scope of the definition under regulation 2(1)(e). Whether a promoter is also an acquirer or person acting in concert would depend on the facts of each case. It is to be noted that there is no blanket prohibition on the promoters acquiring shares etc. in the company."

Learned representative submitted that as per regulation 2(1)(b), the term 'acquirer' means any person who directly or indirectly acquires or agrees to acquire shares or voting rights in the target company, either by himself or with any person acting in concert with the acquirer, that as per the definition acquirer includes a person acting in concert. He submitted that regulation 2(1)(e) defines the expression "person acting in concert", that as per the first part of the definition, person acting in concert comprises "persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or granting control over the target company, pursuant to an agreement or understanding (formal or informal) directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company. Second part of the definition enumerates certain categories of persons who are deemed to be persons acting in concert with other persons in the same category. Learned representative submitted that the Appellants had commonality of objective to acquire shares, as has been demonstrated by their conduct and therefore, they are acquirers and as such amenable to the provisions of regulation 3(3) and 3(4).

Learned representative referring to the Appellants' submission that regulation 3(3) and regulation 7 are identical, submitted that regulation 3(3) and regulation 7 are independent provisions and apply in different circumstances, that regulation 7 applies in case of an acquirer who acquires shares in any manner whatsoever, which would entitle him to more than 5% shares or voting rights in a company, whereas regulation 3(3) applies when acquisition is exempted from the provisions of regulations 10,11 & 12 of the Regulations, that the exemption available under regulation 3(1)(c) is not automatic, but subject to compliance of certain requirements, pre and post acquisition. Learned representative submitted that in the instant

case, the acquisition was by way of preferential allotment and as such enjoyed exemption under regulation 3, that the acquisition under regulation 3(1)(c) is exempt only from compliance of requirements of regulations 10,11 and 12 and not from the compliance requirement under regulation 3(3) and 3(4).

With reference to the contention that regulation 3(4) had no application, in the instant case, the learned representative referred to the observation of the Tribunal in Nagaraj Ganeshmal (supra) and submitted that in the light of the said finding the Appellants' contention is untenable. He cited the following portion from the said order:

> "On a perusal of regulation 3(4) it is seen that in respect of certain acquisitions, which include acquisitions in preferential allotment, the acquirer is required within 21 days of the date of acquisition to file a report with SEBI with details in respect of acquisitions which would entitle such person to exercise 10% or more of the voting rights. The Appellants had advanced more or less the same arguments as put forth with reference to the applicability of regulation 11(2) to them that their holding exceeded the prescribed limit even before the present acquisition, also in support of their contention that regulation 3(4) is not attracted. It has already been discussed at length in this order that the said argument is devoid of any merit. What is envisaged in regulation 3(4) is not a onetime reporting, as is evident from the reason stated by the committee necessitating such reporting. Thus the contention that regulation 3(4) is not required to be complied with by the Appellants who had crossed the benchmark before 15.9.1997 is of no sound footing and I reject the same."

With reference to the submission of the Appellants that the adjudicating officer had failed to take into account the provisions of Section 15J of the Act in adjudicating the quantum of penalty under section 15A, learned representative submitted that the adjudicating officer has considered the factors required to be taken into consideration as provided in section 15KJ is evident from the fact that he has taken a lenient view in determining the quantum of penalty, that he has not imposed the maximum penalty imposable under section 15A. He submitted that the Appellants' contention that the default was technical and the adjudicating officer has failed to take into account the fact that the default did not harm or cause any loss to any person or that the Appellants have not derived any disproportionate gain or any unfair advantage as a result of the default etc. are not relevant in the context of the proven failure on the part of the Appellants.

Learned representative submitted that even though the Appellants were fully aware of the requirements of the Takeover Regulations they did not bother to comply with the reporting requirements under regulation 3(3) and 3(4), and the reasoning given by them is baseless, that their interpretation is not relevant as the regulation is very clear and unambiguous. He submitted that the Appellants complied with the requirements of 3(4) belatedly when the stock exchange insisted them to file the same, that it was not done voluntarily. He submitted that from the factual position available on record it is clear that non compliance of the regulation was nothing but a wilful defiance of law and therefore, penalty was warranted.

Learned representative submitted that the observation made by this Tribunal in Yogi Sungwon (supra) can not have application to the present case as the factual position in the present case is clearly distinguishable from the case of Yogi Sungwon. He further submitted that the decision in the case of Samrat Holding and Cabbot International relied on by the Appellants with reference to penalty has also no application to the present case in view of the fact that the reporting was not done intentionally, defying the legal requirements. Learned representative submitted that quantum of penalty arrived at by the adjudicating officer for the contravention of regulation 3(3) worked out, if found in excess, in the light of the view held by the Tribunal in the case of J. M. Financial (supra), the Tribunal may requantify the same. He submitted that for violation of regulation 3(4) the penalty of Rs.1 lakh imposed by the Respondent is reasonable and that the adjudicating officer has justified the same and it is obvious from the order that he has taken into consideration the factors provided in section 15 J.

I have carefully considered the rival contentions and the material on record.

The Appellants have admitted that they are promoters of the company and they were holding 34.99% of the capital of the company at the time of acquisition of further shares in the preferential allotment made by the company. They were issued OCDs and on exercising the

option, the company allotted 71,56,345 equity shares. As a result thereof their holding increased from 34.99% to 44.84% (i.e. by 9.85%). It is seen that these 7167345 shares were acquired by 17 Appellants who are admittedly the promoters of the company and that individual acquisition of each one of them (except one Appellant was below 5% of the equity capital of the company. The said acquisition was made on 15.2.2001.

The adjudicating officer appointed by the Respondent after enquiry, has come to the conclusion that the Appellants had failed to comply with the requirements of regulation 3(3) and 3(4).

Regulation 3(3) is as follows:

"In respect of acquisitions under clauses ( c ) (e) (h) and (i) of sub regulation (1), the stock exchanges, where the shares of the company are listed, shall for information of the public, be notified of the details of the proposed transaction, at least 4 working days in advance of the date of the proposed acquisition, in case of acquisition exceeding 5 per cent of the voting share capital of the company"

Regulation 3(4) is as follows:

"In respect of acquisitions under clause (a) (b) (c) (e) and (i) of sub regulation (1), the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to the Board giving all details in respect of acquisitions which (taken together with the shares or voting rights if any, held by him or by persons acting in concert with him) would entitle such person to exercise 15%, or more of the voting rights in a company."

In terms of regulation 3(1) ( c), preferential allotment made in pursuance of resolution passed under section 81(1A) of the Companies Act, 1956 is exempted from the purview of regulation 10, 11 and 12. Regulation 10, 11 requires the acquirer acquiring shares beyond the specified limit to make a public offer to acquire shares of the company in accordance with the regulation. Regulation 12 also provides for making similar public offer in the event of

acquisition of control over a company. Thus, an acquisition which is falling under any of the exempted categories provided in sub regulation (1) of regulation 3 is not required to make public offer. The preferential allotment made to the Appellants is exempted under clause ( c ) of sub regulation 1 of regulation (3). The sub clause (c) is referred to in both the sub regulations i.e. (3) and (4) of regulation 3 and accordingly acquisition is required to be notified/reported to the concerned stock exchange and to the Respondent within the stipulated time. Section 15A provides penalty for failure to comply with the reporting requirements. The said section 15A is as follows:

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

(a) to furnish any documents, 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) xxxxxxxxx"

Exemption provided under regulation 3(1)( c ) is available subject to compliance of the requirements stated thereunder. According to regulation 3((1) ( c ):

"Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to preferential allotment, made in pursuance of a resolution passed under section 81(1A) of the Companies Act, 1956

Provided that,--

(i) board resolution in respect of the proposed preferential allotment is sent to all the stock exchanges on which the shares of the company are listed for being

notified on the notice board;

(ii) full disclosures of the identity of the class of the proposed allottee(s) is made, and if any of the proposed allottee (s) is to be allotted such number of shares as would increase his holding to 5 per cent or more of the post issued capital, then in such cases the price at which the allotment is proposed, the identity of such person(s), the purpose of and reason for such allotment, consequential changes, if any, in the board of directors of the company and in voting rights, the shareholding pattern of the company and whether such allotment would result in change in control over the company are all disclosed in the notice of the general meeting called for the purpose of consideration of the preferential allotment."

Shri Merchant had submitted that the Appellants had submitted copy of the Board resolution referred to in sub clause (i) and the notice with details as per clause (ii) to the concerned stock exchange and as such requirement of notifying the acquisition under regulation 3(3) has been substantially complied with and therefore the Appellant can not be held guilty of failure to comply with requirements of the said regulation. The Respondent has not refuted the Appellants' version of sending the Board resolution and copy of the notice to the concerned stock exchange. In this connection it is noted from the material furnished by the Appellants that the following resolution passed by the Board of Directors of the company on 28.1.2000 is the resolution stated to have been forwarded to the concerned stock exchanges:

"RESOLVED THAT subject to the approval of the Members pursuant to the provisions of Section 81(1A) and such other applicable provisions, if any, of the Companies Act, 1956, Reserve Bank of India, Securities & Exchange Board of India, and subject to compliance with relevant provisions of the Guidelines for preferential allotment of shares, SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 1997 or any other legislation the Memorandum and Articles of Association of the Company and subject to approval of such other appropriate authorities as may be required for the

purpose, 40,00,000 Optionally Convertible Debentures (OCD) of Rs. 100/- each, aggregating to Rs. 40 Crores be issued on Private Placement Basis to the Promoters, Non Resident Indians (NRIs), Overseas Corporate Bodies (OCBs), Financial Institutions, Mutual Funds etc., on such terms and conditions as may be stipulated by the approving authority and agreed to by the Company and Subscribers, based on the stipulation that 50% of the face value of each OCD be converted compulsorily into Ordinary Shares of Rs. 10/- each, at a price of Rs. 47/- per ordinary shares, which has been determined on the basis of SEBI pricing formula, at the end of 18 months from the date of allotment of the debentures and the balance 50% plus cumulative interest thereon, if any, on the entire investment would, at the option of the investors, also be convertible into ordinary shares of Rs.10/- at the end of 18 months, at the same price as indicated above.

In case the option to convert the balance amount of the OCD into ordinary shares is not exercised by any of the investors, the same shall be redeemed at par or at premium, if any, to be decided by the Company in consultation with such Investors in three equal instalments at the end of $4^{th}$, $5^{th}$ and $6^{th}$ year from the date of allotment of the OCDs. The interest accrued on the OCDs shall be paid forthwith upon receipt of investor's decision for non-conversion of the balance amount. The promoters and NRI Investors / OCBs have expressed their willingness to convert into ordinary shares their entire investment along with accrued interest on the investment. The coupon rate on the OCDs would be decided by the Company in consultation with the investors, which shall not exceed 16% p.a. payable at half yearly intervals."

The core portion of the special resolution to be passed in the Extra ordinary general meeting held on 1.3.2000, as disclosed in the notice dated 28.1.2000 is as follows:

"consent of the Company be and is hereby accorded to the Board of Directors of the Company (hereinafter referred to as "the Board" which term shall be deemed to include

any Committee constituted by the Board or any Committee which the Board may hereafter constitute, to exercise one or more powers including the powers conferred by this Resolution), to issue, offer and allot, not exceeding 40,00,000 (Forty lakhs only) Optionally Convertible Debentures (OCDs) of the face value of Rs.100/- each at par aggregating to Rs.40 Crores on Private Placement basis to the Promoters, Non Residents Indians (NRIs), Overseas Corporate Bodies (OCBs), Financial Institutions, Mutual Funds etc. as the Board may in its absolute discretion deem fit. 50% of the face value of each OCD would be compulsorily converted into ordinary shares of Rs.10 each, at the end of 18 months from the date of allotment of the OCDs at a price of Rs.47/- per ordinary share which has been determined based on SEBI pricing formula (treating January 30, 2000 as the relevant date) and the balance 50% plus cumulative interest thereon, if any, on the entire investment would, at the option of the investor, also be convertible into ordinary shares of Rs.10/- each at the end of 18 months from the date of allotment of the OCDs at the same price as indicated above. In case the option to convert the balance amount of the OCD into ordinary shares is not exercised by any of the investors, the same shall be redeemed at par or at a premium, if any, to be decided by the Board in consultation with such Investors in three equal annual instalments at the end of $4^{th}$, $5^{th}$ and $6^{th}$ year from the date of allotment of the OCDs. The interest accrued on the OCDs shall be paid forthwith upon receipt of investors' decision for non-conversion of the balance amount. The promoters and NRI/OCB Investors have expressed their inclination to convert into ordinary shares their entire investment alongwith accrued interest on the investment. The coupon rate on the OCDs would be decided by the Board in consultation with the investors, which shall not exceed 16% p.a. payable at half-yearly intervals".

In the explanatory statement to the notice the company has furnished the details as per clause (ii) of regulation 3(1)( c ). The statement gives the details of (a) the identity of allottees (b) number of OCDs and price, (c ) purpose and reason for allotment (d) changes in the Board (e) changes in voting rights and shareholding pattern (f)change in control.

It is to be noted that the compliance of the requirements of 3(1)( c ) (i) & (ii) are preconditions to avail of the exemption. In this context it is to be noted that the Board resolution dated 28.1.2000 and the notice of the extraordinary general body meeting is dated 28.1.2000 and the date of extra ordinary general meeting is 1.3.2000. It is seen from the material available on record that on exercising the right of conversion, the Appellants were allotted shares on 15.2.2001. The date of acquisition therefore is 15.2.2001. As already stated the proposed acquisition is required to be notified to the stock exchange atleast 4 working days in advance of the proposed acquisition and reporting to the Respondent is required to be made within 21 days from the date of the acquisition. The time frame provided for compliance of notifying/reporting has some purpose. The authorities are required to be informed of the acquisition in close proximity to the date of acquisition. As per clause (i) the board resolution is required to be sent to the concerned stock exchange for being notified on the notice board. Displaying it on the notice board is for information of the public. It is an accepted fact that timely information is a crucial input in decision making in the context of dealing in shares. Therefore, it is difficult to agree with the Appellants Counsel that the information furnished to the stock exchange more than a year before the actual acquisition be considered as compliance of the requirements of regulation 3(3). It is also seen from the text of the board resolution that it is not focused as to whom the OCDs are going to be allotted. The allottees referred to therein are:

"Promoters, Non Residents Indians (NRIs), Overseas Corporate Bodies (OCBs), Financial Institutions, Mutual Funds etc. The special resolution passed in the extra ordinary general meeting held on 1.3.2000 also refers to issue of OCDs not exceeding forty lakhs on private placement basis to the"Promoters, Non Residents Indians (NRIs), Overseas Corporate Bodies (OCBs), Financial Institutions, Mutual Funds etc." The explanatory statement to the notices referred to earlier is with reference to the said resolution. It is also noted that the resolutions passed by the board of directors and in the extra ordinary general meeting is for issue of OCDs and it is not for allotment of shares on preferential basis as such. The equity

share allotment comes to picture only when the holder of OCDs exercise their option to convert OCDs to equity shares. The resolution puts only an outer limit of the number of OCDs, which the Board is empowers to issue. The exact number is not mentioned either in the Board resolution or in the general body meeting resolution. The resolution is also not specific as to the exact quantum of the shares likely to be allotted. According to the general body resolution "50% of the face value of each OCD would be compulsorily converted into Ordinary Shares of Rs. 10/- each, at a price of Rs. 47/- per ordinary shares, which has been determined on the basis of SEBI pricing formula, at the end of 18 months from the date of allotment of the debentures and the balance 50% plus cumulative interest thereon, if any, on the entire investment would, at the option of the investors, also be convertible into ordinary shares of Rs.10/- at the end of 18 months, at the same price as indicated above. In case the option to convert the balance amount of the OCD into ordinary shares is not exercised by any of the investors, the same shall be redeemed at par or at premium, if any, to be decided by the Board …….". It is noted that the OCDs were allotted on 29..5.2000 and the entire contribution of the promoters was converted into equity shares at an early date on 15.2.2001 and by reason of such conversion the Appellants" acquired 71,56,345 shares of Rs.2/- each". Thus it is clear that factual position stated in the resolutions/notice was not specific and the subsequent developments have shown the developments at variance with certain disclosures made in the resolutions. It is to be noted that the reporting under regulation 3(3) and 3(4) is with reference to the actual acquisition of shares and not with reference to acquisition of Optionally Convertible Debentures. It is also noted that the Respondent has already devised separate formats for furnishing information by the acquirers in terms of regulation 3(3) and 3(4) and the information as available in the board resolution and the notice of general meeting does not fully cover the information required to be so furnished. In my view, in the light of the facts and circumstances of the case, I am not inclined to agree with Appellants' view that in view of the compliance of the requirements under regulation 3(1)( c) (i) & (ii)the concerned stock exchanges were not required to be notified under regulation 3(3).

Shri Merchant had referred to the observation made by this Tribunal in HDFC's case that default per se is not the dominant guiding principle for imposition of penalty. But it is to be noted that facts and circumstances attendant to the default are important factors. Whether the failure of the Appellants to comply with the requirements of the regulation is punishable or not is discussed elsewhere in this order.

Learned Counsel had submitted that regulation 3(3) has appliciation only in case where the proposed acquisition exceeds 5% of the voting shares capital as the concept of acquirer and person acting in concert is not included in the said regulation. It is clear from the provisions of regulation 3(3) that obligation to notify the acquisition is on the acquirer. In this context the opening part of regulation 3(1) is the pointer. Regulation 3(1) provides "Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to acquisition referred under the sub clauses. The obligation under regulation 10,11, and 12 is on the acquirer. As a result of the exemption the acquirers are not obliged to comply with the requirements of the said regulations 10,11 and 12. The acquisition is relatable to the acquirer. As per regulation 3(3) the details of acquisitions including the one falling under 3(1) ( c ) are to be notified to the stock exchanges. In this context it is also to be noted that the proposed transaction (acquisition) is required to be notified 4 days in advance of the proposed acquisition. Except an acquirer who else can authoritatively notify the proposed transaction in advance of the proposed acquisition. In this context it is to be noted that according to regulation 2(1)(b) "acquirer means any person, who directly or indirectly, acquirers or agrees to acquirer shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer". According to regulation 2(1)(e) "persons acting in concert comprises persons who for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target, pursuant to an agreement or understanding (formal or informal) directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company." It is evident from the facts on record that the Appellants are promoters of the

company and they had the common objective of acquiring the shares of the company and pursuant to the said common objective they acquired shares. Each one of them acted in concert with the other is thus evident,and therefore the shares acquired by them collectively, in the light of the facts of the case, has to be taken for the computation of the specified bench mark holding of the shares. It is to be noted that since the Appellants were already in management of the company further acquisition was of no significance is not correct. On a careful reading of regulation 2(1)(b) and 2(1) (e) it is clear that the deciding factor is not the pre acquisition status of the person acquiring the shares in a company. It is the conduct of the person concerned which decides whether he is an acquirer/person acting in concert. The question whether a promoter can be an acquirer has been decided by this Tribunal in Modipon (supra). In the said case this Tribunal had viewed that:

> "there is no hard and fast rule that a promoter can never be an acquirer or person acting in concert. If a promoter agrees to acquire shares or voting rights or gains control over the target company he can be safely considered as an acquirer who in turn would be subject to the provisions of regulation 11. Likewise a promoter can be a person acting in concert provided he is found to cover within the scope of definition under regulation 2(1)(e). Whether a promoter is also an acquirer or person acting in concert would depend on the facts of each case. It is to be noted that there is no blanket prohibition on the promoters acquiring shares etc. in the company…"

"The fact that in the regulation2(1)(h) a promoter also includes "the person or persons who are in control of the company does not mean that he can not be an acquirer who acquires or agrees to acquire shares or voting rights in a company. By virtue of a position to exercise control over a company the person concerned is not debarred from acquiring shares in the company". This Tribunal's decision in Modipon was challenged in an appeal before the Hon'ble Bombay High Court. The observation made by the Hon'ble High Court in this regard has settled the issue. Hon'ble Court held:

"But, since acquirer includes within its definition persons acting in concert with him, the question arises as to who are the persons acting in concert with him. This must be considered in the background of the offer made by the acquirers, and, therefore, the question to be answered is : Whether the person concerned is acting in concert with the acquirer for the purpose of acquiring the shares in the target company? It, therefore, follows that the mere fact that a person is a promoter does not make him an acquirer, unless it is shown that he either intends to acquire or is acting in concert with the acquirer for the acquisition of shares of the

target company. Before he can be said to be acting in concert with the acquirer, it must be shown that he shares with the acquirer a common objective or purpose for substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding and directly or indirectly co-operates with the acquirer or agrees with him to acquire shares or voting rights in the target company or control over the target company. It is significant that the definition of acquirer does not include a promoter, but includes persons acting in concert with an acquirer. The question as to whether a person is acting in concert with the acquirer, is essentially a question of fact. A promoter may not act in concert with the acquirer., whereas a stranger might. As the Appellate Tribunal has rightly pointed out, there is no hard and fast rule that promoter must always be deemed to be an acquirer or a person acting in concert with the acquirer. On the facts, it may be held that a promoter shares the common objective or purpose of substantial acquisition of shares with the acquirer. It may well be that he may not share the said common objective or purpose. If he does, he shall be deemed to be a person acting in concert with the acquirer, but if he does not, he cannot be deemed to be an acquirer merely because he happens to be a promoter. Regulation 2(1)(e)(2) also makes this clear. The persons named therein are deemed to be persons acting in concert with other persons in the same category, unless the contrary is established. It, therefore, follows that even though there is a presumption that the persons described therein may be deemed to be persons acting in concert with the acquirer, the presumption is rebuttable, and, therefore, in each case, the facts have to be examined to reach a conclusion as to whether a person is or is not acting in concert with the acquirer for the purpose of substantial acquisition of shares or voting rights or gaining control over the target company. He may do so by an express agreement or understanding, and the agreement or understanding may be proved by evidence on record. Similarly, he may co-operate with the acquirer directly or indirectly or indirectly. What is important is that it must be shown that he is acting in concert with the acquirer. A company may have several promoters, but only one of them may decide to increase his shareholding in the company by substantial acquisition of shares or voting rights in the company. The mere fact that one of the promoters of the company wishes to do so, is no reason to hold that the other promoters also necessarily share his objective or purpose. The other promoters may, in fact, be opposed to the acquirer acquiring further shares in the target company, and if they fail to prevent the acquirer from doing so, they may be inclined to dispose of the shares held by them. If such a situation, it cannot be said that the other promoters share the common objective or purpose of the acquirer."

According to Shri Merchant the requirement of regulation 3(3) is similar to the requirement under regulation 7 requiring the acquirer to make disclosure only when he acquires 5% or more of the share capital and that for further acquisition no further disclosure is necessary.In my view the scope of regulation 7(1) and 3(3) is not identical. According to regulation 7(1) any acquirer who acquires shares or voting rights which (taken together with shares or voting rights, if any held by him) would entitle him to more than five per cent shares or voting rights in a company, in any manner whatsoever, shall disclose the aggregate of his shareholding or voting rights in that company, to the company. It is evident from the text of the regulations 3(3) and 7(1), the requirement is not the same. This Tribunal in Mega Resources

Ltd. V SEBI (2002) 48 CLA 211 SAT) had viewed that:

> "on a combined reading of the above cited definitions (i.e. definition of acquirer and person acting in concert) it is not possible to agree with Shri Banerjee's submission that in view of the word acquirer is singular and the absence of the words acting in concert in the regulation excludes an acquirer whose individual holding does not exceed 5 per cent from complying with the requirements of the Regulation. In the light of the definition of the expression 'acquirer' and the 'persons acting in concert' and also taking into consideration the purpose of regulation 7, I am of the view that the acquisition of shares by persons acting in league, is very relevant and the disclosure of such concerted acquisition to the target company and the company in turn to the concert stock exchange is in tune with the objective of the said disclosure. If one is to accept Shri Banerjee's contention, that would mean that each person acting in concert could acquire upto 5 per cent shares without making disclosure and continue to do so upto 15 per cent without attracting the requirements of public offer under regulation 10. Such an interpretation would defeat the very purpose of the Regulations. As already stated one of the objects of the Regulation is to protect the interests of the investors through prompt disclosures. In my view the shares acquired by all those persons acting in league has to be taken as a whole for the purpose of regulation 7".

I do not see any reason to take a different view for making disclosures under regulation 3(3) and 3(4).

The observation made by this Tribunal in Yogi Sungwon (supra) cited by the learned Counsel has no application to the case. In fact he has relied on an observation made in the said order ignoring the specific background in which the Tribunal had made such an observation. In Yogi Sungwon the issue involved was inter se transfer of shares among the promoters and the argument therein was that as a result of such interse transfer, the total holding of the promoter group in the company did not change. It was in that context the Tribunal had viewed that " the Appellant's submission that there is no legal requirement to submit the information etc. is based on the view that there was no change in the overall ownership of the shareholding by the Appellant and the persons acting in concert, as the transaction was interse shareholders in the same promoter group. But this contention is not supported by the provisions of the regulations". It was in the said context that the Tribunal observed that " it is clear from the wording of regulation 3(4) and 7(1) etc. That what is contemplated in the regulation is not the total holding of the promoter group but the holding of the individual". The Tribunal had further

observed "the argument that the acquisition was from other shareholders in the same group and as a result of acquisition, the holding of the group did not change is not of any force to claim non applicability of the regulation to the transaction in question. If the interpretation of the Appellant is accepted then the very exemption provided under 3(1)(e) itself would be redundant". On careful analysis of the facts of the said case, it is difficult to endorse the Appellants' view that Yogi Sungwon's case support their case.

As regards the compliance of regulation 3(4) is concerned the appellant has admitted that it has filed the report with SEBI after a delay of 281 days. According to the Appellants' own version the report was filed on the stock exchange advising them to file the report. The appellants' argument is that reporting under regulation 3(4) was not considered necessary as the promoters were holding over 15% of the share capital of the company that the said regulation is taken and similar to regulation 10. In this context it is to be noted that sub regulation (3) and (4) were incorporated in the regulation for the reason as the expert committee based on whose recommendation the regulation is framed, put it "in order to ensure transparency in the transaction and assist in the monitoring all exempted transactions should be subject to reporting requirements to the concerned stock exchange in advance of the proposed acquisition and to SEBI." In the light of the argument advanced by the Appellants referred to earlier, the observation made by this Tribunal in Nagraj Ganeshmal Jain (supra) is considered relevant to the present case also. This Tribunal had observed:

> "On a perusal of regulation 3(4) it is seen that in respect of certain acquisitions, which include acquisitions in preferential allotment, the acquirer is required within 21 days of the date of acquisition to file a report with the SEBI with details in respect of acquisitions which would entitle such person to exercise 10 per cent or more of the voting rights. The Appellants had advanced more or less the same arguments as put forth with the reference to the applicability of regulation 11(2) to them that their holding exceeded the prescribed limit even before the present acquisition, also in support of their contention that regulation 3(4) is not attracted. It has already been discussed in this order that the said argument is devoid of any merit. <u>What is envisaged in 3(4) is not a one time reporting</u> as is evident from the reason stated by the committee necessitating such reporting. Thus the contention that regulation 3(4) is not required to be complied with by the Appellants who had crossed the bench mark before 15.9.1997 is of no sound footing and I reject the same."

The Appellants' argument that since their holding having crossed 15% even before the acquisition of shares in the preferential allotments by the company is not correct for the same reason as stated in Nagraj Sagarmal Jain.

For the reasons stated above the Appellants' contention that they have not violated the provisions of regulation 3(3) and 3(4) is not correct. In my view they were required to comply with the requirements of regulation 3(3) and 3(4). They have failed to comply with the requirements of the said regulations. Shri Merchant had submitted that even for any reason it is viewed that the Appellants had failed to comply with the requirements of regulations, the failure was purely of a technical nature and that it was not willful and penalty is not warranted. In support he referred to this Tribunal's decision in Samrat Holding and Cabbot International.Learned

Counsel for the Appellants had argued that the reasons for non compliance of the requirement of the regulation was on account of their understanding that in view of the compliance of the requirements of regulation 3(1) ( c )(i) & (ii) reporting under regulation 3 (3) and 3(4) was not warranted. It is thus clear that the non compliance of the requirement was not because of any ignorance of the provisions of the regulations. The Aappellants felt it not necessary. Thus it was deliberate and conscious decision based on the interpretation of the regulations by them. Regulation 3(3) and 3(4) are couched in plain language and there is no scope for interpreting the same to hold that its application is not required to cases of acquisition covered under regulation 3(1) ( c ). Mistaken interpretation of regulation is not an excuse to absolve the offender from the consequences attendant to the offence. In this context the observation made by the Hon'ble Supreme court in Dinesh Chandra Jamnadas Gandhi Vs. State of Gujrat (AIR 1989 SC 1011) is to be noted. In the said case Hon'ble Supreme Court held that "It is no defence that the accused acted on a mistaken interpretation of the statute which he honestly believed to be true." Since it was willful decision to not to comply with the requirements of regulation 3(3) and 3(4) the decision in Samrat Holding and Cabbot

International has no application. The Appellants' argument that the adjudicating officer has not taken into consideration the factors required to be considered for the purpose of imposing penalty is not correct, as the adjudicating officer has imposed only one lakh rupees penalty for violation of regulation 3(4) inspite of the fact that the delay involved in filing the report was 486 days. However, there is substance in the submission of the Appellants that the quantum of penalty has been wrongly worked out for violation of regulation 3(3). It is noted that the adjudicating officer has quantified the penalty treating failure on a continuing basis. He has decided to levy penalty at the rate of Rs.500 as against the maximum penalty of Rs.5000/-leviable per day for 486 days. But this is not correct. This Tribunal had held in J. M. Financial and Consultancy Services Ltd., (supra) that failure of notifying the acquisition to the stock exchanged under regulation 3(3) is not a continuing offence. In the said case the Tribunal had held that:

> "The adjudicating officer in his detailed order has explained the factual position and the legal provisions based on which he decided to impose the penalty. However, the respondent's conclusion that there was a delay of 40 days in complying with the requirements of notifying the stock exchange the details of acquisition and based on that conclusion levying a total penalty of Rs.80,000 worked out at Rs.2,000 per day of default for 40 days is not legally sustainable. The failure under sub regulation (3) is not of a continuing nature after acquisition and, therefore, penalty cannot be decided on the basis of per day default post acquisition, as decided by the adjudicating officer. Sub-regulation requires the acquirer to notify the requirements atleast 4 days in advance of the date of acquisition. It is clear from the provisions of the said regulation that notifying stock exchange is a pre-acquisition requirement. Therefore, the decision to impose Rs.80,000 based on a per day penalty for a period of 40 days after completion of the offence, is not legally sustainable."

I do not consider it necessary to remand this case only to requantify the quantum of penalty under section 15A(b) in view of the finding in which penalty for failure to comply with the requirements of regulation 3(3) has been decided. I am not suggesting that failure in complying with the requirements of regulation 3(3) need not attract penalty. I have only pointed out that the error involved in quantifying the penalty by the Respondent. The acquisition was on 15.2.2001. The cut off date has been taken as 13.6.2002 i.e. date of show cause notice to quantify the delay. The adjudicating officer has decided to levy a sum of Rs.500/- per day as penalty as against the maximum sum of Rs.5000 payable per day. Taking

into consideration the totality of the facts and circumstances of the case, I am of the view that a total sum of Rs.1,02,000 for failure to comply with the requirements of sub regulation (3) and (4) of regulation would be fair. Accordingly the total quantum of penalty payable by the Appellants is fixed at rupees one lakh two thousand and to this extent the impugned order stands modified. The impugned order as modified sustains.

The appeal is disposed of in the above lines.

Sd/-

**(C. ACHUTHAN)**
**PRESIDING OFFICER**

**MUMBAI.**
**DATE: April 30, 2003.**