BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO.48/2001

In the matter of:

Luxury Foams Ltd.,
Echo Chemicals Pvt. Ltd.,
Yare Engineering Pvt. Ltd.,
TMS Boards & Industries Pvt. Ltd.,
Cookfast Foods Pvt. Ltd.,
Econo Commercial Evaluators Pvt. Ltd.,
Ajay Roadways Pvt. Ltd.,
Castle Builders Pvt. Ltd.,
Dilli Soaps & Chemicals Pvt. Ltd.,
Rai Chemicals Pvt. Ltd
CMC Marketing Pvt. Ltd. **Appellants**

Vs.

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

Appearance:

Mr. K.K. Agarwal
P.O.A. **For Appellants**

Mr. Ananta Barua
Jt. Legal Adviser, SEBI

Mr. Vinay Chauhan
Legal Officer, SEBI **For Respondent**

(Appeal arising out of the order dated July 24, 2001, made by the Adjudicating Officer, Securities and Exchange Board of India)

ORDER

Securities and Exchange Board of India (SEBI), received certain complaints relating to the preferential allotment of shares made by one company, namely Website Infosys Ltd (the company). The said preferential allotment was made to the Appellants who belong to the promoter group of the company. SEBI, on September 19, 2000 issued show cause notice to the company and the Appellants, asking them to explain their conduct with reference to their alleged failure to comply with the requirements of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations) in the matter of the said preferential allotment of shares made by the company. The company vide its reply dated October 10, 2000 denied violation of any of the provisions of the 1997 Regulations, mainly on the ground that the preferential allotment in question was exempt in terms of regulation 3(1)(c) of the 1997 Regulations. Since the company's explanation was not found satisfactory, SEBI decided to inquire into the matter. For the purpose SEBI appointed an Adjudicating Officer under Section 15 I of the Securities and Exchange Board of India Act, 1992 (the Act). The Adjudicating Officer concluded the inquiry holding the Appellants guilty of failure to comply with the requirements of section 15 H and imposed monetary penalty at the rate of Rs. 40, 000 against each of the Appellants, vide his order dated July 24, 2001. The said order is under challenge in the present appeal.

The Board of Directors of the company in their meeting held on October 5, 1999 made preferential

allotment of 41, 81,700 fully paid up equity shares of Rs. 10/- each and 4, 40, 00, 000 partly paid equity shares at the rate of Re.1/- each, for consideration other than cash, to the following persons belonging to the promoter group.

NAME OF ALLOTTEE	NO. OF SHARES	% HOLDING
Luxury Foams Ltd.	43, 80, 000	6.083
Echo Chemicals P Ltd.	43, 80, 000	6.083
Yare Engineering P. Ltd.	43, 80, 000	6.083
TMS Boards & Industries P Ltd.	43, 80, 000	6.083
Cookfast Foods P Ltd.	43, 80, 000	6.083
Econo Commercial Evaluators P Ltd.	43, 80, 000	6.083
Ajay Raodways P Ltd.	43, 80, 000	6.083
Castle Builders P Ltd.	43, 80, 000	6.083
Dilli Soaps & Chemicals P Ltd.	43, 80, 000	6.083
Rai Commercial P Ltd.	43, 80, 000	6.083
CMC Marketing P Ltd.	43, 81, 700	6.085
TOTAL	4, 81, 81, 700	66.915

According to the Appellants since acquisition of shares in a preferential allotment is exempted in terms of regulation 3(1) (c) they are not required to comply with the requirements of regulations 10, 11 and 12. Shri K.K. Aggarwal, authorised representative of the Appellants submitted that the entire adjudication proceeding and the order made by the Respondent is bad in law for the reason of non inclusion of the necessary party i.e. the issuer company, as most of the allegations pertaining to failure in filing of Board Resolution with stock exchanges, not making disclosures of the proposed allotment in the notice convening the General Meeting, failure to give prior intimation to the stock exchanges etc. pertain to the company, and the Appellants had nothing to do with the compliance of such requirements. According to the learned representative, the Adjudicating Officer ought to have made the company a party to the whole proceedings and penalty should have been imposed on the company for the alleged failures, if found justified. He submitted that for the alleged failure on the part of the company, the Appellants have been penalised. He submitted that compliance under regulation 3(1) (c) and 3 (3) is required to be made by the Issuer Company and not the acquirers of shares. The only allegation directed against the Appellants in the context is that as allottees of the preferential allotment, they failed to submit a report along with the prescribed fees to SEBI with in the prescribed time, in contravention of regulation 3(4) and 3 (5). He read out the provisions of regulation 3(4) and 3(5) and submitted that the Appellants were under the genuine belief that report under regulation 3(4) was required to be filed by them only if they were allotted shares which would entitle them to exercise 10% or more voting rights and that no single acquirer was allotted such number of shares which could entitle him to exercise the stipulated voting right, the Appellants did not file the report. Learned representative further submitted that in case the Appellants were to be considered as acting in concert, holding that they belonged to the same promoter group, the fact that collectively they were already holding more than 10% of voting rights and hence there was no change in the shareholding position requiring reporting in terms of regulation 3(4) has to be accepted. He also submitted that most of the shares allotted to them were partly paid shares and therefore did not carry voting right as provided in the company's Articles of Association, and as a result there was no significant change in the voting rights of the Appellants in the company. Shri Aggarwal further submitted that, as advised by the Respondent and considering the fact that the Appellants belonged to the promoter group and they were acting in concert, the requisite report with the filing fee, was filed with the Respondent, though slightly belatedly.

Shri Aggarwal contended that the preferential allotment has not resulted into change in control or management of the company as the allottees are none else but promoter group companies.

As regards levy of penalty for the particular lapse on the part of the Appellants, the learned representative submitted that since the Appellants were acting in concert, the penalty for the alleged violation should have been levied only on one entity and not on each one of them separately.

Shri Ananta Barua, learned representative of the Respondent read out regulation 3(1)(c), 3(3), 3(4) and 3 (5). He submitted that exemption from complying with the requirements of regulations 10, 11 and 12 are available to acquisition in a preferential allotment only on complying with the provisions of regulation 3(1)(c) (i), and 3(1)(c)(ii), 3(3), 3(4) and 3(5), that since the said requirements have not been complied with, monetary penalty imposed by the Adjudicating Officer on each one of the Appellants is in order. For the factual support in respect of the charge of failure on the part of the Appellants in complying with the provisions of the regulations, Shri Barua relied on the factual position disclosed in para 5 of the impugned order. Shri Barua submitted that exemption under regulation 3(1)(c) is subject to compliance of certain requirements stipulated there under. In this context he cited this Tribunal in Arya Holding Ltd V P Sri Ram (2001) 31 SCL 549. With reference to the Appellants' contention that obligation to comply with the reporting requirements under the regulations is on the issuer company, Shri Barua stated that as per the regulation, the duty to report to the stock exchanges, and SEBI in terms of regulation 3(3), 3(4) and 3(5) is on the acquirer. In this context he referred to the definition of the expressions "acquirer" and "person acting in concert" provided in the regulation and stated that in the light of the admitted facts the Appellants are acquirers.

Refuting the Appellants' claim that the requirement of regulation 3(3) is to be complied by the issuer company and not the acquirer, Shri Barua stated that this Tribunal had held in Yogi Sangwon (India) Ltd V SEBI (2001) 31 SCL 535 that the reporting obligation under the said regulation is on the acquirer.

Shri Barua refuted the Appellants' contention that the impugned order is bad in law for not subjecting the company under adjudication. He stated that the order is confined to acquisition of shares by the Appellants and therefore there was no need to consider as to there was any failure on the part of the company. He submitted that the Appellants having admitted the fact that they had acted in concert and acquired the shares, and the acquisition having exceeded the benchmark prescribed in the regulation, the requisite requirement of the regulation was necessary to be complied with and the Appellants cannot absolve themselves, stating that they acted in "genuine belief" that the requirements are not attracted. With regard to the Appellants contention that if the allottees were to be considered as acting in concert and part of the promoter group, they were already holding more than 10% of the company's shares before the acquisition, and therefore there was no need to comply with the requirements of the regulation, Shri Barua stated that the regulation requires reporting even in such cases, that filing of the report under regulation 3(4) cannot be linked to the change in situation/control as contended by the Appellants. He stated that from the notice of the General Meeting dated September 1, 1999 it is clear that the Appellants were holding more than 10% voting rights in the company and after the preferential allotment of shares to them their voting rights increased from 32.99 to 77.84 %. Shri Barua stated that 440 lakh shares issued, which were partly paid also had voting rights. He further stated that even if it is assumed, that the partly paid shares did not carry voting rights as canvassed by the Appellants, in that scenario also voting rights of the Appellants had increased from their pre-preferential allotment holding of 32.99% to 42.99 %. In this context Shri Barua referred to the following data provided in para 6 of the Respondent's reply:

Pre-Preferential				Post preferential		
	Fully Paid	Partly paid up	Total	Fully paid	Partly paid	Total
Appellants	2356200 (9.89%)	-	2356200 (9.89%)	65,37,900 (9.08%)	4,40,00,000 (61.12%)	50537900 (70.20%)
Promoters other than Appellants	55,00,300 (23.10%)	-	55,00,300 (23.10%)	55,00,300 (7.64%)	-	55,00,300 (7.64%)
Public &	1,59,61800	-	1,59,61800	15961800	-	15961800

Others	(67.01%)		(67.01%)	(22.16%)		(22.16%)
Total	23818300 (100%)	-	23818300 (100%)	2,80,00,000 (38.88%)	44000000 (61.12%)	72000000 (100%)

Shri Barua submitted that in the light of the factual position, it is evident that the acquisition made by the Appellants exceeded the prescribed limit, thereby requiring mandatory submission of report under regulation 3(4). With reference to imposition of penalty on each Appellant, Shri Barua submitted that the order is in order as for the violations under the Regulations "the acquirer / persons acting in concert" are individually as well as severally liable.

I have carefully considered the rival contentions and my views there on are as follows:

Short delay involved in filing the present appeal is condoned taking into consideration the factual position stated by the Appellants and also the fact that the Respondent has not contested the same.

There is no dispute about the number of shares allotted by way of preferential allotment by the company, and the quantum of shares allotted to each allottee. It is also on record that all the allottees are part of the promoter group and they were acting in concert.

The Respondent in para 5 of his order has stated the factual position in this regard as under:

> "From the records it is seen that WSL (the company) made a preferential allotment for 41, 81, 700 fully paid up shares and 4, 40, 00, 000 partly paid up shares on 5th October, 1999. The preferential allotment was done by WSL to 11 Co.'s – M/s. Luxury Foams Ltd., M/s. Echo Chemicals Pvt. Ltd., M/s. Yare Engineering Pvt. Ltd., M/s. TMS Board & Industries Pvt. Ltd., M/s. Cook Fast foods Pvt. Ltd., M/s. Econo Commercial Evaluators Pvt. Ltd., M/s. Ajay Roadways Pvt. Ltd., M/s., castle Builders Pvt. Ltd., M/s. Dilli Soaps & Chemicals Pvt. Ltd., M/s. Rai Chemicals Pvt. Ltd., M/s, CMC Marketing Pvt. Ltd., (herein after referred to as acquirers). All these 11 companies are promoter group companies and are considered as "Persons Acting in concert". As a result of this allotment the holding of these companies increased from 9.90% to 23.25%. The fully paid up capital (?) of WSL prior to the preferential allotment was 2, 38, 18, 300 and after the preferential allotment the full paid up capital (?) was 2, 80, 00, 000.
>
> The allegation is that these 11 Acquirers (the Appellants) acting in concert acquired the shares of the company in violation of regulation 10 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997."

It is seen from the factual position recorded by the Respondent that the effect of allotting 440 lakh shares partly paid @ Re.1/- has not been taken into consideration. In this connection it is to be noted that the Appellants had stated that article 88 of the company's Articles of Association provided that "subject to provisions of the Act, no member shall be entitled to voting right in respect of any shares registered in his name on which any call or other sums payable by him has not been paid or in regard to which the company has and has exercised any rights of lien" and as such partly paid shares allotted under the preferential allotment did not carry any voting right.

As per section 181 of the Companies Act, 1956 (restriction on exercise of voting right of member who have not paid calls etc), "notwithstanding anything contained in this Act, the Article of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid or in regard to which the company has and has exercised any right of lien."

According to section 87(1) of the Companies Act, 1956, subject to the provisions of section 89 and sub section 2 of section 92, (a) every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company; and (b) his voting right on a poll shall be in proportion to his share of the paid up equity capital of the company (emphasis supplied).

From the above it is clear that the member / shareholder cannot exercise voting right in respect of any shares registered in his name in case of any calls or other sums presently payable by him have not been paid or in regard to which the company has and has exercised any right of lien. There is nothing on record to show that any call was made and the Appellants failed to pay the amount. In the instant case, the Appellants version that since the 4, 40, 00, 000 shares have been allotted to them on partly paid basis, those shares do not carry any voting rights is contrary to the legal position flowing from section 87(1)(b). The Respondent's version that "the shares have the potentiality of carrying voting right after making full payment" is also not correct.

In the light of the legal position regarding voting rights attached to the partly paid shares in terms section 181 and 87 of the Companies Act, it is difficult to subscribe to the Appellants version that 440 lakh equity shares of Rs.10 lakh issued but partly paid, have no voting rights and as such should be excluded for the purpose of computing the percentages prescribed in regulation 10 etc., is not tenable. In any case since the Appellants have not contested the factual position that the shares acquired by them in the preferential allotment, taken as a whole is above the percentage prescribed in regulation 10, I do not think that it necessary for considering the present appeal, one should independently work out precisely the voting rights acquired by the Appellants. The fact that the Appellants had acquired shares / voting rights which taken together with shares / voting rights held by them entitled them to exercise 15% or more of the voting rights in the company, remains un disputed. It is also a fact that the Appellants had not made any public announcement to acquire shares of the company in accordance with the Regulation before making the said acquisition. The argument that the preferential allotment has not resulted into any change in control of management of the company, as all the allottees are promoter group companies is of no help to the Appellants as regulation 10 is on acquisition per se and not linked to control of management.

The Appellants' main contention is that they are not required to make any public announcement as the acquisition of shares by them is by way of preferential allotment and such acquisition is exempt in terms of regulation 3(1)(c), from complying with the requirements of regulations 10, 11 and 12. In this context the observation made by the Respondent in para 5.6 of the impugned order need be looked into, as he has imposed penalty based on his perception of the law as reflected therein:

> "In order to seek exemption from making an offer, which has to be made as per Regulation10, 11 and 12 of SEBI (substantial Acquisition of Shares and Takeover) Regulations, 1997 there should be compliance with Regulations 3(1)(c)(i), 3(1)(c)(ii), 3(3), 3(4), and 3(5). There was a delay of four days in complying with Regulation 3(3) and a delay of 147 days in complying with regulation 3(4) and 3(5). Thus the exemption from making an open offer, as specified in Regulation 3 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 is not available to the acquirers.
>
> Thus, I find that the acquirers have acquired the shares without making an open offer."

In the light of the said finding it is necessary to see the regulations relied on by the Adjudicating Officer in this regard. These Regulations, are extracted below:

> Regulation- 3(1) Nothing contained in Regulations 10, 11 and 12 of these Regulations shall apply to
>
> (a) Xxxxxxxx
>
> (b) Xxxxxxxx
>
> (c) preferential allotment, made in pursuance of a resolution passed under section 81 (1A) of the Companies Act, 1956 (1 of 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 disclosure 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 member 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

Regulation 3(3): - In respect of acquisitions under clauses (c) (e) (h) and (i) of sub-regulation (1), the stock exchange where the shares of the company are listed shall, for information of the public, be notified of the details of the proposed transactions at least 4 working days in advance of the date of the proposed acquisition, in case of acquisition exceeding 5% of the voting share capital of the company.

Regulation 3(4): - In respect of acquisitions under clauses (a), (b), (c), (e) and of sub regulation (1), the acquirer shall within 21 days of the acquisition, submit a report along with supporting documents to the Board giving all details in respect of acquisition which (taken together with 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.

Regulation 3(5): - The acquirer shall, along with the report referred to under sub-regulation (4) pay a fee of 10, 000 to the Board, either by a bankers cheque or demand draft in favour of the Securities and Exchange Board of India payable at Mumbai.

The expression ‘acquirer’ referred to in the above-cited regulations has been defined in regulation 2(1)(b) as under:

"acquirer means any person who, directly or indirectly acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company either by himself or with any person acting in concert with the acquirer"

"Person acting in concert" has been defined in regulation 2(1)(e) as under:

"Person acting in concert" comprises: -

(1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.

(2) Without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other person in the same category, unless the contrary is established:

(i) a company, its holding company, or subsidiary of such company or company under the same management either individually or together with each other;

(ii) a company with any of its directors, or any person entrusted with the management of the funds of the company;

(iii) directors of companies referred to in sub clause (i) of clause (2) and their associates;

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

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

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

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

(viii) venture capital funds with sponsors;

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

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

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

Note: For the purpose of this clause 'associate' means:

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

(b) family trusts and Hindu Undivided Families.

In the light of the legal and factual position stated above, let us examine the Appellants' claim that their acquisitions by way of preferential allotments are covered under regulation 3(1)(c) and therefore, they are not required to comply with the requirements of regulations 10,11 and 12. This Tribunal had examined the scope of regulation 3(1)(c) in Arya Holding Ltd V. P. Sri Sai Ram, Adjudicating Officer (2001) 31 SCL 549 and held as under:

"…….. it is clear from the provisions of regulation 3(1)(c) cited above that an acquisition pursuant to a preferential allotments simplicitor will not be eligible for exemption unless the requirements stipulated in clauses (i) and (ii) are complied with. In this context it is pertinent mention that since the law specifically provided that the exemption is subject to compliance of certain requirements specified there in, to avail the exemption it is absolutely necessary to comply with the specified requirements. It is therefore necessary to examine whether the appellants had fulfilled the requirements of clauses (i) and (ii) of regulation 3(1)(c)".

With reference to compliance of the requirements of sub clause (i) of clause(c) of regulation 3(1) the Appellants had stated before the Adjudicating Officer that the notice of the meeting was sent to all the concerned stock exchanges (BSE, DSE, JSE, and ASE) on which the company's shares are listed, vide letter dated August 9, 1999. There is no evidence to substantiate this claim of disclosure. However according to the Respondent the said notice simply stated "that the Board of Directors in their meeting held on 7.8.99 had decided to meet again on 1.9.99 to consider issue of equity shares valuing up to 75 crores to promoters/non promoters on preferential basis". In the said context if the Adjudicating Officer has recorded:

"The acquirer has submitted that "As per Proviso (i) of Regulation 3(1)(c), in order to exempt a preferential issue from making public announcement, a copy of Board Resolution in respect of proposed preferential allotment is to be sent to all the stock exchanges on which shares of WSL were listed for being notified on the notice board. It is thus clear that it is only an intimation regarding proposed allotment of shares on preferential basis that has to be given to the Stock Exchanges. Therefore, if WSL has informed the Stock Exchanges about decision of the Board to meet again on a particular date to consider issue of shares on preferential basis, it is a good communication of intention of WSL to allot shares on preferential basis. The format might be different, that too happened because of lack of experience in dealing with such matters by WSL but the message was loud and clear and well communicated to the Stock Exchanges and hence the regulation was complied with. Therefore, the nature of mistake being technical may kindly be condoned."

From the records and from the submissions of the acquirer, I find that W.S.L the Target Company have not enclosed a copy of the Board Resolution about the preferential allotment along with their letter dt.9.8.99 to the Exchanges. They have only sent a letter stating that the Board of Directors in their meeting held on 7.8.99 had decided to meet again on 1.9.99 to consider issue of equity shares valuing upto Rs.75 crores to promoter / non-promoters on preferential basis.

The regulation specifically refers to "Board resolution" and W.S.L should ensure that the copy of the Board Resolution making allotment is sent to the Exchanges. Even the intimation that was sent does not conclusively say that preferential allotment is made. It merely states that the Board of Directors would again meet to consider this.

Hence, I find that due to omission of WSL by not sending the Board Resolution, the acquirers have not got the benefit of compliance with the provisions of Regulation 3(1)(c)(i) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997."

I agree with the conclusion reached at by the Adjudicating Officer that the requirement of regulation 3(1)(c)(i) that the company is to send Board resolution in respect of the proposed preferential allotment to all the stock exchanges on which the company's shares are listed for being notified on notice board has not been complied with. The said information is meant to be notified on the notice board of stock exchange for public information. The letter dated August 9, 1999 relied on by the Appellants is nothing but an intimation of the fact that the Board of Directors would be meeting on September 1, 1999 to consider issue of preferential shares to promoters / non-promoters. The said communication is not a substitute for the Board resolution envisaged in the regulation.

Regarding compliance of regulation 3(1)(c)(ii) the Appellants' stand is that the company had made full disclosures of the identity and class of the proposed allottees in the Notice of General Meeting scheduled on September 30, 1999. It is seen from the impugned order that the Appellants had informed the Adjudicating Officer that "class of proposed allottees was given as body corporates and inclusion of entire proposed allotment in the promoters group under para 6 of item no.2 of the Explanatory Statement clearly showed that WSL planned to issue shares to the promoters on preferential basis". The Appellants have not filed a copy of the said notice in the proceedings. However the Adjudicating Officer has recorded that "In para 1, under item no.2 of the explanatory statement, it is stated that …….". "The company has planned to issue equity shares to promoters / non-promoters on private placements, by issuing shares on preferential basis……". That means the shares can be allotted to either the promoters or to non-promoters. However pt.1 of item No.2, it is stated that "It is proposed to issue 4, 81, 81, 700 equity shares to the following body corporates as per details given below……..". From the records it is seen that these body corporates belong to the promoter group companies. This fact should have been disclosed in pt. No.1 of item No.2. Hence I accept the observations of the SEBI investigations as contained para 2.0 above and find that the acquirer / WSL has not made proper disclosure on the count". For the reason stated by the Adjudicating Officer I agree with his finding in this regard.

In the absence of any material produced before me by the Appellants, proving proper compliance of the requirements of regulation 3(1)(c)(i) and 3(1)(c)(ii), the Respondent's version based on the facts discussed in the report that the requirements of the said regulations have not been complied with by the Appellants, have to be accepted. The Appellants' argument that compliance of regulation 3(1)(c) is required to be made by the company making preferential allotment and for the failure, if any, in this regard, the company

is liable and not the acquirer, is not acceptable. It is to be noted that regulation 3 provides exemption from complying with the requirements of regulation 10, 11, 12 in respect of certain type of acquisitions stated in the said regulation. The requirement of compliance in terms of regulation 10, 11, 12 is by the acquirer. So if the acquirer is keen to avail of the exemptions, it is for him to satisfy as to whether the preconditions required to be complied with to avail exemption have been complied with or not. It is to be noted that the impugned order, is directed against the Appellants on account of their failure to comply with requirements of regulation 10 etc., and not directed against the company for not fulfilling the preconditions so as to qualify the preferential allotment to be exempted. Since the adjudication is directed against the Appellants failure, there is no need for subjecting the company to the adjudication. Therefore in my view the Appellants version that by not arraying the company in the adjudication proceedings, the order is bad in law, is baseless.

In the light of the facts on record, it is clear that the preferential allotment made to the Appellants has failed to qualify to avail exemption in terms of regulation 3.

The Adjudicating Officer's finding that compliance of the requirements of sub-regulations (3), (4) and (5) of regulation 3 is a pre-requisite for availing exemption under regulation 3 is not legally tenable. Compliance of the requirements of the said sub regulations is required only if the acquisition comes under the exempted category. This Tribunal had clearly stated the legal position in this regard in J.M. Financial & Investment Consultancy Services Ltd V Shri Ananta Barua, Adjudicating Officer ((2001) 30 SCL 357: (2001) 41 CLA 263) decided on March 16, 2001. In the said appeal the Tribunal was considering the scope and applications of regulation 3(1)(e). In that context the Tribunal held:

> "Shri Barua's submission that compliance of the requirements under sub regulations 3 and 4 is a pre requisite for availing exemption under regulation 3 is not legally tenable. Compliance of the requirements of the said sub regulations 3 and 4 is required only if the acquisition comes under the exempted category. In terms of the explanation to regulation 3(1)(e) the benefit of availing of exemption from applicability of Regulations for increasing share holding or inter se transfer of share holding among group companies, relatives and promoters shall be subject to such group companies or relatives or promoters filing statements concerning group and individual share holding as required Regulations 6, 7 and 8. Requirements of notifying stock exchange and reporting to SEBI in terms of sub regulations (3) and (4) are consequential to availing of exemption and not a requirement to avail exemption under regulation 3 as is made crystal clear in the Regulations."

Since the acquisition by the Appellants exceeded the limit prescribed in regulation 10, and that the acquisitions do not come under the exempted category acquisition under regulation 3, compliance of the requirements of regulation 10, was necessary. According to regulation 10, "no acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen percent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations."

Even though the acquisition of shares by the Appellants attracted, regulation 10, they have failed to make the public announcement as required there under. Failure to make such a public announcement is punishable in terms of section 15H(ii) of the Act. According to the said section:

> "If any person, who is required under the Act or any rules or regulations made there under, fails to –
>
> (i) xxxxxxxxxxxxxxx
>
> (ii) make a public announcement to acquire shares at a minimum price, he shall be liable to a penalty not exceeding five lakh rupees."

Since the Appellants have failed to make the public announcement required under regulation 10, section 15 H (ii) is attracted.

The Adjudicating Officer has imposed penalty as provided in section 15H(ii). In this connection the Appellants had submitted that since the Respondent has clubbed the total number of shares acquired by all the persons acting in concert and has come to the conclusion that their total acquisition exceeded the limit prescribed, and that the failure being only one relatable to the preferential allotment made by the company, the penalty, if at all to be imposed could have been imposed only against one and not against all those acquirers belonging to the promoter group.

In this connection it is to be noted that in terms of regulation 10, it is acquirer who is required to make the public announcement. In terms section 15H "if any person" fails to comply with the requirements of the Act etc., he is liable to penalty. It is on record that in the preferential allotment made by the company, each Appellant had acquired shares, that each Appellant belongs to the promoters group and according to their own admission they acted in concert. Thus in my view each Appellant for the purpose of acquisition had acted in league with the remaining others, say acted in concert. So each one of them could be considered as an acquirer that since his acquisition along with the shares acquired by those persons acting in concert with him, exceeded the prescribed limit, warranted public announcement under regulation 10. In this context, the object of the regulation should be remembered. It is meant for "information disclosure" to the investors. Had one of the Appellants complied with the requirements of disclosing the acquisition of shares made by him and the remaining 10 Appellants, it would have been considered sufficient, as such an action would have met with the object for which the regulation is put in place. But since there is a failure in this regard, imposition of penalty on each one of the Appellants-acquirers- is legally in order. It is to be noted that even though section 15H(ii) provides for a penalty not exceeding five lakh rupees against each person for failure to comply with the statutory requirements stated there in, the Adjudicating Officer has taken care to impose only a total sum of four lakhs forty thousand rupees. He has equally apportioned the said amount, among the Appellants by imposing forty thousand rupees on each one of them, obviously with a view to avoid complications in recovering the penalty amount. Therefore it cannot be said that the penalty imposed by the Adjudicating Officer is unauthorised or unjustified or disproportionate.

In the light of the above discussions, I am of the view that the impugned order is to be sustained.

Accordingly the appeal is dismissed.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: March 20, 2002