BEFORE THE SECURITIEIS APPELLATE TRIBUNAL
MUMBAI

APPEAL NO. 43/2001

In the matter of:

Modi Spinning & Weaving Mills Co. Ltd. Appellant

Vs.

Securities & Exchange Board of India	**Respondent No.1**
Modi Rubber Ltd.	**Respondent No.2**
Dr.Bhupendra Kumar Modi	**Respondent No.3**
Mr.Vinay Kumar Modi	**Respondent No.4**
Mod Fashions and Securities	**Respondent No.5**
Modikem Limited	**Respondent No.6**
HSBC Securities &	
Capital Markets(I)Pvt.Ltd	**RespondentNo.7**
Punjab National Bank	**RespondentNo.8**

APPEARANCE:

Mr. Arif Bookwala
Advocate

Mr.Mohammed Himayatullah
Advocate
I/b. M/s. Negandhi Shah & Himayatullah

Dr.R.K.Gulati
Diredctor, BIFR **for Appellant**

Mr.K.R.C.V.Sheshachalam
Asstt.Legal Adviser, SEBI

Mr.Vinay Chauhan
Legal Officer, SEBI **for Respondent No.1**

Ms Mamta Muthreja
Asstt.Manager(Compliance)
HSBC Securities &
Capital Markets(I)Pvt.Ltd **for Respondent No.7**

Mr.L.K.Sinha
Dy.Zonal Manager
Punjab National Bank **for Respondent No.8**

None for Respondent Nos. 2, 3, 4, 5 and 6

(In the matter of appeal arising out of the order dated 16.7.2001 made by the Chairman, Securities & Exchange Board of India).

ORDER

The present appeal is directed against the order dated 16.7.2001 made by the Chairman, Securities and Exchange Board of India, Respondent No.1 (SEBI), holding that Modipon Ltd and the Appellant will not be eligible to participate in the public offer made by the acquirers to consolidate the holding of promoters group of Modi Rubber Ltd.

The Appellant is a public limited company, stated to be one of the Group companies of the Modi family. Modi family owned and controlled several companies. Members of the said Modi family entered into a Memorandum of Understanding on 24.1.1989 (MOU), whereunder the control and management of all the Modi Group Companies was agreed to be distributed amongst two groups – say Group A and Group B. Group A comprised Shri K.N.Modi and his sons, S/Shri M.K.Modi, Y.K.Modi and D.K.Modi. Group B comprised Shri K.K Modi and brothers namely, S/Shri V.K.Modi, B.K.Modi, V.K.Modi and S.K.Modi. The Appellant was put under Group 'A'. Modi Rubber Ltd (MRL) was put under Group 'B'. The Appellant had made investments in several companies and one of such investments was in 6,66,667 equity shares of Rs.10 each of MRL.

The present management of MRL decided to consolidate their holding in MRL by acquiring about 35% capital, through a public offer. On 31.3.2001 the Respondent No.7 issued a public announcement for the purpose, as per the requirements of the SEBI(Substantial Acquisition of Shares and Takeovers) Regulation, 1997 (the 1997 Regulations), on behalf of Shri V.K.Modi, Dr. B.K.Modi, Modi Fashions and Securities P.Ltd and Modiken Ltd (Respondents 3, 4, 5 & 6 respectively) (collectively called the acquirers), for acquisition of 87, 64, 186 shares at the rate of Rs.80/- per share from the shareholders of MRL. The acquirers thereafter submitted draft letter of offer to SEBI, therein inter alia stating that the offer to the shareholders of MRL is made in accordance with regulation 11(1) – i.e. to consolidate the holdings of present management of MRL, that certain companies specifically stated, including the Appellant, are persons deemed to be acting in concert with the acquirers/ promoters and the response is expected in the open offer from the total share holding of 76% held by financial institutions/mutual funds/public etc. As a result of holding the Appellant as a person deemed to be acting in concert with the acquirers, the Appellant was disqualified from participating in the public offer. The Appellant represented to SEBI in this regard. However, SEBI vide its letter dated 25.5.2001 stated inter alia that as per the 1997 Regulations, the Appellant being part of the promoter group of MRL and a person deemed to be acting in concert with the acquirers is not eligible to participate in the open offer made by the acquirers. On 19th June, 2001 Modipon Ltd filed a Writ Petition bearing No.1536/2001 in the Hon'ble Bombay High Court inter alia challenging SEBI's letter dated 25.5.2001. The Division Bench of the Hon'ble High Court vide its order dated 2nd /3rd July, 2001 disposed of the petition directing SEBI to grant personal hearing to the petitioners (the Appellant herein) and the concerned Respondents and their merchant bankers and pass a fresh order in accordance with the law by 16th July, 2001 . The impugned order was made in compliance with the said direction of the Hon'ble High Court. Modipon filed an appeal (appeal No.34/2001) in the Tribunal challenging the said order. Tribunal allowed the appeal on 31.7.2001.

However the Appellant, instead of availing of the appellate remedy provided under the Securities & Exchange Board of India Act (the Act), preferred to file a Writ Petition seeking to invoke High Court's jurisdiction under article 226 and accordingly filed a Writ Petition 4374/2001 in the Hon'ble Delhi High Court. Though, in appeal No.34/2001 filed by Modipon Ltd., the Appellant was also arrayed as a Respondent and notice was served on it, the Appellant decided to remain out of the proceedings on the ground that it has filed a Civil Writ Petition before the Hon'ble Delhi Court and that the matter was pending and subjudice. Shri Arif Bookwala, the learned Counsel appearing for the Appellant, stated that the Appellant had subsequently approached the Hon'ble High Court seeking permission to withdraw the said Writ Petition and the Hon'ble Court allowed the prayer vide order dated 18.9.2001.

Shri Arif Bookwala, learned Counsel for the Appellant, submitted that the Appellant had made investments in several companies and one of such investments was in 6,66,667 equity shares of MRL. He further stated that the Appellant had borrowed monies from Punjab National Bank and as part of the securities the said shares were pledged in favour of the said Bank.

Learned Counsel stated that the Appellant had approached the Board for Industrial and Financial Reconstruction (BIFR) in 1989 for being declared as sick company and for rehabilitation. A rehabilitation Scheme has been sanctioned by BIFR. Under the said Scheme, the Appellant is being run under a Board which has four representatives of Modi Group (two representatives of each one of the two groups) and six nominee Directors of banks, financial institutions and BIFR. Accordingly the majority of the Board of

Directors of the Appellant are representatives of the Banks / FIs & BIFR.

According to the learned Counsel as per the MOU executed between the Appellant and Punjab National Bank (PNB) which has been noted by the Hon'ble High Court and reflected in the sanctioned Scheme, the Appellant agreed to pay to Punjab National Bank a sum of Rs.2800.00 lacs as One Time Settlement (OTS) as on 31.12.1997 alongwith interest @ 15% per annum with quarterly rest with affect from 1.1.98 to be paid within a specified period as per an agreed schedule. Punjab National Bank had agreed to release the pledged shares on prorata basis after receiving 1/3rd of the OTS and 1/3rd of the accrued interest. The said agreement/obligation of the Appellant was duly incorporated in the Rehabilitation Scheme sanctioned by BIFR under section 18 (4) and 19 (3) of the SICA 1985 vide its order dated 5th June, 2001.

Shri Bookwala submitted that as per the MOU and clause 3(C) of the Sanctioned Rehabilitation Scheme, the Appellant was required to pay 1/3rd of the settled amount alongwith interest accrued within six months of the sanction of the Scheme, that if the payments were made as per the schedule, the pledged shares were to be released back to the Appellant in a phased manner in proportion to the amount then due. The sanctioned Scheme contemplated that the said shares were to be sold by the Appellant in the period 1st April, 2001 to 31st March, 2002 for generating the funds required for implementation of the scheme. However, the Scheme also expressly stipulated that in case the Appellant defaulted in paying the crystalised dues, the Banks/Fis would be entitled to recover their amounts and "shall be entitled to enforce the security available to them for recovery of their respective claims in full". The Rehabilitation Scheme also expressly stipulated that the provisions of the MOU executed between the Appellant & Punjab National Bank would prevail notwithstanding the terms and conditions as mentioned in the Rehabilitation Scheme.

Learned Counsel submitted that the Appellant is now managed by an independent Board with majority of the directors representing Banks/Financial Institutions and BIFR and it is not a part of Modi Group or any other group. He referred to this Tribunal's order dated 31.7.2001 in appeal no.34/2001 and stated that the issues involved in the present appeal are similar to those involved in the said appeal and in view of the identical facts, prayed that a similar order may be passed in the present appeal also . He also stated that the Appellant is adopting the grounds on which the Respondent SEBI's order dated 16.7.2001 was challenged by Modipon Ltd. in appeal no.34/2001.

Learned Counsel submitted that in the first week of April, 2001, the Appellant came across the public announcement issued by Dr.Bhupendra Kumar Modi (Shri B.K.Modi)/BKM) and Shri Vinay Kumar Modi (V.K.Modi/VKM) whereby they expressed their intention to acquire 87,64,186 fully paid up equity shares of Rs.10.00 each of MRL at the rate of Rs.80.00 per share, which was subsequently increased to Rs.90/- per share. The said 87,64,186 shares represented 35% of the outstanding equity capital (and voting rights) of MRL. In the said Public Announcement, the Appellant was not mentioned as a "person acting in concert" with the acquirers. The Acquirers issued a public announcement of a revised offer dated 29th May, 2001 for the purchase of the shares of MRL from its shareholders. Even in the said revised offer the Appellant was not included as acquirer, promoter or person acting, or deemed to be acting, in concert with the acquirers .

Learned Counsel stated that on 30th May, 2001 the acquirers issued letter of offer to the shareholders of MRL. wherein the Appellant was specifically excluded from the offer, that with a view to block the sale of the shares held by the Appellant on 3rd June, 2001, the acquirers got published a purported clarification in the newspapers wherein it was mentioned that Appellant is also a "person deemed to be acting in concert" with the acquirers.

Shri Bookwala stated that the Appellant (vide letter dated 29th June, 2001) had informed the acquirers that it was desirous of selling of the said pledged shares under the Public Offer, in order to generate funds to partially pay off PNB's dues and requested the acquirers to forward to the Appellant a Letter of Offer the purpose. However in response to PNB's letter dated 12th June, 2001, SEBI vide its letter dated 21st June, 2001 advised that the Appellant "is a person deemed to be acting in concert with the acquirers within the meaning of Regulation 2(1)(e)(2)" and "is also forming part of the promoter group" and could accordingly not sell the said shares in the public offer.

Learned Counsel stated that the purported clarification is totally incorrect, illegal and mischievous and has been made with the intent of preventing the Appellant from participating in the public offer , that the Appellant is neither a promoter, nor a person acting, or deemed to be acting, in concert with the Acquirers. Further, Appellant or its directors are not concerned in any manner with the management or control of MRL, that there is no connection between the Appellant and MRL and the Appellant is also not connected or associated with the acquirers in any manner. He also submitted that the Appellant is in no manner connected with or interested in the intended acquisition of shares of MRL by the acquirers, that on the contrary the Appellant is keenly interested in selling the shares of MRL held by it so that it can liquidate/repay its dues to banks and financial institutions.

The main grounds on which the Appellant has challenged the impugned order are as follows:

SEBI has wrongly held that the Appellant and Modi Pon Ltd. come within the purview of regulation 2(1)(e)(1) for the purpose of present offer made by the acquirer SEBI has misinterpreted the provisions of regulation 2(1) which defines the meaning of persons acting in concert as 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. In the present case it is no one's case that the Appellant is in any manner interested or involved in the acquisition of shares or voting rights or in gaining control over MRL When there is no such allegation or even an averment against the Appellant., nor is there any finding to this effect, the Appellant cannot be termed as person acting in concert.

The Appellant is also not a person 'deemed to be acting in concert' with the acquirers within the meaning of Regulation 2 (1)(e)(2) of the 1999 Regulations, that the Appellant does not fall under any of the categories mentioned in Regulation 2(1)(e)(2) so as to make it a person deemed to be 'acting in concert' with any or all of the acquirers in the present case. As regards category (i) of Regulation 2(1)(e)(2), Appellant is not the holding company or subsidiary of Mod Fashions and Securities Pvt. Ltd. or of Modikem Ltd, [the two Acquirer Companies]. The Appellant and the two acquirer companies are not under the same management, either individually or together with each other. Therefore, the Appellant does not fall under category (I). Further, Appellant is not a director of either of Mod Fashions & Securities Ltd. or Modikem Ltd. nor is it entrusted with management of their funds; therefore, Appellant also does not fall in category (ii) of the aforesaid Regulation. Also, Appellant is not a director of the acquirer companies nor an associated of Shri B.K. Modi and/or Sh. V. K. Modi who are the directors of the aforesaid two acquirer companies and as such category (iii) is also inapplicable in the present case. Rest of the categories (iv) to (x) have no relevance in the present case and the same are inapplicable.

The provisions of Regulation 2(1)(e)(2), which is a deeming provision, must be read in conjunction of Regulation 2(1)(e)(1) which prescribes that the "person acting in concert" comprise of "Persons who, for a common objective or purpose of substantial acquisition of shares of 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". A fortiori, persons who are deemed to be acting in concert must together have some intention or interest in the acquisition of shares of the 'target company'. A seller of shares of the 'target company' cannot therefore be a person acting or deemed to be acting in concert for the acquisition of shares. In the present case, when the Appellant had categorically informed SEBI that it wants to sell its shareholding in MRL in pursuance of the public offer, it is completely illogical to hold that the Appellant be deemed to be acting in concert with the acquirers. In order to be a person deemed to acting in concert, that person has to fall in one of the ten categories provided in the said regulation, that even if a person does fall in any such category, the presumption of acting in concert with other persons in the same category is rebuttable under the provision of the said regulation itself.

The provisions of the 1997 Regulations deal with persons who are directly or indirectly acquiring the shares of the 'target company' and the Regulations do not restrict or prohibit the rights of any shareholders of the 'target company' from selling his shares to the acquirers in terms of the public offer, and therefore it will be unfair and unjust to prevent the Appellant from selling its shares giving a totally illegal and arbitrary interpretation to the provisions of the Regulations.

SEBI has erred in holding that the Appellant falls under category (x) of regulation 2 (1) (e) (2) since the Appellant along with MRL are the associate companies of Modi Group, that in category (x) for a company to be deemed to be acting in concert with other persons it is necessary that such company should be an "investment company". The Appellant is neither an investment company nor is there any finding to this effect in the impugned order or in any other document. The Appellant is a manufacturing company and does not deal in investments or securities, that an investment company can only mean a company whose principal business or main object is to deal in investments, that merely because that it had purchased the shares of MRL or other companies does not make the Appellant an investment company.

SEBI has taken into account irrelevant and extraneous factors while coming to the conclusion whether the Appellant is a person deemed to be acting in concert with the acquirers. The fact that Shri V. K. Modi and Dr. B. K. Modi, the Directors of MRL , are the real brothers of Sh. K. K. Modi who is one of the Directors of the Appellant is totally irrelevant to the issues arising in the present case. Further, the contention that members of Modi group had an informal understanding that they will always support and vote in favour of the acquirers is also immaterial to the issues arising in the present case. The word "associate" can have relevance under category (x) only if the Appellant was an investment company. Therefore, taking into account the factors of relationship or support within the Modi group is totally erroneous and contrary to the provisions of the Regulations.

The Appellant cannot be deemed to be person acting in concert when Mr. K.K. Modi, S.K. Modi, Mr. U.K. Modi, the real brothers of Sh. B.K. Modi, and Sh. V.K. Modi and who hold individual shareholding in MRL. are neither being categorised as a promoter nor as a person acting in concert and are also not being restrained from participating in the offer. The acquirers are prepared to buy the shares of their brothers, but not of the Appellant where there is substantial public shareholding.

SEBI in its order dated 16.7.2001 erred in holding that the Appellant is a part of promoter group of the MRL . The Appellant is not a promoter or an acquirer or a person acting in concert or deemed to be acting in concert with the acquirers of MRL as:

The Appellant had been specifically excluded in the definition of present promoter by the acquirers in their public announcement dated 30th March, 2001, 30th May 2001 and even in their present letter of offer, that moreover, even if the Appellant is presumed to be an initial promoter of MRL, it ceased to be so after the execution of MOU dated 24th January 1989, as by virtue of the same, control and management of all the Modi companies has been separated. Since then MRL. is being managed and controlled by Shri B.K. Modi and Shri. V.K. Modi, and the Appellant or its directors have no control over MRL

In the first offer made by the acquirers on 30th March 2001 or even the revised offer in the present case the acquirers had rightly not included the name of the Appellant as promoter, acquirer or person acting, or deemed to be acting in concert, with the acquirers.

In paragraph 3.4 of the Letter of Offer issued by the acquirers, it has been stated that one of the objects and purpose of acquisition of shares is that the present management of MRL [i.e. Sh. B.K. Modi and Sh. V.K. Modi] wishes to consolidate its holding in the Company. The Appellant is not at all concerned in the management of MRL and it does not share any of the objectives, which the acquirers have in the acquisition of shares of MRL.

The Appellant does not fall within the definition of ‘promoter’ as defined in Regulation 2(1)(h). The Appellant is merely a shareholder of MRL and the shares were acquired by it even prior to the coming into force of the Regulations, that mere holding of shares cannot make the Appellant a promoter of MRL specially when the same is denied by it.

Declaration with regard to change of shareholding were only required to be filed by MRL, that in any event, the alleged declarations have no legal value specially in view of the Scheme Sanctioned by the BIFR. Therefore, the said declarations are meaningless and have no sanctity in the eyes of law. The alleged declaration filed by MRL with the stock exchanges have been filed without the consent or permission of the Appellant that such unilateral declarations cannot bind the Appellant and cannot affect its rights as a shareholder of MRL.

There is no presumption in law or in fact that a person once a promoter of a company shall remain a promoter or is a person acting in concert or deemed to be acting in concert with the acquirers.

SEBI erred in relying upon the draft offer document as also final offer document issued by the acquirers wherein acquirers had included the shareholding of the Appellant in the shareholding of promoter group of MRL. SEBI failed to appreciate that in the initial public announcement made by the acquirers on 30.3.2001, the acquirers had not included the shareholding of the Appellant in the shareholding of promoter group. In fact the name of the Appellant was not even shown as a promoter in the said public announcement it was only when the SEBI itself gave directions to the acquirers, that they include the shareholding of the Appellant under the category of persons deemed to be acting in concert. Even in the final offer document the Appellant was not shown as a promoter of MRL , that at the instance of SEBI it was added in the offer document that *"Modi Spinning & Weaving Mills Company Ltd" being a part of the promoter group of MRL and being person deemed to be acting in concert with the acquirers is not eligible to participate in the instant open offer".* Even assuming without admitting that Appellant is a promoter of MRL even then, the acquirers are bound to issue a letter of offer to the Appellant and the Appellant is entitled to participate in the public offer because public offer is open to all the shareholders and there is no bar even against a promoter from selling its shares to the acquirers under the public offer, that SEBI has no power to provide that a shareholder is not eligible to participate in a public offer.

There is no provision in the Regulations, which prevents a shareholder of the target company from participating in a public offer of purchase made by the acquirers in terms of the said Regulations. A public offer once made under the Regulations is open to all the shareholders of the company. In fact, under Regulation 22(3), it is obligatory upon the acquirer to send individual letter of offer to all the shareholders of the target company whose names appear on the register of members of the company as on the specified date. Since the Appellant is a shareholder of MRL and its name appears in the register of shareholders of MRL the acquirers were bound to send their letter of offer to the Appellant also.

The object of the Regulations is to ensure that a shareholder of the target company who does not wish to remain with the company upon a substantial acquisition of shares, is entitled to dispose of his shares in the public offer. This opportunity is available to all the shareholders of the target company, be it a promoter or any other shareholder. The provisions of Regulations do not restrict the right of the shareholders to sell their shares. Also the definition ‘public shareholding’ as defined in Regulation 2(1)(j) means shareholding in the hands of the persons other than acquirer and persons acting in concert with the acquirer. The shareholding of promoter has not been excluded in the said definition and therefore it also forms part of the public shareholding.

The Appellant or any shareholder will suffer irreparable loss and injury if it is prevented from participating in the public offer. The sale proceeds from the sale of MRL shares are to be given to banks and financial institutions towards their dues as per the scheme sanctioned by the BIFR. No prejudice will be caused to any shareholder or any other person if the Appellant sells its shares in terms of the public offer.

SEBI erred in keeping out the Appellant from the public offer on the alleged ground of "public interest". The said ground is not tenable either in facts or in law. The present shareholding of MRL is as under:-

SHAREHOLDING OF MRL

1	Acquirers(Respondents No.3 to 6)	12.53%
2	Persons Deemed to be Acting in concert	3.68%
3	Modi Spinning & Weaving Mills Co.Ltd	2.66%
4	Modipon Ltd	4.53%
5	Financial Institutions/Insurance Companies	44.25%
6	Mutual Funds/Banks/FIIs/SFIs	6.85%

7	Public (other than 1 to 6)	25.50%
	TOTAL	100.00%

It is clear from the share holding pattern that public holds only 25.5 per cent shares in MRL whereas the present public offer has been made for acquiring 35 per cent shareholding of the company in addition to the existing shareholding of acquirers/ PDACs, that even assuming that the entire public offers their shareholdings to the acquirers, even then participation of the Appellant will not effect the purchase of their shares by the acquirers. SEBI has erroneously clubbed the shareholding of financial institutions and banks with the shareholding of the public. The ground of public interest is merely based upon an assumption that the acquirers will receive more shares than what they have offered to purchase in their public offer. However, this is merely a presumption and it is quite possible that the acquirers might get a lesser response not even aggregating to 35 per cent shareholding which the acquirer seek to purchase in the public offer. In any case, "public shareholding" has been defined in regulation 2 (1) (j) to mean shareholding in the hands of person(s) other than the acquirer and persons acting in concert with him, that since the Appellant is neither an acquirer nor a person acting in concert with him, its shareholding has to be included as public shareholding like shareholding of any shareholder of MRL.

It is a settled principle of interpretation that a statute must be read as it is and its provisions cannot be given a different meaning than what is provided for on the extraneous grounds such as "public interest". When there is no provision in the Regulations for exclusion of any shareholder from a public offer, it is not permissible to read into the Regulations any supposed prohibition for excluding the Appellant from the said public offer. Therefore, even of participation of the Appellant in the public offer results in proportionate reduction of shares held by public in the offer, even then such reduction cannot be a ground for excluding the Appellant from the public offer. SEBI misread the provisions of regulation 3(1) (e) (iii) and erred in holding that the availability of alternate "exit route" to relatives, promoters etc. without triggering public offer further justifies exclusion of persons belonging to the promoter group from the offer. The said regulation does not envisage any "exit route" as held in the impugned order. The said regulation neither prescribes a compulsory mode of transfer of shares amongst promoters nor does it provide an alternative to the public offer. The said regulation merely provides exemption from the formalities of a public offer in cases where there is an inter se transfer of shares amongst the promoters of a company. Such an exemption would be made use of only in cases where the promoters are agreeable for such inter se transfer. In the present case Sh. V.K. Modi and Sh. B.K. Modi had clearly stated during the hearing before the Chairman it is entirely their discretion whether they would purchase the shares held by the Appellant and also the price at which they will purchase the shares if offered under the terms of regulation 3. The Appellant thus cannot be compelled to sell its shares at the mercy of the acquirers as it has all the rights of a shareholder of MRL like any other shareholders . The provisions of regulation 3 are no justification for excluding the Appellant from the present public offer".

Shri Bookwala submitted that Respondent 7 in the wake of this Tribunal's order dated 31.7.2001 in appeal No.34 of 2001 had vide its letter dated 30.8.2001 addressed to SEBI pointed out that " the issues dealt with in the SAT order dated 31.7.2001 i.e. while Modipon Ltd is a promoter of MRL., it cannot be held that Modipon Limited is an acquirer or a person deemed to be acting in concert with the acquirers and therefore ineligible to participate in the offer, can be applicable in the case of MSWM". Even though they had requested SEBI to confirm that in view of the Tribunal's said order in the case of Modipon Ltd, SEBI order dated 16.7.2001 does not apply in case of the Appellant also and that 6,66,667 shares lodged by the Appellant on 23.7.2001 should be considered by them while considering the offer. SEBI did not respond to the same? Shri Bookwala read out the following portion from the letter dated 17.9.2001 from Respondent 7 to the Appellant :

"With reference to public announcement dated 17th September 2001 we inform you that:

The number of shares tendered by the shareholders exceeded the offer of 87, 64, 186 shares. Pursuant to regulation 21(6) of Securities and Exchange Board of India (Substantial Acquisition of shares and Takeovers) Regulations, 1997 , the acquisition of shares from shareholders is on a proportionate basis.

Accordingly, out of 6, 66, 667 shares tendered by you 1, 26, 007 shares will be despatched to you by 21st September 2001

Acquisition of 5, 40, 660 shares is subject to the decisions of the Securities Appellate

Tribunal (SAT) in Appeal No. 43 of 2001 and the Delhi High Court in Writ Petition No.4374 of 2001.

The 5, 40, 660 shares will continue to remain in our possession with Karvy Consultants Limited.

Consideration for 5, 40, 660 shares i.e. Rs.4, 86, 59, 400 (Rupees four crores eighty six lacs fifty nine thousand and four hundred) will be paid as per orders passed by SAT and the Delhi High Court."

Shri Bookwala also referred to the letter dated 21.9.2001 from Karvy Consultants to Respondent No.8 in the matter. It has been stated in the said letter that :

"Open offer to acquire upto 87,64,186 fully paid-up equity shares, 10/- each of Modi Rubber Limited(MRL) constituting 35% of the Equity share capital (and voting rights) of MRL by Mr. V.K.Modi, Dr.B.K.Modi, Mod Fashions and Securities Private Limited and Modikem Limited in concert with Witta International Inc. and Sidh International Limited in terms of the provisions of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and subsequent amendments thereto ("Takeover Regulations").

Further to letter dated 17th September, 2001 addressed to you by HSBC Securities and Capital Markets (India) Private Limited, Managers to the open offer, share certificate number (s) 360080 for 1,26,007 shares are enclosed, the acquisition of shares from shareholder being on a proportionate basis under Regulation 21(6) of the Takeover Regulations)"

Learned Representative of Respondent No.7 submitted that he has no objection in allowing the appeal. Learned Representative of Respondent No.8 supported the Appellant's case.

Learned Representative of SEBI submitted that he is adopting the argument of its Counsel in Appeal No.34 as recorded in the Tribunal's order dated 31.7.2001. Gist of the submission as recorded in the said order is as follows:

"Shri Kumar L Desai, learned Counsel appearing for SEBI submitted that the impugned order is a well reasoned one explaining the basis of arriving at the conclusion that the Appellant is not eligible to participate in the public offer. Shri Desai, particularly emphasised that the Appellant is a promoter of MRL for the reason that its name appeared as promoter of MRL in the offer documents, and in the declarations filed with stock exchanges and Financial Institutions, that the Appellant itself in its declaration submitted to MRL had admitted that it is a promoter, that there is an informal understanding with the present management of MRL not to vote against them in the resolutions. Learned Counsel submitted that once a person becomes a promoter, he will continue to be so till he walks out of the company, that the Appellant has not yet walked out of MRL. He pointed out that since the regulations specifically provide for the promoters to acquire shares in the event of a hostile takeover, in the absence of any such specific provision enabling the promoter to acquire shares in other cases, the presumption is that the promoter is not entitled to participate in the public offer. He stated that the Appellant is an acquirer, being a person deemed to be acting in concert with the acquirers in terms of regulation 2(2)(e))x) of the 1997 Regulations and on this count also the Appellant is ineligible to participate in the public offer. Shri Desai further stated that the Appellant's holding in MRL is around 4.5% and in case the Appellant is allowed to participate, to that extent the public participation would be reduced and that will go against the interest of the public shareholders. He urged that the impugned order is in the interests of the public shareholders of MRL and as such the same deserve to be upheld".

I have very carefully considered the submissions made by the learned Counsel / Representatives of the parties. The scope of the present appeal is rather limited, as it is required only to decide the legality and validity of the order dated 16.7.2001 made by SEBI.

It is seen from the evidence on record that the Appellant had approached the Board for Industrial & Financial Reconstruction (BIFR) in 1989 for being declared as sick company and for rehabilitation. A Rehabilitation Scheme has been sanctioned by BIFR. Under the said scheme the Appellant is being run under an independent Board which has an independent Chairman and four representatives of Modi Group (two representatives of each one of the two groups) and six nominee Directors of banks, financial

institutions and BIFR. Accordingly the majority of the Board of Directors of the Appellant are representatives of the Banks / FIs and BIFR. The Board of Directors of the Appellant is thus independent of Modi Group A and B. There is also an independent management committee headed by the Chairman of the Appellant with two nominee directors of FIs/Banks and special director of BIFR as also a representative each from Group A and B of Modis. Thus it is clear that the Appellant is not a part of the Modi Group at present.

The issues involved in the present appeal are substantially identical to the issues raised in the appeal No.34 of 2001 filed by Modipon Ltd, another company, which was also disqualified from participating in the public offer made to the shareholders of MRL on the ground that it is a promoter of MRL and deemed to be acting in concert with the acquirers. The factual and legal positions are substantially identical in both the appeals. The Tribunal vide its order dated 31.7.2001 had discussed the legal position in the said appeal as under:

> "Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997 made under the SEBI Act,is the governing regime for take overs. The Regulation was framed basically taking into consideration the recommendations of a committee chaired by Justice P.N.Bhagvati. It is necessary to go behind the regulatory requirements to discover their raison de etre and the fundamental principles on which these regulations are predicated. The Committee's report is helpful in this regard. Therefore before we go into the scope of certain specific regulations applicable to the issues raised in the appeal it is considered necessary to note the basic principles underlying the Regulations, as stated in the committee's report. The cardinal principle of the Regulation is to provide equality of opportunity to all shareholders, protection of minority interests, transparency and fairness. It has been observed in the report that:
>
> > "Committee also recognised that the process of take overs is complex and is inter-related to the dynamics of the market place. It would therefore be impracticable to devise regulations in such detail as to cover the entire range of situations which could arise in the process of substantial acquisition of shares and takeovers. Instead there should be a set of General Principles which should guide the interpretation and operation of the Regulations, especially in circumstances which are not explicitly covered by the Regulations.These principles are:
> >
> > > Equality of treatment and opportunity to all shareholders
> > > Protection of interests of share holders
> > > ……..
> > >
> > > …….
> >
> > In the event of any ambiguity or doubt as to the interpretation of the regulations, the concerned authority shall pay adequate attention to and be guided by any one or more of the aforesaid general principles having a bearing on the matter"(emphasis supplied)

In the instant case the present management proposes to consolidate its holdings in MRL. Since the proposed acquisition is to the extent of 35% of the paid up capital, compliance of regulation 11(1) was necessitated. According to the said regulation 11(1):

> " No acquirer who, together with persons acting in concert with him has acquired, in accordance with the provisions of law 15% or more but less than 75% of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, in any period of 12 months, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations (emphasis supplied)".

In terms of the requirements of regulation 18(1) within 14 days from the date of public announcement the acquirer through its merchant banker is required to file with SEBI a draft of the letter of offer and the letter of offer is required to be despatched to the shareholders not earlier than 21 days from its submission, by incorporating the suggestions, if any, made therein by SEBI within the said 21 days. It is in this context SEBI directed the acquirers to incorporate a statement in the offer document that Modipon Ltd. being a part of the promoter group of MRL and being a person deemed to be acting in concert with the acquirers is not eligible to participate in the instant open offer. In the light of the said observation it is necessary to find out (i)whether the Appellant is a part of the promoter group (ii) and a person deemed to be acting in concert with the acquirers (iii) and whether the Appellant is ineligible to participate in the

instant open offer.

The expression promoter has been defined in regulation 2(1)(h) as under:

"Promoter" means:

(1) (i) the person or persons who are in control of the company, or

(ii) person or persons named in any offer document as promoters;

(2) a relative of the promoter within the meaning of section 6 of the Companies act, 1956 (1 of 1956); and

(3) in case of a corporate body,

(i) a subsidiary or holding company of that body, or

(ii) any company in which the 'Promoter' holds 10% or more of the equity capital or which holds 10% or more of the equity capital of the Promoter, or

(iii) any corporate body in which a group of individuals or corporate bodies or combinations thereof who hold 20% or more of the equity capital in that company also hold 20% or more of the equity capital of the 'Promoter'; and

(4) in case of an individual,

(i) any company in which 10% or more of the share capital is held by the 'Promoter' or a relative of the 'Promoter' or a firm or Hindu Undivided family in which the 'Promoter; or his relative is a partner or co-parcener or a combination thereof,

(ii) any company in which a company specified in (i) above, holds 10% or more of the share capital, or

(iii) any HUF or firm in which the aggregate share of the Promoter and his relatives is equal to or more than 10% of the total."

In this context it is necessary to see as to whether in the light of the facts stated in the impugned order and the rebuttal of the same by the learned Senior Counsel, the Appellant can be considered as a promoter. The factual position that the Appellant has been shown as a promoter in the offer document issued by MRL in February, 1992 and that in several declarations filed with the stock exchanges and the financial institutions the Appellant was shown as a promoter company remains unrebutted, though the authenticity of such declaration has been now questioned by the Appellant. Even if we are to believe the Appellant's version that such disclosures were made by MRL without the knowledge or approval of the Appellant, the Appellant cannot disown the declaration filed by itself showing it as a promoter of MRL, on the ground that the corporate office had done so without verifying the factual position and without application of mind. Chairman, SEBI, in his order has stated that the Appellant itself had filed such declaration to MRL as recently as on 3.4.2001. These declarations are statutory declarations and cannot be brushed aside as routine, trivial or insignificant. In view of the factual admission that it is a promoter group company and having stated so in a self declaration and also disclosures of such status made in the offer documents , etc, it cannot be said that the Appellant is not a promoter of MRL, even if it is to be assumed that it has ceased to be a person in control of MRL, in terms of the agreement arrived at vide MOU dated 24.1.1989.Therefore SEBI's finding stated in the impugned order that the Appellant is a promoter of MRL survives.

Now let us examine as to whether the Appellant can be considered as a person deemed to be acting in concert with the acquirers . As the expression is linked to acquirer it is necessary to know first as to who is an acquirer. According to Regulation 2(1)(b) :

"acquirer means any person who, directly or indirectly, acquirers 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".

This definition leads us to identify as to who is considered as a person acting in concert with the acquirer.

Answer to this search is available in regulation 2(1)(e) which states that a 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 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 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% of the paid up capital of that company or with any other investment company in which such person or his associates holds not less than 2%of the paid up capital of the latter company.

Note: For the purposes 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.

The submission that the Appellant is an investment company referred to in clause (x) above for the reason that it holds investment valued at Rs.8 crores against a paid up capital of Rs.9 crores of the company is not tenable. On a perusal of the Appellant’s balance sheet and profit and loss account, it is clear that the company’s main business is manufacturing and the value of total fixed assets of the Appellant is very large. An investment company normally will not be having substantial fixed assets, as the business requires liquid funds and not stagnant assets. An investment company is normally identified as one whose principal business is the acquisition of shares, stocks debentures , or stocks. The conclusion that the Appellant is an investment company is erroneous.

It could be seen that in terms of regulation 2(1)(e)(i) persons acting in concert comprises persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target 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. In the present case it is no ones case that the Appellant is in any manner interested or involved in the acquisition of shares or voting rights or in gaining control over MRL.

Shri Doctor had stated that since the provisions of regulation 2(1)(e)(2) defining person acting in concert being a deeming provision, must be read in conjunction of regulation 2(1)(e)(i)which states that persons acting in concert comprises of 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 company or control over the target company. A fortiori , persons who are deemed to be acting in concert must together have some intention or interest in the acquisition of shares of target company. A seller of shares of the target company cannot therefore be a person acting or deemed to be acting in concert with the acquirer for acquisition of shares . In the present case the Appellant's concern is not to acquire the shares but to sell its existing share holding in MRL in pursuance of the public offer. The legal position stated by Shri Doctor is correct. It is absurd to hold that the seller of shares also can be considered as a person acting in concert with the acquirers, whose sole aim is to acquire shares.

In the light of the legal position explained above and in the light of the facts it is difficult to subscribe to the view that the Appellant is a person deemed to be acting in concert with the acquirers. The answer to the question as to whether the Appellant is a person deemed to be acting in concert is important as the regulation prohibits acquisition of shares held by acquirers and persons acting in concert with them. In the event of substantial acquisition and or takeovers, the requirement is to offer to the public shareholders to purchase the shares held by them. What comprises public shareholding? In terms of the definition at 2 (1)(j) "public shareholding" means share holding in the hands of person(s) other than the acquirers and persons acting in concert with them. In this context it is to be remembered that in terms of regulation 11 (1) referred to above, which is applicable to the present acquisition, in the process of consolidation of holdings by an acquirer., if the acquisition exceeds the prescribed 5% mark, the acquirer is required to make a public announcement to acquire shares from the public. "The public" referred to in the regulation includes all the shareholders of the target company on the specified date, to the exclusion of the acquirer and the person acting in concert with the acquirer;

It may be noted that the promoter as such need not be an acquirer automatically . Any person, and share holder including the promoter will become an acquirer or a person acting in concert with the acquirer only if he falls within the definition of these expressions provided in regulation 2(b) and 2(e). It is the conduct of the party that decides the identity. A dormant promoter or a promoter simpliciter who neither acquires or agrees to acquire shares or voting rights or control over the target company is not an acquirer and his share holding in the target company cannot be considered as the share holding of the acquirer warranting exclusion from the public shareholding. Similarly if the characteristics of a person acting in concert stated in the definition are found missing in the case of a person, it may not be proper to consider him as a person acting in concert with the acquirer.

The argument putforth by the learned Senior Counsel for the Appellant that the requirements of regulation 11(1) are not applicable to a promoter is not correct. On a perusal of the said regulation it could be seen that the regulation requires the acquirer or person acting in concert with him to make an offer to the public to purchase their shares as required under the regulation. The expressions 'acquirer' and the 'person acting in concert with the acquirer' have been defined in the regulation. There is no hard and fast rule that a promoter can never be an acquirer or person acting in concert. If a promoter acquires or agrees to acquire shares or voting rights or gains control over the target company he can be safely considered as an acquirer who in turn would be subject to the provisions of regulation 11. Likewise a promoter can be a person acting in concert provided he is found to cover within the scope of the definition under regulation 2(1)(e). Whether a promoter is also an acquirer or person acting in concert would depend on the facts of each case. It is to be noted that there is no blanket prohibition on the promoters acquiring shares etc. in the company. In fact regulation 11 impliedly recognises the promoters' right to acquire further shares. However, in the instant case it is clear that the Appellant, even though could be considered as a promoter, cannot be considered as an acquirer or person acting in concert with the acquirer for the simple reason that the Appellant is not making any acquisition of shares but is selling its existing shareholding. A person, who is selling his shareholding cannot be considered as an acquirer by any standard.

Now, having come to the conclusion that in terms of the Regulation the Appellant is a promoter of MRL but not an acquirer or a person deemed to be acting in concert with the acquirer, the next question required to be considered is the sustainability of the impugned order holding Appellant ineligible to participate in the public offer. I do not find any provision in the Regulation disabling a promoter simpliciter participating in a public offer. In this context it is relevant to note that even regulation 2(1)(j) does not keep out the share holding of a promoter simpliciter from the ambit of the "public shareholding". SEBI's finding in this regard reflected in paras 8.9 and 8.10 is considered relevant to the question under consideration. In para 8.9 it has been stated:

> "8.9 - I find that the present offer has been made by the acquirer under Regulation 11(1) for consolidating the further holding of the promoter-group beyond the creeping limit. It is not the case of an hostile takeover. It is a case of an existing management or promoter group further consolidating its stake.
>
> I find that the above provision was brought in the 1997 Regulations so that in a competitive environment, it may enable the person (s) in control and or promoters of the company to consolidate their holding either suo moto or in the event of building defences against take over threats. Thus, when an offer is made by existing promoters to further consolidate its holding, it is obvious that the persons belonging to the promoter group cannot participate in the public offer. Otherwise, there will be no meaning of consolidation by persons in control or promoter-group . If the persons belonging to the promoter group are allowed to participate in the public offer made by the promoters to consolidate their holding, the same will not be in consonance with Regulation 11, which was enacted to provide for consolidation of holdings by existing promoters or persons in control or persons holding more than 15%."

What is stated in the above para as a general proposition is flawless. But it cannot have a universal application as the facts and circumstances of all the cases need not be common. The facts and circumstances specific to certain cases may not support application of the said general proposition to those cases. In this context one has to go by Justice Bhagawati Committee's views (supra) that the circumstances which are not explicitly covered by the regulation should be dealt with following the general principles, such as equality of treatment and opportunity to all shareholders and protection of interests of shareholders.

The instant case is somewhat peculiar. The present management is planning to consolidate its holdings in the company. Acquisition price is attractive. It is to be noted that there are disputes and resultant litigations between the two promoter groups. In such a scenario while one group which is managing the company, is enhancing its holding in the company to their benefit, to what extent it is reasonable not to allow the other group to avail of the opportunity to exit from the company by participating in the public offer made by the management. The regulations are devised to protect the interest of all the shareholders. It should not be interpreted in a way as would suppress the interests of any shareholders. It will be improper to interpret the regulations which is not in tune with its proclaimed objective.

The argument that since the regulation specifically provides for promoter participation in the case of a hostile takeover, absence of such specific provision in regulation 11 implies prohibition on promoter participation in a public offer is not correct. As the learned Senior Counsel for the Appellant submitted, it would be improper to read into the regulation a condition that would be adverse to the interest of the shareholders and also contrary to the objectives of the regulation. It is difficult to agree with the view expressed in para 8.9 of the order extracted above that allowing the Appellant, in the light of the facts peculiar to its case, to participate in the public offer will not be in consonance with regulation 11. It is to be noted that proposed acquisition of 35% from the public is to consolidate the management's holding in MRL and the Appellant is not a part of the said management. It is not a case of acquisition of shares by promoter group as a whole. Only Group 'B' is involved. In my view, not allowing the Appellant belonging to Group 'A' to participate in the public offer and thereby denying exit from MRL managed by Group 'B', would be against the cardinal principle under lying the take over regulations. The argument that since a promoter can exit in terms of regulation 3(1)(e)(iii) he should not be allowed to participate in the public offer is baseless. There is nothing like that in the regulations. Regulation 3(1)(e)(iii) is an exemption provision from procedures and not a beneficial substantive provision as provided in regulation 11. Further the provisions of regulation 3(1)(e)(iii) is contractual in nature and subject to certain other conditions. It is not a substitute or an alternative to participate in the public offer providing certain attendant benefits to the shareholders.

In para 8.10 of the impugned order it has been further stated as under:

> "8.10: I find that under Reg. 21(1) of the Regulations, an acquirer has to make a minimum public offer of 20%. Further, in terms of regulation 21(6) if the number of shares offered for sale by the shareholders are more than the shares agreed to be acquired by the person making the offer, such person shall accept the offers received from the shareholders on a proportional basis in consultation with merchant bankers taking care to ensure that basis of acceptance is decided in a fair and equitable manner and does not result in non marketable lot. If persons belonging to promoter group are allowed to participate in a public offer made by a promoter group to consolidate their existing holding, the same will be detrimental to the interest of the public shareholders and proportion of shares held by public being accepted in the offer would be reduced to the extent of shares offered by the promoters".

It appears that the above observation is made without fully appreciating as to what constitutes "public shareholding". As already stated, in the light of the conclusion that the Appellant is neither an acquirer by itself nor a person acting/deemed to be acting in concert, the shares held by it should be considered as public shareholding. The argument that allowing the Appellant holding 4.5% capital in MRL to participate in the public offer will be detrimental to the interests of the public shareholders as proportion of shares held by public being accepted in the offer would be reduced to the extent of shares offered by the Appellant, does not hold good to debar the Appellant for the reason that the law does not prohibit a promoter simpliciter participating in the public offer. It may not be forgotten that a promoter simpliciter is also a shareholder and he also should be treated fairly and in a non discriminatory manner vis-à-vis other shareholders. Any reduction on a pro-rata basis in the quantum held by others in the public offer, as a result of the Appellant's participation should not be a ground to deny the legitimate claim of the Appellant in its capacity as a shareholder, to participate in the offer. Such a denial would be against the general principles of "equality of treatment and opportunity to all the shareholders and protection of interests of shareholders" propounded by Justice Bhagwati Committee. Since the regulations do not prohibit the participation, the regulator cannot on its own deny the Appellant its right of participation in the public offer on extraneous grounds.

Yet another argument putforth against the Appellant is that its participation would adversely affect the interests of the small investors. First of all, the Regulations do not recognise small shareholder and large investors differently and no different treatment is provided to the small investor in particular. Regulation is meant to protect the interest of all the shareholders irrespective of the size of their holding. In this context it is to be noted that the Financial Institutions / Insurance Companies hold about 44.25% in the capital of MRL. Can one legally object to their participation in the public offer on the ground that since they are large investors their participation in the public offer would be against the interest of the small investors and therefore they should not be allowed to participate so as to protect the interests of small investors? Obviously one cannot.

The reasons put forth in the order justifying exclusion of the Appellant from the public offer are found legally unsound and untenable.

For the reasons stated above, though SEBI's finding that the Appellant is a promoter of MRL is tenable it cannot be held that the Appellant is an acquirer or a person acting or deemed to be acting in concert with the acquirers and thereby ineligible to participate in the public offer. I am of the view that there is no legal backing flowing from the Act, or the Regulations to uphold SEBI's decision holding the Appellant ineligible to participate in the public offer made vide letter dated May 30,2001."

I do not see any reason to take a different view in the present appeal in the light of the comparable factual and legal position in both these appeals. It is felt that if SEBI had promptly and properly responded to the letter of Respondent No.8 dated 30.8.2001, perhaps there would not have been any need to file the present appeal.

For the reasons stated above the appeal is allowed and the SEBI's direction in the impugned order that the Appellant shall not be eligible to participate in the public offer made by the acquirers vide letter dated 30.5.2001 is set aside.

(C.ACHUTHAN)
PRESIDING OFFICER

Place:Mumbai
Date: November 9, 2001