BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO. 49/2001

In the matter of:

Mega Resources Limited **Appellant**

Vs

Securities & Exchange Board of India **Respondent**

APPEARANCE:

Mr. Ratnoko Banerjee
Bar at Law

Mr.K.A.Kharade
Advocate
I/b. M/s. Hariani & Co. **for Appellant**

Mr. Kumar Desai
Advocate

Ms Uma Dalal
Advocate
I/b. Maneksha & Sethna

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

(Appeal arising out of the order dated August 29, 2001 made by the Chairman, Securities & Exchange Board of India).

ORDER

The Chairman, Securities and Exchange Board of India, made an order on August 29, 2001 debarring Shri Arun Kumar Bajoria (Shri Bajoria) and certain other persons viz. Mega Resources Ltd (the Appellant), Mega Stock Ltd, The Hooghly Mills Ltd, Pooja Bajoria, Mohini Devi Bajoria, Lata Devi Bajoria and Meenakshi Jatia, stated to be persons acting in concert with Shri Bajoria, from accessing the capital market, and dealing directly or indirectly in securities, for a period of one year. It was also directed that an adjudicating officer be appointed to inquire into violations, if any, of section 15A (b) of the Securities and Exchange Board of India Act, 1992 (the Act) in respect of failure by Shri Bajoria and others to comply with the disclosure requirements under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (the 1997 Regulations). The order further stated that as Shri Bajoria and the persons acting in concert have already reduced their holding to below 5% of the paid up capital of Bombay Dyeing and Manufacturing Co. Ltd. (Bombay Dyeing) no specific directions are being issued to sell the shares acquired in violation of the 1997 Regulations. The said order is under challenge in the present appeal. Even though the impugned order is directed to Shri Bajoria and others, till now, except the present appeal no other appeal has been filed against the order.

The Respondent, on receipt of certain information that Shri Bajoria with some other persons acting in

concert, had failed to comply with the requirements of regulation 7(1) in the context of acquisition of more than 5% of the shares of Bombay Dyeing, decided to investigate the matter. According to the Respondent, the investigation revealed non compliance of the requirements of regulation 7(1) by the concerned persons and in that context, the Respondent issued show cause notice to the alleged defaulters informing them of the findings of the investigation and also asking them to explain their conduct. The Appellant responded to the notice by submitting written reply to the notice and also by availing of the opportunity of being heard offered to it by the Respondent. Thereafter, Chairman, SEBI made the impugned order. Gist of his findings is available in para 10 of the order, which reads as under: -

> "10.1: In view of the findings in paras 6.3 to 9.6 above I find that Shri Arun Bajoria, acquired with persons acting in concert, 20, 69, 732 shares as on March 15, 2000 which exceeded 5% of equity of BDMCL (Bombay Dyeing). The total holding of Shri Arun Bajoria with persons acting in concert and with persons deemed to be acting in concert was 56, 77, 326 shares as on September 21, 2000 which was above 13% of share capital of BDMCL. However, this peak holding was reduced to 54, 67, 213 shares on October 10, 2000 on account of sale of shares.
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> 10.2: As required under regulation 7(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 the Acquirer was duty bound to disclose the aggregate of his holdings to the target company when he acquired 20, 69, 732 shares with persons acting in concert which exceeded 5% equity of BDMCL within 4 days i.e. by March 20, 2000. I find that Shri Bajoria and the persons acting in concert have failed to inform BDMCL about his above holdings / acquisition by 20/3/2000 as per regulation 7(1) of the Takeover Regulations, 1997. In view of the detailed discussions in the foregoing paragraphs it is clear that there was a non-compliance of regulation 7(1) by Shri Arun Bajoria. There was also a deliberate attempt to create an evidence of submission of information about the holding in the Target Company to CSE. On account of this Shri Bajoria along with the persons acting in concert have violated the Takeover Regulations, 1997 and are, therefore liable to such directions and penalties mentioned in the regulation 44 and 45 of the Takeover Regulations"

Shri Ratnoko Banerjee, learned Counsel appearing for the Appellant explained the background of the appeal. He submitted that the matter regarding which the present appeal has been made is not pending before any Court of Law or any other tribunals at the instant of the Appellant. He stated that so far as the Appellant is aware, Shri Bajoria has filed an application under Article 226 of the Constitution of India challenging the order in appeal before the Hon'ble High Court at Calcutta. Bombay Dyeing had made an application under section 111A of the Companies Act, 1956 before the Company Law Board wherein the Appellant amongst others was arrayed as a Respondent. The said proceedings were disposed of by the Company Law Board by an order dated July 4, 2001 that the said order has been challenged against by the concerned Respondents therein including the Appellant herein before the Hon'ble High Court at Bombay, and it is pending. He also stated that Shri Bajoria had filed a Writ Petition before the Hon'ble High Court at Calcutta challenging the show cause notice issued by the Respondent to him, in respect of the self-same matter and the said Writ Petition was disposed of by the Court on March 27, 2001, that an appeal has been preferred from the said order, that the said appeal was admitted on May 16, 2001 and directions were given for filing of Paper Books. The said appeal is still pending. Shri Banerjee stated that the pending litigations are in no way concerned with the order under appeal. On the strength of the learned Counsel's submission, that there are no court proceedings against the Tribunal deciding the present appeal, the matter was taken up for disposal.

Shri Banerjee explained in detail the purpose of the Act, the Regulations, and the several requirements thereunder, and stated that the Act is a restrictive legislation for regulating the securities market and protecting the interests of investors, that provisions of the same should not be used in an unfair manner. He stated that the purpose of the Act is clear from the preamble to the Act that it is an Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto, that the requirements of the Regulations and in particular the provisions of regulation 7(1) have to be understood in the context of the object proposed to be achieved by the Act, that any regulatory action by the Board under the Act, should be for the purpose of regulating the securities market and to protect the investors' interests.

Learned Counsel referred to the Appellant's letter dated March 16, 2000 and stated that by the said letter that the Appellant informed Bombay Dyeing that the holding of the Appellant along with its

associate had exceeded 5% and as such information was given as required under the SEBI guidelines; that the said letter was sent by Under Certificate of Posting (UCP). He referred to the photocopy of the certificate of posting annexed to the appeal. He also referred to the Appellant's letter dated March 29, 2000 and stated that whereunder it had also informed the Calcutta Stock Exchange Association Ltd (CSE) that its holding in Bombay Dyeing along with the associates had exceeded 5% bench mark, that the receipt of the said letter by CSE is evidenced from the receipt stamp of CSE affixed on the copy of the letter. He further stated that the receipt of the said letter by CSE is also evidenced from the letter from the Secretary of CSE dated November 29, 2000 wherein it has been stated that "It appears from our records that a letter dated 29.3.2000 disclosing your holdings in Bombay Dyeing and Manufacturing Company Ltd. was prima facie forwarded to this Exchange and the Exchange had given its acknowledgement thereto".

Learned Counsel stated that the Appellant received a show cause notice dated December 18, 2000 from the Respondent alleging that the Appellant acting in concert with Bajoria did not comply with the requirements of regulations 7(1) in the context of acquisition of Bombay Dyeing's shares and thus primafacie violated the Act and the Regulations and was therefore liable to directions and penalties enumerated in section 11B, and 15A read with section 15I of the Act and regulations 44 and 45 of the 1997 Regulations.

Shri Banerjee submitted that as per 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 percent shares or voting rights in a company, is required to disclose the aggregate of his share holding or voting rights in the target company to that company within four working days of the acquisition of shares or voting rights. In this context he also referred to the definition of the expressions "acquirer" and "persons acting in concert" as provided in clauses (a) and (e) of sub regulation (1) of regulation 2 of the 1997 Regulations. Shri Banerjee stated that acquirer means any person who directly or indirectly, acquirers or agrees to acquire shares or voting rights in the target company or acquirers or agrees to acquire control over the company either by himself or with any person acting in concert with the acquirer. Shri Banerjee read out the components of the definition person acting in concert and stated that as per the definition persons acting in concert are not acquirers by themselves, but they are the persons who co-operate with the acquirer in acquisition. He submitted that in terms of regulation 7(1) the duty to disclose the share holding to the target company is cast on the acquirer and not on the persons acting in concert. In support, he stated that regulation 7(1) refers to "acquirer" in singular and requires the acquirer to disclose "his" shareholding to the target company, that the acquisition of shares or voting rights required to be disclosed in terms of regulation 7(2)(b) is cast on the acquirer and not on anyone else and the legislative intent is clear in this regard. He stated that wherever it was felt that the persons acting in concert also should act, the regulation has made specific provisions and referred to the provisions of regulations 10 and 11. According to him if the acquirer is to include persons acting in concert as well, then there would not have been specific reference to them in regulation 10 and 11. He submitted that compliance regulation 7(1) is required only when the acquirer acquires shares beyond the specified limit, that since the Appellant had not acquired more than 5% share capital of Bombay Dyeing, the Appellant was not required to make the disclosure in terms of regulation 7(1). In this context Shri Banerjee submitted that the regulations are required to be read harmoniously. In support, he cited Poppatlal Shah v. The State of Madras AIR 1953 SC 274 wherein the Hon'ble Supreme Court had observed that "it is a settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together as each word, phrase or sentence, is to be considered in the light of the general purpose and objective of the Act itself". He also cited Punjab Beverages P. Ltd v. Suresh Chand (AIR 1978 SC 995) therein the Hon'ble Supreme Court had held that "it is a well settled rule of construction that not one section of a statute should be read in isolation, but it should be construed with reference to the context and other provisions of the statute, so as far as possible, to make a consistent enactment of the whole statute, Lord Herschell stated the rule in the following words in Colguhoun v Brooks (1889) 14 AC 493 at p 506, it is beyond dispute, too, that we are entitled and indeed bound, when constructing the terms of any provisions found in a statute, to consider any other parts of the Act which throw light on the intention of the legislature, and which may serve to show that the particular ought not to be construed as it would be alone and apart from the rest of the Act. We must therefore have regard, not only to the language of S.33 (2) (b) but also to the object and purpose of that provisions, the context in which it occurs and other provisions of the Act in order to determine what the legislature intended should be effect of contravention of S.33 (2) (b), in the order of dismissal". The Hon'ble Court made the above observation while interpreting Ss.33 (2)(b) and 33 (2)(c) of the Industrial Disputes Act, 1947. Shri Banerjee submitted that the purpose of furnishing information to the target company is to forward the same to the concerned stock exchange to make the stock exchange know about the acquisition and that the said requirement has been met with by the Appellant directly furnishing information to CSE, vide its letter dated March 29, 2000 that thus there is substantial compliance of the requirement of Regulation 7

(1) for which it is made. He submitted that a mere technicality cannot be used to impose heavy penalty like deprivation of the right to do legitimate business, as has been done by the Respondent in the case of the Appellant.

Learned Counsel submitted that the show cause notice and the impugned order are based on an investigation carried out by a person appointed for the purpose by the Respondent. He submitted that the so called investigation conducted at the behest of the Respondent into the alleged acquisition of shares by the Appellant is in excess and without jurisdiction for the reasons that there was no proper appointment of any investigating officer to carry out investigation under regulation 38; that the Appellant has not been furnished with any complaint received from investors to commence investigation or the source of the Respondent's knowledge or information warranting suo moto investigation. Learned Counsel further stated that no notice as required under regulation 39(1) was issued before undertaking investigation and no reason to dispense with notice as required by regulation 39(2) has been recorded. Shri Banerjee submitted that it is also not known as to whether the investigation report has been submitted to the Respondent as per regulation 41, that in any case the Appellant has not been given a copy of the report as required under regulation 42(1). Learned Counsel stated that directions issued by the Respondent are not in accordance with the requirements of regulation 42(2) as the impugned order is not a measure in the interest of the securities market and for due compliance with the provisions of the Act and Regulations.

Learned Counsel submitted that any direction under regulation 44 adversely affecting the rights and interests of the persons concerned or any penalty under regulation 45 cannot be made without following the principles of natural justice. Shri Banerjee stated that the impugned order has been made in total disregard to the principles of natural justice. He stated that from the Respondent's letters and the notices, it is very clear that the Respondent had already decided and arrived at a conclusion and the procedure was only farce. Learned Counsel stated that the Respondent issued show cause notice on September 6, 2000 despite receipt of the Appellant's letter of August 29, 2000 giving all the clarifications the Respondent had asked for, that this itself is indicative of the malafide of the Respondent, that the personal hearing offered to the Appellant was only a formality and an eye wash in pretended compliance with the provisions of the Act and Regulations.

Learned Counsel submitted that the Appellant was denied of the right to give effective reply to the show cause notice and make effective representation before the Respondent, that the Appellant was also denied access to and inspection of documents which were material to enable the Appellant to make effective representation, that the right to test the veracity of statements made by persons concerned by cross examination was also denied. He stated that even the evidence produced by the Appellant was not considered as could be seen from the facts and in particular that the three affidavits filed by Jyoti Sharma, Subir Santra and Krishan Sharma confirming the posting of the letter dated March 16, 2000 and delivery of letter dated March 29, 2000 to CSE. Learned Counsel stated that providing an opportunity of being heard is not an empty ritual. He cited Khemchand v Union of India (AIR 1958 SC 300) to show that "the noticee must not only be given an opportunity but such opportunity must be a reasonable one. ……. If the opportunity to show cause is to be a reasonable one it is clear that he should be informed about the charge or charges levelled against him and the evidence by which it is sought to be established, for it is only then that he will be able to put forward his defense. If the purpose of this provision is to give an opportunity to exonerate himself from the charges and if this opportunity is to be a reasonable one he should be allowed to show that the evidence against him is not worthy of credence or consideration". Learned Counsel also cited Meenglas Tea Estate v. The Workmen (AIR 1963 SC 1719) wherein the Hon'ble Supreme Court had observed that "it is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted". Shri Banerjee submitted that the Respondent has not followed in Appellant's case the above principles laid down by the Hon'ble Supreme Court.

Learned Counsel submitted that the Appellant along with its associated company Mega Stock Ltd, on acquiring Bombay Dyeing's shares in excess of 5% of the company's total share capital had informed Bombay Dyeing about such share holding by a letter dated March 16, 2000 duly sent to the said company, that subsequent to the letter dated March 16, 2000 a another letter dated March 29, 2000 was also sent to CSE in this regard, and the receipt of the letter has been duly acknowledged by CSE. He

further stated that when shares were acquired by the Appellant and its associate on march 15, 2000 there was no intention of making any substantial acquisition of Bombay Dyeing's shares, that this was made clear to the Respondent by the Appellant in several of its letters including the one dated August 4, 2000. Learned Counsel stated that the dispatch of the letter dated March 16, 2000 by UCP intimating the shareholding in Bombay Dyeing was substantial compliance of the requirement under regulation 7 and there was little justification to pass the impugned order.

Learned Counsel submitted that regulation 7 does not cast any strict statutory duty on an acquirer to disclose acquisition over 5% of the paid up capital of the target company, that the word "shall" used in regulation 7 cannot be construed as to imply that it is mandatory on the part of the acquirer to disclose to the target company, that the acquirer is not at all duty bound to ensure that his communication reaches the target company. He refuted the Respondent's contention that disclosures under regulation 7 are mandatory in nature or that in the absence of proper communication, the shareholders of the target company and the company's management are deprived of their right of information. He submitted that since the shares of Bombay Dyeing are in de-mat form and the depository periodically furnishes the details of share transfers to the company, the information so available would be sufficient for the company to know changes in ownership of its shares, that the company is not exclusively dependent on the disclosure under regulation 7(1) in this regard. He further stated that in the absence of any specific provision regarding the mode of disclosure to be made and any statutory explanation as to when the acquisition takes place within the means of regulation 7(2), the requirement of the said regulation cannot be considered mandatory but only directory.

Learned Counsel submitted that it is impractical and against principles of statutory interpretation to suggest that communication under regulation 7 by any acquirer on his holding exceeding 5% of the paid up capital must reach the target company within 4 days, as the acquirer cannot have any control over any communication after the same has been dispatched and the duty alleged to be cast upon acquirer under regulation 7, of the 1997 Regulations is onerous. Shri Banerjee also refuted the Respondent's contention that the letters sent by under certificate of posting are on the same footing as the letters sent through letterbox. According to him there is sufficient compliance of regulation 7 by any acquirer, if the letter is posted by ordinary post under certificate of posting. He further stated that there is no requirement in the regulation for an acquirer to send the letter to the target company through registered post or by any other means of communication such as speed post, fax, etc; that there is no statutory obligation on the Appellant to check up over phone with Bombay Dyeing subsequent to dispatch of the letter as to the receipt of the letter, as stated by the Respondent, that it is not correct to hold that only if the letter of disclosure was sent through Registered post or Speed Post, it could be presumed that the letter has been delivered. He refuted the Respondent's version that the information sent by the Appellant under certificate of posting was not sufficient compliance of the requirements of regulation 7. He further stated that Bombay Dyeing had in any event information about the acquisition of shares by the Appellant from the National Stock Depository Ltd., as the shares are put in de-mat form and the said Depository furnishes promptly and regularly the details to the companies whose shares are traded in de-mat form. He submitted that denial of receipt of the letter by Bombay Dyeing is irrelevant in the circumstances and no reliance should be placed on the company's statement.

Learned Counsel submitted that the Respondent had even gone to the extent of questioning the need for posting the letter from Dharmatolla Post Office. He submitted the fact that the said letter was posted from Dharmatolla Post office under certificate of posting, cannot be a reason to come to a conclusion that the letter was not sent. He stated that the letter was posted under instructions from the Appellant by one of its employees and he had chosen a post office of his convenience. In this connection he referred to the affidavits filed by Mr. Jyoti Sharma, Mr.Subir Santra, Mr. Krishan Sharma, confirming the posting of the letter of March 16, 2000 and also delivery of the letter of March 29, 2000 to CSE. Learned Counsel stated that the allegation by the Respondent that the Appellant was attempting to create evidence of sending letter to Bombay Dyeing and CSE is baseless.

With reference to the letter sent to CSE, learned Counsel stated that CSE by its letters dated October 16, 2000 and November 15, 2000 has admitted receipt of the Appellant's letter on 29th March, 2000, that though the Appellant had requested to summon the CSE officials, who according to the Respondent had denied receipt of the letter, to elicit the factual position, the request was not acceded to by the Respondent. Shri Banerjee submitted that the fact that the Appellant had written to CSE on March 29, 2000, though it was not required in law to disclose any such information to CSE, goes to prove the bonafides of the Appellant. Though the obligation to report to CSE is on Bombay Dyeing under regulation 7(2), the Respondent has ignored the default by Bombay Dyeing in this regard.

Learned Counsel submitted that reference to section 11B in this order is of no help to the Respondent as the Appellant is not a person contemplated under the said section 11B. Referring to the direction issued under regulation 44(a), the learned Counsel submitted that a direction under the said regulation can be issued only in the interest of the securities market, that the impugned direction cannot be considered by any standard as one issued in the interest of the securities market. He submitted that when the law itself puts a precondition for issuing the direction, the authority cannot ignore the said requirement and wantonly issue direction.

Learned Counsel submitted that the impugned order is harsh, and penal in effect. Learned Counsel submitted that the Appellant interalia deals with buying and selling of securities, that on the date of passing the impugned order, the Appellant was holding in its name securities worth approximately Rs.40 crores. He stated that by the impugned order the Appellant has been stopped from even disposing of the shares which it was holding in the normal course of its business and the Respondent has clarified vide its letter of September 11, 2001, that the Appellant cannot sell any shares purchased by it earlier also. Learned Counsel submitted that such a direction is contrary to the object of the Act and the Regulations, that it was issued without authority and jurisdiction, but only to hurt the Appellant.

Shri Kumar Desai, the learned Counsel appearing for the Respondent refuted the allegation that the Respondent's action is malafide and biased. He submitted that the Respondent is required to protect the interests of investors and the securities market, and to achieve the said goal, the impugned directions were issued. He submitted that the 1997 Regulations provide for transparency in share acquisitions and takeovers through periodic disclosures, to benefit the investors, market and also the target companies.

Shri Desai refuted the Appellant's contention that the Respondent had not followed the procedural requirements of the investigation as prescribed in the Regulations and the principles of natural justice while passing the impugned order. He stated that investigation was conducted by the Respondent as required in terms of regulation 38, and on receipt of the investigation report, show cause notice incorporating the finding of investigation was issued to the Appellant on December 18, 2000, thereby giving the Appellant adequate opportunity to present its case, that the documents relied upon in support of the charges were also made available and inspection of these documents was also given. In this context he relied on the copies of the correspondence exchanged in this regard between the parties, filed in the proceedings. Shri Desai submitted that there was no failure on the part of the Respondent in following the requirement of the rules of natural justice, and denied the allegation that the Appellant was deprived of presenting its case before the Respondent. He stated that the Appellant had inspected the documents on January 9, 2001 and adequate opportunities of hearing were also given to the Appellant as could be seen from the evidence on record, that taking into consideration the entire evidence and the submissions of the Appellant, the impugned order was passed. He submitted that during the proceedings before the Respondent, the Appellant did not seek cross-examination of any person particularly and in any case the charge against the Appellant is based on the facts on record.

Learned Counsel submitted that though the Appellant has claimed that it had sent information to Bombay Dyeing and CSE both of them have denied receipt of the same, and therefore the burden of proof is on the Appellant to prove that it had actually furnished the information to them. Shri Desai stated that there are several decisions of the Hon'ble Supreme Court that no conclusive presumption arises when the letter sent under certificate of posting was received and also that a certificate of posting was easy to procure and did not inspire confidence. He said that under regulation 7(1) a duty has been cast on the acquirer to ensure that he informs the target company about the holding of shares in excess of the prescribed limit and this responsibility is not over by claiming to have posted a letter without ensuring delivery of the same to the addressee.

Shri Desai submitted that it is an admitted fact that the share holding of the Appellant and the persons acting in concert with it, in Bombay Dyeing exceeded 5% of the company's paid up capital on March 15, 2000 and attracted the disclosure requirements as laid down in regulation 7(1). In this context he stated that the expression acquirer as per the definition available in regulation 2(1)(b) means any person who directly or indirectly acquires or agrees to acquire shares or voting rights or control in / over the target company, either by himself or with any person acting in concert with the acquirer, and that by this definition the Appellant who acquired shares along with others in the same fold is also an acquirer and required to fulfill the obligations which the regulation cast on the acquirer to fulfill.

Shri Desai submitted that the 1997 Regulations provides for transparency and dissemination of information to the investors and also to the management of the target company, in matters of substantial acquisition of shares or control, that regulation 7 is one of the devices designed for the purpose, requiring the acquirer to report to the target company his holding on exceeding 5% of the company's share capital and the target company thereafter to report the position to the concerned stock exchange. He submitted that the very object of putting regulation 7 in the 1997 Regulations would be defeated, if the Appellant's view that the requirement of reporting arises only in the event of individual acquirer's holding exceeds 5% share holding and the holding of those persons acting in concert with him to be discarded. He submitted that regulation 7 is meant to protect the interests of the investors and the management of the target company as the reporting under regulation 7(1) enables the target company to know of any attempt by any person to corner shares of the company and to take measures to safe guard its interests, that requiring the target company to report the matter to the stock exchange under regulation 7(2), is to provide information to the investors about the dominant holdings in the company so as to enable them to decide on their investments. Shri Desai submitted that the provisions of regulation 7 are substantive provisions and mandatory, that there is no escape but to comply with the same. According to him the expression "shall" used in regulation 7(1) is indicative of the mandatory nature of the requirement. Shri Desai submitted that the requirement of regulation 7(1) is to make disclosure, which means the information should be brought to the notice of the company, that a routine posting of information, with no certainty of the same reaching the target company by itself is not sufficient compliance of the regulation. He pointed out that the Appellant has not produced any evidence to show that the information required to be furnished in terms of regulation 7(1) was furnished to Bombay Dyeing, that it is not the evidence of routine posting of the letter that is relevant for the purpose of the regulation. He further stated that in any case 'under certificate of posting' cannot be accepted even to prove that the letter was dispatched as it is well known that evidence of posting can be fabricated. He further submitted that even the information said to have been sent by the letter itself is not complete and exhaustive as required by the format devised for the purpose, and made known to all concerned by the Respondent. The argument that Bombay Dyeing's shares are traded in de-mat form and as such the information even otherwise would be available to the company, is not an excuse to not to comply with the requirement of regulation 7(1), that it has to be noted while the 1997 Regulation was notified in 1997, the Depositories Act, 1996 which provide for de-mat trading of shares was already in position. He refuted the Appellant's contention that regulation 7 has no nexus with the object of the 1997 Regulations and that regulation 7 is not aimed at protecting the interests of the investors in securities or for promoting the development or regulating the securities market and that the regulation is vague, unworkable and does not prescribe any guidelines as to the manner and method of disclosures to be made thereunder.

Shri Desai submitted that the Appellant is confusing the matter by identifying direction and penalty as one and the same. He referred to the show cause notice dated December 18, 2000 issued to the Appellant and stated that the notice required the Appellant to show cause as to "why suitable directions including directions prohibiting it to further deal in securities, prohibiting it from disposing of any of the securities acquired in violation of these Regulations, directing it to sell the shares acquired, should not be issued to it under section 11B of the SEBI Act read with Regulation 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997, for the above mentioned violations. Mega Resources Ltd., is also required to show cause as to why adjudication proceedings under section 15A read with 15I of SEBI Act, 1992 read with regulation 45 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 should not be initiated against it" for the violations stated in the notice. Shri Desai submitted that direction and penalty are not one and the same and the Appellant cannot be unaware of the same as could be seen from the show cause notice. Shri Desai submitted that regulation 44 (a) is in no way violative of Article 19 (1) (g) of the Constitution of India; He submitted that the impugned order has been passed under regulation 44 (a) and 45 (6) read with sections 11 and 11B of the Act, that the law empowers the Respondent to issue such directions.

Shri Desai submitted that most of the submissions of the Appellant have been covered in the order of the Hon'ble Calcutta High Court in its order dated March 27, 2001 in Writ Petition No.331/2001 filed by Shri Bajoria and also in the Company Law Board's order dated July 4, 2001 in Company Petition No. 46/111A/200 in Bombay Dyeing and Manufacturing Co.Ltd v. Arun Kumar Bajoria, ((2001) 44 CLA 232), a copy each of the same was made available, and stated that as the Appellant has gone in appeal against those orders, he is not citing these decisions as such, but he is adopting the findings of the Hon'ble High Court and the Company Law Board as his arguments in the present appeal.

Shri Desai submitted that the Appellant is creating evidence, to support its version by planting letters, acknowledgement etc. With reference to the Appellant's submission on the denial of cross examination

Shri Desai submitted that there was no need for cross examination of anybody, as the facts relied on in the order are born out the records, that cross examination is not an essential element of the rule of natural justice. He submitted that the decision in AIR 1963 SC 179 relied on by the Appellant is applicable only when the statement of a person is relied on, that in the instant case the Respondent is not relying on the statement of any person, but going by documentary evidence. Shri Desai submitted that the order has been made after following the procedure prescribed under regulation 38 and the principles of natural justice and the Respondent has passed the order in exercise of the powers vested in it by the Act and the 1997 Regulations.

I have considered the pleadings and arguments of the Counsel. Acquisition of more than 5% shares of Bombay Dyeing by the Appellant along with the persons acting in concert is the starting point of the controversy. Non compliance of the disclosure requirements under regulation 7(1) in the context of the said acquisition is the charge held against the Appellant. Impugned directions were issued in the said context. The Appellant has denied the charge. But the Respondent sticks to the order.

Sometime in July, 2000, the Respondent came to know that Shri Bajoria along with persons acting in concert had acquired more than 5% of the share capital of Bombay Dyeing, attracting the provisions of regulation 7(1). Clarification was sought by the Respondent on July 26, 2000 from Shri Bajoria in this regard. Shri Bajoria informed the Respondent that his holding along with persons acting in concert with him in the company was 49, 64, 014 shares on June 19, 2000, which reached 50, 39, 014 on June 20, 2000, 51, 95, 133 on June 27, 2000 and 52, 53, 826 on August 29, 2000. Shri Bajoria also stated that Mega Resources (the Appellant) acted in concert with him. Investigation followed. The investigations revealed that Shri Bajoria acting in concert with the Appellant had acquired 20, 69, 732 shares of Bombay Dying on March 15, 2000 which exceeded the 5% bench mark provided in regulation 7(1) for the purpose of disclosure. Thereafter the Respondent issued a show cause notice to the Appellant also. The Appellant denied violation of the regulation, as alleged in the notice. Shri Bajoria in his reply dated June 6, 2001 to the Respondent (page 8) had stated that "I would also like to point out that even when shares were acquired by Mega Resources Ltd and its associate Mega Stocks Ltd on 15th March 2000, there was no intention of substantial acquisition of shares in Bombay Dyeing". The Appellant has filed copies of its letters dated March 16, 2000 and March 29, 2000 reportedly sent to Bombay Dyeing CSE respectively furnishing the shareholding, as Annexure A1 and A3 to the appeal. In the letter addressed to the Bombay Dyeing it has been stated that "our holding in your company with our associate have exceeded 5% "In the letter addressed to CSE also the same position has been repeated with a slight change therein with the word associates in the place of associate. The Appellant claimed that it has complied with the requirements of regulation 7(1) by posting the letter to Bombay Dyeing under certificate posting. The fact that the Appellant with its associate(s) was holding more than 5% of the paid up capital of Bombay Dyeing is therefore not under dispute. But the Respondent did not agree to the Appellant's version of making disclosure, for the reason that there was no reliable evidence to show that the information stated to have posted reached Bombay Dyeing, especially in the wake of the company's statement that the letter did not reach it.

Based on the findings in the investigation, the Respondent decided to pursue the matter and issued a detailed show cause notice on December 18, 2000 to the Appellant, a copy of which is available on record. Since the adequacy of this notice and the legal provisions invoked by the Respondent is under challenge, it is felt that it would be advisable to extract the following concerned para from the notice for quick reference:

> "In view of the above, it appears that Mega Resources Ltd. acting in concert with Shri Arun Bajoria did not comply with the provisions of Regulation 7(1) of SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997. On account of this non-compliance, the company Mega Resources Ltd. along with persons acting in concert, have prima facie violated the SEBI Act, 1992 and SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997. Mega Resources Ltd. is therefore prima facie liable to such directions and penalties as are enumerated in the Section 11 B, Section 15 A read with section 15 I of the SEBI Act and Regulation 44 & 45 of the said Regulations as deemed fit by the Board.
>
> The findings of investigations contained in the paragraphs above are communicated to Mega Resources Ltd. as required under Regulation 42 (1) of SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997 for giving it an opportunity of being heard before initiating any further action under the SEBI Act, 1992 and the SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997. This communication is being sent to Mega Resources Ltd. with approval from the Competent Authority.

Mega Resources Ltd. is therefore, required to show cause as to why suitable directions including directions prohibiting it to further deal in securities; prohibiting it from disposing of any of the securities acquired in violation of these Regulations; directing it to sell the shares acquired, should not be issued to you under Section 11 B of the SEBI Act read with Regulation 44 of the SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997, for the above mentioned violations. Mega Resources Ltd., is also required to show cause as to why adjudication proceedings u/s 15A read with 15I of SEBI Act, 1992 read with Regulation 45 of SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997 should not be initiated against it for the above mentioned violations. The documents / material relied upon has been forwarded to Shri Arun Bajoria. Mega Resources Ltd. may also inspect the documents / material, if so desired, at any time by fixing an appointment.

Its reply should reach the undersigned within 15 days of the receipt of this show cause notice.

If the opportunity of reply is not availed, it would be presumed that there is no explanation to offer and SEBI can take action as deemed fit under the SEBI Act, 1992 and SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 1997".

Before proceeding further in the matter, it is felt that it would be beneficial to have a brief idea about the role / activities of the Appellant and the Respondent.

The Appellant is a public limited company incorporated under the provisions of the Companies Act, 1956. It is an investment company, which inter alia deals in buying and selling of securities. According to the information stated in the Rejoinder dated November 24, 2001 filed by the Appellant, it was holding securities worth approximately of Rs.40 crores in its name on the date of the impugned order.

The Respondent is a statutory body established under the Act. The object of the Act has been stated in its preamble that it is "an Act for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto". Government has established a Board namely the Securities and Exchange Board of India (the Respondent) under section 3 of the Act for the purpose. It’s powers, duties and functions have been provided in the Act. Chapter IV of the Act enumerates the powers and functions of the Respondent. As per sub section (1) of section 11 thereunder, subject to the provisions of the Act, it shall be the duty of the Respondent to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks. Sub section (2) enumerates certain specific measures, without prejudice to the generality of the provisions of sub section (1). One of the measures provided therein is to provide measures for "regulating substantial acquisition of shares and take over of companies (section 11 (2) (h). Section 30(1) empowers the Board to make Regulations consistent with the Act and the rules made thereunder to carry out the purposes of the Act. In terms of section 31 every Regulations made under the Act is required to be laid, as soon as may be after it is made, before each House of Parliament, for a period of thirty days and in case the Parliament modifies the Regulations so laid, the modified version will prevail or if the Parliament agrees that the Regulations should not be made, the Regulations thereafter will have no effect. The Respondent has in exercise of the powers vested in it notified the 1997 Regulations, and laid the same before the Parliament. The Parliament has neither modified nor vetoed the Regulation, therefore the Regulation is considered to have the approval of the Parliament and have equal force as if it is made by the Parliament. The 1997 Regulations provides the requisite measures to regulate substantial acquisition of shares and takeovers of companies. The legal position regarding the Respondent’s powers to provide measures to regulate substantial acquisition of shares and takeovers is thus clear.

The Regulations notified in 1997, which replaced the 1994 Regulations, is the one in force regulating substantial acquisition of shares and takeovers. The 1997 Regulations was framed mainly on the input provided by a committee headed by Justice P. N. Bhagwati. The Committee viewed that "the Regulations for substantial acquisition of shares and takeovers should operate principally to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers". The general principles which should guide the interpretation and operation of the Regulation, specially in circumstances which are not explicitly covered by the regulations, laid down by the Committee inter alia include (i) Equality of treatment and opportunity to all shareholders and (ii) protection of interests of shareholders. To translate these principles to reality, measures to bring in transparency in transactions is required. For this purpose dissemination of full information is required. It is with this end in view the 1997 Regulations has made several provisions for making disclosures at pre-acquisition and post acquisition

stages of acquisition. Requirement of disclosure under regulation 7(1) and 7(2), at post acquisition stage is one among them.

Regulation 7 which the Appellant is stated to have violated reads as under:

> 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 percent 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.
>
> (2) The disclosures mentioned in sub regulation (1) shall be made within four working days of;
>
> (a) the receipt of intimation of allotment of shares; or
>
> (b) the acquisition of shares or voting rights as the case may be
>
> (3) Every company, whose shares are acquired in a manner referred to in sub regulation (1), shall disclose to all the stock exchanges on which the shares of the said company are listed, the aggregate number of shares held by each of such persons referred above within seven days of receipt of information under sub regulation (1)" (emphasis supplied)

In this context it is to be noted that Shri Banerjee had submitted that duty to disclose under regulation 7 (1) is cast on the acquirer on his holding exceeding 5% independent of the share holding of persons acting in concert with him. In this context he had referred to the provisions of regulations 10 and 11 to show that where ever the holding of the persons acting in concert is to be taken into consideration the same has been so specifically mentioned, that in the absence of any such requirement in regulation 7(1) it has to be viewed that it is the absolute share holding of the acquirer that alone be taken into consideration for deciding the bench mark percentage of 5 provided therein and that since the Appellant's holding was less than 5% it was not incumbent on it to make the disclosure. The expression "acquirer" as per regulation 2(1)(b) 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".

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

> 2(1)(e): "person acting in concert" comprises, -
>
> (1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company
>
> (2) without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established:
>
> (i) a company, its holding company, or subsidiary or such company or company under the same management either individually or together with each other;
>
> (ii) a company with any of its directors, or any person entrusted with the management of the funds of the company;
>
> (iii) directors of companies referred to in sub-clause (i) of clause (2) and their associates;
>
> (iv) 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 or 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 per cent 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 per cent of the paid-up capital of the latter company".

On a combined reading of the above cited definitions it is not possible to agree with Shri Banerjee's submission that in view of the use of the word "acquirer" in singular and the absence of the words "acting in concert" in the regulation excludes an acquirer whose individual holding does not exceed 5%, from complying with the requirement 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 concerned 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% shares without making the disclosure and continue to do so upto 15%, without attracting the requirements of public offer in terms of regulation 10. Such an interpretation would defeat the very purpose of the Regulations. As already stated one of the objects of the Regulations 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. Since the Appellant itself having admitted that the holding of the Appellant with its associate (s) exceeded 5% of the paid up capital of Bombay Dyeing, it was incumbent upon the Appellant to make the disclosure, as per regulation 7(1) to Bombay Dyeing.

The argument that since Bombay Dyeing's shares are in de-mat form and as such the company could be aware of the acquisitions from the information received from the Depository and therefore disclosure under regulation 7(1) is not relevant is untenable. It cannot be said that the Respondent was unaware of the provisions of the Depositories Act, 1996 when it notified the 1997 Regulations. The Respondent knew the existence of the de-mat provision and still provided for disclosure under regulation 7(1). It is also to be noted that the Respondent has devised a format for disclosure purpose and the format has been published for information of all those concerned. The format for the purpose of disclosure under regulation 7(1) and 7(2) is as under:

Format for informing details of acquisition to target company in terms of regulation 7(1)

Name of the Target Company (T.C.)		
Name of the acquirer		
Shareholding / holding of Voting rights (VR) before acquisition under consideration	No. of shares	% of shares / voting rights to total paid up capital of Target Company

Shares /voting rights acquired		
Shareholding / holding of VR after acquisition		
Mode of acquisition (market purchase / public issue / rights issue pref. Allotment / inter se transfer etc.). Please specify Date of acquisition of shares / VR on date of receipt of intimation of allotment of shares, whichever is applicable.		

The information from the Depository to the companies whose shares are in the de-mat form, does not give all the details which the acquirer is required to give under regulation 7(1) to the company as per the format. Therefore the argument that the information available to the company from the Depository is a substitute for the disclosure under regulation 7(1) by the acquirer is untenable. Even by the Appellant's own admission it has not made the disclosure, as per the format. Shri Banerjee's argument that the Appellant had directly furnished the information relating to its shareholding to CSE is of no help to the Appellant. In fact there is a reason to make the disclosure directly to the company by the acquirer and the company to the stock exchange. The purpose of making timely disclosure to the company is to inform it about the cornering / concentration of shares by others so as to enable it to take preventive measures, if it so desires, to ward of the entry of potential raiders and strengthen the management's position. The argument that making disclosure by the acquirer of its holding in Bombay Dyeing directly to CSE is to be treated as the substantial compliance of requirement of the regulation, is not tenable. Therefore, in my view it is not at all necessary to go into the facts to ascertain whether the Appellant had really submitted the letter making "such disclosure" to the CSE or it was only a story to prove its bonafides. The so called compliance of regulation by informing the shareholding of the Appellant in Bombay Dyeing to CSE is of no help to absolve the Appellant from the charge of non-compliance of regulation 7(1).

The Appellant claims that it had posted a letter dated March 16, 2000 to Bombay Dyeing, a copy of which is available at Annexure AI to the appeal, The said letter reads as under:

> "To,
>
> The Company Secretary
> Bombay Dyeing & Manufacturing Co.Ltd.,
> Nevile House,
> J.N.Heredia Marg,
> Ballard Estate,
> Bombay 400 038
>
> Dear Sir,
>
> Sub: Our Holding in your Company.
>
> This is to inform you that our holding in your company with our associate have exceeded 5%. This is just for your information as required under SEBI Guidelines.
>
> With Thanks'
>
> Yours faithfully,
>
> Sd/-
>
> Authorised Signatory"

Along with the said letter the Appellant has filed another sheet of paper with the photocopy of the imprint of the seal of the Dharma Tala Post office, dated March 16, 2000, stated to be affixed by the post office claiming as evidence to show that the said letter was "posted under Certificate of Posting".

The Respondent has strongly contested the authenticity of the claim of posting the letter and genuineness of the certificate of posting produced by the Appellant. Shri Kumar Desai citing several authorities, stated that a letter posted under certificate of posting in no way ensures its reaching the addressee and that it is in all respect a letter box posting. In the context the learned Counsel cited the Hon'ble Supreme Court in Gadakh Yashwantrao v. E.V. Alias Bala Saheb Vakil (1994) 1 SCC 682 wherein the Court had observed that the certificate of posting being easily obtainable cannot be relied on. It is on record that Bombay Dyeing has not received the said letter.

For the purpose of determining the disputed version of compliance of regulation 7(1) by the Appellant, I do not consider it necessary for me to embark on any investigation to find out whether actually the Appellant posted the letter under certificate of posting or not. It is a well-accepted fact that all the letters posted need not necessarily in every case reach the addressee, though every one would like to see that his letter reaches the addressee. There is no way to ensure the reach of the letter sent by ordinary post. That is why the postal authorities have devised several modes of postage such as registered post, etc. to meet the requirements of postal users. Those who want to ensure service of the postal article on the addressee they are at liberty to use one of these methods. In the absence of any evidence otherwise, one cannot ignore the addressee's version of not getting the letter. In the instant case that is the position. The Appellant claims it posted the letter. Bombay Dyeing, the addressee claims that the letter did not reach it. It is in this context we have to look at the provisions of regulation 7(1) to see that by simply posting the letter to Bombay Dyeing the Appellant's obligation is over. Shri Banerjee had argued that by posting the letter the Appellant's obligation under regulation 7(1) is over in the absence of any specific requirement under the said regulation to sent the information by registered post / speed post / fax etc. He had also stated that no duty is cast on the Appellant to check up with the Target Company to ensure receipt of the communication. Shri Banerjee's contention is not acceptable for the simple reason that regulation is not simply on sending the information, it requires disclosure. Mere dispatch of the information is short of the said requirement. If the requirement was only "to send", on sufficient proof of posting the letter would have in the normal course to some extent met with such a requirement. But Regulation 7(1) requires the acquirer to disclose the aggregate of his holding in the Target Company to the company. Sub regulation (2) prescribes the time limit within which the disclosure is required to be made. Therefore the crucial question is whether the requisite disclosure has been made by the Appellant. For the purpose it is necessary to know what is meant by "disclosure" in the sense in which it is used in the regulation. Disclosure is required to be made to the Target Company. "Disclose to the company" is the clue. "Disclose" according to Websters Encyclopedic Dictionary means - to make known, reveal or uncover – to cause to appear, allow to be seen, lay open to view. According to Blacks Law Dictionary "Disclosure" means – act of disclosing, revelation, the impartation of that which is secret or not fully understood. Disclose is to expose to review or knowledge anything, which before was secret, hidden or concealed. Thus the requirement is that the information should reach the person to whom it is meant. The obligation does not end by simply posting the information in a letterbox. The fact that the information should reach the target company is also evident from the provisions of regulation 7(2) which casts an obligation on the company to disclose to the concerned stock exchange the shareholding of persons covered under regulation 7(1) within seven days of receipt of the information from the acquirer. In view of the above I am not inclined to view that by posting a letter under certificate of posting, stating the shareholding by itself is sufficient compliance of regulation 7(1). In my view the Appellant has failed to comply with the requirement of regulation 7(1), for the reason that it has failed to make the disclosure of the requisite information to Bombay Dyeing.

The Appellant's argument that the requirement of regulation 7(1) is not mandatory is also not tenable. The word "shall disclose" read in the light of the scheme of the Regulations itself indicates that the provision is a mandatory requirement. Learned Counsel for the Appellant had also stated that the Act has not provided any penal consequences for non-compliance of the regulation and as such the regulation is not mandatory is also not correct. Failure to make the requisite disclosure attracts monetary penalty as specifically provided in section 15A (b) of the Act. As per the said section "if any person who is required under this Act or any rules or regulations made thereunder to file any return or furnish any information, books or other documents within the time specified therefore in the regulation, fails to file return or furnish the same within the time specified therefore in the regulation, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues". Thus the consequences of default are provided in the act itself. The argument that regulation 7(1) has no nexus with the object of the regulation and that it is arbitrary and impractical is unfounded. Timely disclosure of requisite information is the best investor protection measure. Regulation 7 provides for such timely disclosure. I do not find anything to support the Appellant's version that the disclosure requirement in the regulation is arbitrary and impractical.

The Appellant's contention that the investigation was not conducted in the manner provided in the Regulations and that the Respondent had failed to adhere to the rules of natural justice is unfounded as is evident from the facts on record.

Chapter V of the 1997 Regulations provides for "Investigation and action by the Board". Board's right to investigate has been stated in regulation 38, which is as under:

> "38. The Board may appoint one or more persons as investigating officer to undertake investigation for any of the following purposes, namely: -
>
> > (a) to investigate into the complaints received from the investors, the intermediaries or any other person on any matter having a bearing on the allegations of substantial acquisition of shares and takeovers.
> >
> > (b) to investigate suo motu upon its own knowledge or information, in the interest of the securities market or investors interest, for any breach of the regulations;
> >
> > (c) to ascertain whether the provisions of the Act and the regulations are being complied with for any breach of the regulations.

Requirement of notice before investigation has been stated in regulation 39, as follows:

> 39. (1) Before ordering an investigation under regulation 38, the Board shall give not less than 10 days notice to the acquirer, the seller, the target company, the merchant banker, as the case may be.
>
> (2) Notwithstanding anything contained in sub-regulation (1), where the Board is satisfied that in the interest of the investors no such notice should be given, it may, by an order in writing direct that such investigation be taken up without such notice.
>
> (3) During the course of an investigation, the acquirer, the seller, the target company, the merchant banker, against whom the investigation is being carried out shall be bound to discharge his obligation as provided in regulation 40.

Obligations on investigation by the Board have been stated in regulation 40 as under:

> 40 (1) It shall be the duty of the acquirer, the seller, the target company, the merchant banker whose affairs are being investigated and of every director, officer and employee thereof, to produce to the investigating officer such books, securities, accounts, records and other documents in its custody or control and furnish him with such statements and information relating to his activities as the investigating officer may require, within such reasonable period as the investigating officer may specify.
>
> (2) The acquirer, the seller, the target company, the merchant banker and the persons being investigated shall allow the investigating officer to have reasonable access to the premises occupied by him or by any other person on his behalf and also extend reasonable facility for examining any books, records, documents and computer data in the possession of the acquirer, the seller, the target company, the merchant banker or such other person and also provide copies of documents or other materials which, in the opinion of the investigating officer are relevant for the purpose of the investigation.
>
> (3) The investigating officer, in the course of investigation, shall be entitled to examine or to record the statements of any direction, officer or employee of the acquirer, the seller, the target company, the merchant banker.
>
> (4) It shall be the duty of every director, officer or employee of the acquirer, the seller, the target company, the merchant banker to give to the investigating officer all assistance in connection with investigation, which the investigating officer may reasonably require.

Submission of report to the Board is required under regulation 41 as under:

> 41. The investigating officer shall, as soon as possible, on completion of the investigation,

submit a report to the Board:

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

Requirement of Communication of findings have been provided in regulation 42 as under:

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

(2) On receipt of the reply, if any, from the acquirer, the seller, the target company, the merchant banker, as the case may be, the Board may call upon him to take such measures as the Board may deem fit in the interest of the securities market and for due compliance with the provisions of the Act and the regulations.

The Respondent is also empowered to appoint auditor under regulation 43:

43. Notwithstanding anything contained in this regulation, the Board may appoint a qualified auditor to investigate into the books of accounts or the affairs of the person concerned:

Provided that the auditor so appointed shall have the same powers of the investigating authority as stated in regulation 38 and the obligations of the person contained in regulation 40 shall be applicable to the investigation under the regulation.

Regulation 44 empowers the Respondent to issue the following directions:

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

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

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

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

(d) taking action against the person concerned.

Penalties for non-compliance of the requirements have been provided in regulation 45 as under:

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

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

(3) The board of directors of the Target Company failing to carry out the obligations under the regulations shall be liable for action in terms of the regulations and the Act.

(4) The Board may, for failure to carry out the requirements of the regulations by an intermediary, initiate action for suspension or cancellation of registration of an intermediary holding a certificate of registration under section 12 of the Act:

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

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

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

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

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

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

Thus Chapter V is thus a self-contained code prescribing the procedure to be followed in investigation etc.

It is clear from regulation 38(b) that the Respondent is empowered to investigate suo motu upon its own knowledge or information, in the interest of securities market or investors interests, for any breach of the regulation. Source of 'knowledge or information' stated therein is not restricted to any one particular source, even a complaint or communication can serve the purpose. Even if it is assumed that the investigation was ordered on the basis of Bombay Dyeing's letter, the Respondent's order to investigate under regulation 38(b) is unquestionable. As the purpose of investigation can be for any breach of the regulations, alleged non-compliance of the requirement of regulation 7(1) can certainly be a ground for ordering investigation.

The contention that the Respondent ordered investigation without giving the minimum notice period of 10 days required under regulation 39(1) and that the Respondent has not dispensed with the said requirement by following the procedure provided in sub regulation (2) of regulation 39 is also unfounded. It is on record that in the order dated November 15, 2000 issued by the Chairman of the Respondent appointing the Investigating Officer, he had recorded "I am further satisfied that in the interest of investors and in public interest / securities market, no notice to the persons investigated should be given. I therefore order that the above investigation may be conducted without such notice". The Chairman on satisfying that it is a fit case to investigate without notice has in writing directed that the investigation be taken up without such notice. Since the requirement of sub regulation (2) of regulation 39 has been thus met with, I do not consider that the action of the Respondent is untenable.

Shri Banerjee's submission that the Respondent did not comply with the requirement of the rules of natural justice for the reason that the Appellant was denied of the right to give an effective reply to the show cause notice by refusing access to and inspection of the relevant documents, that cross examination of the persons whose statements have been relied upon was denied and a copy of the investigation report was not provided etc., are unfounded. It is seen from the documents on record that the Respondent on December 18, 2000 had issued a detailed show cause notice to the Appellant stating the charges and the data relied upon, and the legal provisions attracted, and the consequences that would attract in case satisfactory reply is not given. There is no provision in the regulation to furnish the full text of the investigation report to the noticee. But the law has taken care of the requirement of natural justice by providing in regulation 42(1) to communicate the findings of the investigating officer to the acquirer etc., and give him an opportunity of being heard. It is not the Appellant's contention that the findings of the investigating officer were not communicated to it or that it was not given opportunity of being heard. Grievance is on not giving the investigation report as a whole, which is not a requirement under the regulation. By furnishing the findings of the Investigating Officer the Appellant was given sufficient opportunity to putforth its defense. The Appellant is asking for some thing, which he is not entitled to under the law. With reference to the requirement of inspection of documents it is seen from the documents filed by the Respondent that it had offered inspection of the documents relied on by it. It is on record that the Appellant had inspected the documents and also it is evident that the Appellant had made written and oral submission availing of the opportunity provided by the Respondent. I agree with the learned Counsel for the Respondent that cross-examination of a witness is required only if his statement is made use of in the proceedings. Since the statements of those persons are not relied on, those persons need not be made available for cross-examination. In any case in the light of the factual and legal position with reference to compliance of regulation 7(1) stated by me above, I do not find any justification to insist for cross examination of the persons, as sought by the Appellant. In the light of the factual

position emerging from the pleadings and the oral submission made by the parties, it is difficult to hold that the Respondent had made the impugned order without following the principles of natural justice.

Having come to the conclusion that the Appellant is required to comply with the requirements of regulation 7(1) and that the Appellant has failed to comply with the same and that there was no procedural infirmities in ordering and conducting investigation and in the subsequent action by the Respondent, the next question to be considered is on the legality of the direction made / penalty ordered, by the Respondent.

It is seen from the impugned order (para 10) that the Respondent has invoked regulations 44(a) and 45 (6) of the 1997 Regulations and section 11B and section 11 of the Act for issuing the directions. The Appellant and others mentioned in the order have been debarred from accessing the capital market and dealing directly or indirectly in securities for a period of one year from the date of the order. The said direction as could be seen is in two parts, debarring the Appellant and others (i) from accessing the capital market and (ii) dealing directly or indirectly in securities. In terms of regulation 44(a) the Respondent is empowered to direct "persons concerned not to further deal in securities". Scope of the power under the said regulation is restricted to debarring "further dealings in securities" and the direction issued, under the sub-regulation has to be in the interest of the securities market.

In this context it is to be remembered that the charge against the Appellant is that it had failed to comply with the post acquisition disclosure requirement, in terms of regulation 7(1). It is not that there is no specific penalty for the said omission in the Act. Under section 24, for such a default the acquirer can be prosecuted. The acquirer can also be proceeded against under Chapter VIA and monetary penalty can be imposed. It is not that the default would go unpunished, if established.

Regulation 44(a) does not empower the Respondent to debar the Appellant from accessing the capital market or putting a total ban on dealing in securities. Regulation 44(a) enables the Respondent direct the "persons concerned not to further deal in securities". On a combined reading of sub regulation (b) and (c) the securities referred to in sub regulation (a) could be the securities of the Target Company which is the subject matter of acquisition. The sub regulation (a) does not appear to be meant to stop further dealing in any security held by the acquirer. By debarring the person concerned from further dealing in securities, how the interests of the securities market is taken care of, need be explained. In the instant case the Respondent has not stated as to how debarring the Appellant from further dealing in securities would be in the interest of the securities market in the light of the facts and circumstances of the instant case. According to the Appellant it is an investment company dealing in securities. It is not dealing exclusively in the shares of Bombay Dyeing. According to the information furnished by the Appellant, it was holding shares worth Rs. 40 crores on the date of the impugned order. The implication of the impugned order should not be ignored in the said context. Blocking dealing in the securities held by the Appellant as a whole, for unexplainable reason would in my view be more against the interest of the investors and the securities market, than protecting their interest. There should be sufficient reason, justifying such a direction. Nothing of that sort is available in the impugned order. This part of the order in my view is also untenable for the reason that it is beyond the powers of the Respondent under regulation 44(a). The provisions of Section 11B are of no help to the Respondent in this regard as the direction does not come under any of the purposes for which direction can be issued under the said sections as could be seen from the facts of the case. In this connection the observation made by the Hon'ble Supreme Court in Peerless General Finance & Investment Co. Ltd., v. Reserve Bank (1992) 2 SCL 343 at pg. 375) is to be remembered. The Hon'ble Court had observed that:

> "it is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably".

In my view the direction debarring the Appellant from accessing the capital market and dealing in securities on the ground that it had failed to make the disclosure of its shareholding to Bombay Dyeing as required under regulation 7(1) is held untenable for the reasons stated above and therefore deserves to be set aside. I do so.

Regulation 45(6) and sections 11 and 11B cannot be invoked to issue such a direction as the scope of the said regulation and sections is different. Regulation 45(6) is on penalties for non-compliance of the requirements of sub regulation 1 to 5 of regulation 45. Sub regulations (2) to (5) specify the compliance

requirements to attract the regulation. These regulations do not cover the requirement of regulation 7(1). Further sub regulation (1) is also not attracted as it states that "any person violating any provisions of the Regulations shall be liable for action in terms of Regulations and the Act". This sub regulation by itself is of no relevance as it is a restatement of the legal position. It is not a penal provision by itself. The said provision in effect is of no effect, as it goes without saying that the Act and Regulations will take care of the violations under its provisions. It goes without saying. Then what is the specific provision empowering the Respondent to issue such a direction which is penal in effect? Coming to section 11 and 11B, it is to be noted that section 11 is on the functions of the Respondent. In exercise of the powers specifically provided under section 11(2)(h) the Respondent has already provided the measures to be taken to regulate substantial acquisition of shares and takeovers of companies and consequences that would visit the persons not complying with those requirements have also been specified in the Regulations. I do not find any provision in the said regulation empowering the Respondent to issue such a direction. Respondent cannot expand the scope of regulation 44(a) to issue the directions, which are outright penal in effect. Section 11 is therefore of no help. Section 11B which the Respondent has invoked is also of little help in this context as could be seen from the section, which is reproduced below:

"Power to issue directions

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

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

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

(iii) to secure the proper management of any such intermediary or person.
it may issue such directions,-

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

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market"

The scope and reach of the section is very clear. If the Board is satisfied that it is necessary for the purposes referred at sub clauses (i) to (iii), it is empowered to issue such directions to persons specified in sub clauses (a) and (b) of the section. The Appellant's contention that it is not a person covered under the section and as such not within the reach of section 11B is not correct. The Appellant itself has admitted that it is an investment company engaged in the business of purchase and sale of securities (which obviously includes listed securities) and as such safely the Appellant can be treated as a person associated with the securities market in terms of sub clause (a) of section 11B. Scope of section 11B was subjected to detailed scrutiny by this Tribunal recently while deciding an appeal filed by Sterlite Industries. (Sterlite Industries Ltd v. SEBI (2001) 34 SCL 485: (2001) 45 CLS 195). After detailed consideration the Tribunal held that section 11B does not confer power on the Respondent to take punitive action. In the light of the facts and circumstances of the case, I am of the view that direction debarring the Appellant from accessing the capital market and dealing directly or indirectly in securities for a period of one year for the reason that the Appellant had failed to make the requisite disclosure of its holding in Bombay Dyeing in terms of regulation 7(1), tantamounts to penalty which cannot be imposed under section 11or 11B of the Act.

In para 11.2 of the order it has been stated that as Shri Bajoria and the persons acting in concert have already reduced their holding to less than 5% of the paid up capital of BDMCL, no specific directions are being issued to sell the shares acquired in violation of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation 1997". It appears that the Respondent has wrongly concluded that the acquisition of shares by the Appellant is in violation of the 1997 Regulations, little realising that compliance of the requirement of regulation 7(1) is only a post acquisition requirement and failure to comply with such a requirement by itself will not make the acquisition of the shares violative of the Regulations. If the Respondent's views are to be accepted, that would lead to absurd situations. For example, section 75 of the Companies Act, 1956 requires companies making allotment of shares to file with the Registrar of Companies a return furnishing details of the allotment, within 30 days of the allotment. But failure to file such a return with the Registrar of Companies would not result in treating the allotment itself as violative

of section 75. Since compliance of regulation 7(1) is a post acquisition requirement and failure to comply with the said requirement cannot affect the acquisition as stated in the order to warrant any action.

The Respondent has also directed that an adjudicating officer be appointed under section 15I of the Act to inquire into the violations, if any, of section 15A (b) and adjudicate upon the penalty if so warranted. This is a direction by the Respondent to the Respondent as the power to appoint adjudicating officer is vested in the Board itself as could be seen from the following provisions of section 15I.

> "15I: (1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G and 15H, the Board shall appoint an officer not below the rank of a Division Chief to be a adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.
>
> (2) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections".

Since the adjudication by itself is a separate process and the adjudicating officer is required to hold an inquiry in the prescribed manner after giving the Appellant a reasonable opportunity of being heard for the purpose of imposing any penalty and that the adjudication order is appelable to the Tribunal, no intervention by this Tribunal, at this stage in this regard is felt necessary. The Respondent is empowered by the Act to order adjudication under section 15I and the decision taken in this regard in the present case is well within its powers.

The appeal is disposed of in the above lines.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: March 19, 2002