BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO. 12/2001

In the matter of:

Mr.Naagraj Ganeshmal Jain
Ms B.N.Jain
Mr.H.N.Jain
Mr.J.N.Jain
Mr.B.P.Khanaa
Mr.S.R.Hegde
M/s.Priyamvada Leasing & Finance Pvt.Ltd
M/s. Vinsur Corporate Services Pvt.Ltd
M/s.Clast Finance & Leasing Pvt.Ltd
M/s.Kingfisher Overseas Pvt.Ltd
M/s.Ranger Investment & Leasing Pvt.Ltd
Ms R.N.Jain **Appellants**

Vs.

Shri P. Sri Sai Ram
Adjudicating Officer
Securities & Exchange Board of India **Respondent**

APPEARANCE:

Shri P.G.Kinikar
Authorised Representative **for Appellants**

Mr. Ananta Barua
Division Chief, SEBI

Mr. KRCV Seshachalam
Asstt. Legal Adviser, SEBI **for Respondent**

(Appeal arising out of the adjudication order dated 28.2.2001 made by Shri P.Sri Sai Ram, Adjudicating Officer, Securities and Exchange Board of India)

ORDER

This appeal is directed against the order dated 28.2.2001 made by the Adjudicating Officer appointed by the Securities and Exchange Board of India (SEBI). By the said order the Adjudicating Officer had imposed monetary penalty of one lakh and twenty five thousand rupees on the Appellants on the ground that they had failed to comply with the requirements of the provisions of regulations 3(4) and 3(5) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the Regulations), read with section 15A(a) of the Securities and Exchange Board of India Act, 1992 (the Act)

The Appellants are the promoters of M/s. Canaan International Infotech Ltd (formerly known as Canaan International Credicap Ltd) (the company). They were holding 52.95% of the equity capital of the company. On 15th September 1997, they were allotted 20 lakhs equity shares (18.82%) on preferential basis. As a result of the said allotment promoters' holding in the company's capital increased to 71.77%. The company's shares are listed on stock exchanges at Hyderabad, Chennai and Mumbai. In the context of the said preferential allotment and consequential rise in the promoter holding in the company's capital, SEBI appointed an Adjudicating Officer to enquire into the alleged contravention of section 15A of the Act read with regulations 3(3), 3(4) and 3(5) of the Regulations and adjudge monetary penalty, if so considered necessary. The Adjudicating Officer, after enquiry, viewed that though the

requirements of regulation 3(3) have been substantially complied with, the Appellants had failed to comply with the requirements of the provisions of regulations 3(4) and 3(5) and imposed a sum of Rs.1, 25, 000/- as monetary penalty.

Shri Prabhakar Govind Kinikar, authorised representative of the Appellants explained briefly the background of the case and stated that the Regulations are not applicable to the case and as such imposition of monetary penalty was untenable. According to Shri Kinikar, the Appellants are the promoters of the company. Their share holding prior to the preferential allotment on 15.9.1997 accounted for 52.95% of the company's paid up capital and as a result of the preferential allotment, their holding increased to 71.77%. According to the learned representative, preferential allotment of 20 lakhs shares of Rs.l0 each was made to the Appellants in their capacity as promoters to infuse funds to meet the fund requirements of the company in its business activities, that it was not a case of substantial acquisition of shares or take over of control, so as to attract the Regulations.

Referring to the definition of the expressions "acquirer", "target company" and "person acting in concert", provided in the Regulations, Shri Kinikar stated that they are inter related that the definition of "acquirer" also refers to the concept of the 'target company' and 'person acting in concert'. According to him to fall within the definition of "acquirer" as also "person acting in concert", the person must act for the common objective or purpose and that common objective or purpose must be of "substantial acquisition of shares or voting rights or gaining control over the target company, that target company means a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired. According to the learned representative the Appellants are neither acquirers nor persons acting in concert but promoters, and the objective or purpose of the acquisition was infusion of funds for the felt need of the company, that the company was already under the management and control of the Appellants with 52.95% of the equity capital in their hands on 15.9.1997.

Countering the Adjudicating Officer's observation that in the instant case the promoters are also the acquirers, Shri Kinikar stated that the very fact that the expressions 'acquirer' and 'promoter' have been separately defined in the Regulations, would show that the two concepts are exclusive of each other, that the same person cannot be an acquirer and promoter at the same time; either he is an acquirer aspiring for control of the target company or a promoter already in control. According to Shri Kinikar whether the person is an acquirer or promoter at any given point of time, is a question of facts and circumstances of each case. Learned representative submitted that an acquirer ceases to be so, on his acquiring control over the company and on acquiring control he assumes the status of a promoter and acquisition of shares by such a promoter is not subject to the provisions of regulations 10, 11 and 12.

With reference to the Respondent's observation that the intention of acquisition does not have any relevance to the act of acquisition per se, Shri Kinikar submitted that the Regulations need be interpreted taking into consideration the objective proposed to be achieved by it. In this context he referred to the following observations in Justice Bhagwati Committee report (para 2.22):

> "Person acting in concert" have particular relevance to public offers, for often an acquirer can acquire shares or voting rights in a company " in concert" with any other person in a manner that the acquisitions made by him remain below the threshold limit, though taken together with the voting rights of persons in concert, the threshold may well be exceeded. It is therefore, important to define 'persons acting in concert'.
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> To be acting in concert with an acquirer, persons must fulfill certain "bright line" tests. They must have commonality of objectives and a community of interests which could be acquisition of shares or voting rights beyond the threshold limit, or gaining control over the company and their act of acquiring the shares or voting rights in a company must serve this common objective. Implicit in the concerted action of these persons must be an element of cooperation. And as has been observed, this cooperation could be extended in several ways, directly or indirectly, or through an agreement - formal or informal."

According to the learned representative, the Adjudicating Officer erred in holding that a person can be an acquirer, in two different situations – (1) on acquisition of shares or voting rights in the target company and (2) on acquiring control over the target company. According to him purchasing shares by itself does not make the purchaser an acquirer, that the purchase/acquisition of shares must be in a target company for gaining control. According to Shri Kinikar, a promoter and acquirer can acquire shares in the Target Company, but the objective of acquirer is gaining control, which cannot be the objective of the promoter as he is already in control of the company. A promoter, as in the instant case, who is in full command and control of the target company, can also acquire shares/voting rights in the target company and still remain as promoter without being an acquirer. Referring to the definition of the target company, Shri Kinikar stated that what the definition contemplates is that there could be either a target company of which control is "acquired" or one in which control is being acquired', that the same company cannot be the subject matter of both "being acquired" and 'acquired' at the same time. According to Shri Kinikar, going by the Adjudicating

Officer's version that in the instant case the second situation is not applicable as the promoters are already having control, for the same reason the first situation also is not applicable to the Appellants as any question of acquiring shares or voting rights in the target company for gaining control therein by them does not arise in view of the position already held by them. In this context in support, he cited the observation of Justice Bhagwati Committee report that "not only acquisition of shares but also voting rights in a company or control over a company, however such control be exercised - directly or indirectly - must be covered under the regulations and the present definition of "acquirer" expanded to include these situations". Shri Kinikar stated that the Adjudicating Officer has not addressed the issues raised by the Appellants, as quoted in paras 6.2 and 6.21 in the order, and the finding is deficient in this regard.

Shri Kinikar's another submission is that regulations 11(2), 3(4) and 3(5) are applicable to acquirers and not to promoters, that the Adjudicating Officer has failed to put forward any reasons justifying his finding that the instant acquisition attracted the provisions of regulation 11(2). Shri Kinikar submitted that the said regulations have to take into account (i) the acquisition of shares/voting rights (ii) the existing entitlement and (iii) the threshold, that it is the way the provisions of the regulations are structured that makes the difference as to whether or not the regulations would be applicable to the cases of existing entitlement exceeding the threshold limit. Regulations 3(4), 10 and 11(2) (prior to amendment) are similarly structured and designed on the same pattern except for variance in the threshold limits. Referring to these regulations he submitted that these regulations as stood on 15.9.1997 were applicable to situations where the threshold is crossed by the acquisitions and that if there is no crossing of the threshold, because of the acquisition, these regulations do not apply to such acquisitions. According to the learned representative, the word "entitled" used in these regulations is of considerable significance, that the dictionary meaning of the word entitlement is to give a person a right or legal title to; in other words, that which would enable a person to qualify for. When a person, already possesses the qualification to which one is entitled to, regulation 11(2) would not be applicable. According to him if the acquirer is already holding more than 51% shares, he is already entitled to exercise more than 51% of the voting rights and he cannot acquire the same legal rights again on further acquisition, that the benchmark can be crossed only once and not repeatedly. Any acquisition which does not result in crossing the threshold would, therefore, logically be beyond the purview of the Regulations. In this context he referred to the 1998 amendment to the regulations and explained the drastic changes brought thereunder and stated that the instant acquisition covered under the pre-amended Regulation, that the expression 'entitle' was deleted from regulation 11(2) by the amendment effected in 1998. Shri Kinikar citing the finding of the Adjudicating Officer that regulation 10 is not applicable to the Appellants stated that, by the same logic regulation 11(2) also would not be applicable as the Appellants held 52.95% shares/voting rights in the company prior to the instant acquisition. He submitted that but for the difference in the stipulated percentage, regulation 10 and 11(2) are identical. He argued against the Adjudicating Officers reliance on the expression "more" used in regulation 11(2), stating that the words "more than" in the regulation are not used in the context of the threshold stipulated in the regulation. Shri Kinikar submitted that the use of the word "which" makes the regulation acquisition oriented, that it is applicable to acquisition and the acquisition together with the existing holding must entitle the acquirer to exercise more than 51% of the voting rights. According to the learned representative in order to make the regulation 11(2) applicable, in the first instance there has to be acquisition, the acquisition together with the entitlement has to cross the threshold of 51%, that in the instant case, the said 51% bench mark had crossed before 15.9.1997. He submitted that as a result of further acquisition of 18.82% shares on 15.9.97 the Appellants have not become entitled to voting rights "more than 51%" as the acquisition of 18.82% has resulted only in augmenting the existing voting rights from 52.95% (i.e. more than 51%) to 71.77%, that the status of "holding more than 51%" can come only once, when the threshold of 51% is crossed for the first time. According to the learned representative in a case if the existing entitlement is "more than 51%", further acquisitions will not attract regulation 11(2) as in such a situation any acquisition together with the existing entitlement would not be in a position to cross the threshold of 51%, that this being the position in law, because of the word "more" in regulation 11(2) it cannot be constructed that the regulation 11(2) become applicable to existing entitlement of voting rights of more than 51%. Shri Kinikar submitted that interpretation of regulation 11(2) made by the Adjudicating Officer is far fetched, that it is relatable to the new regulation brought into effect in 1998 and that the said new regulation cannot be effected retrospectively.

Learned representative submitted that provisions of regulation 3 are applicable only to the acquisitions attracting the provisions of regulations 10, 11 and 12, that none of these regulations is attracted in the instant case. However, as an alternative submission he stated that the obligation to submit report under regulation 3(4) is on the acquirer, that the Appellants are neither acquirers nor persons acting in concert with the acquirers; they are only promoters. Referring to the concept of persons acting in concert, the learned representative stated that the main components of the definition on the basis of the most natural grammatical construction, are - (i) persons who (ii) for a common objective or purpose of (iii) substantial acquisition of shares or voting rights or gaining control over the target company (iv) pursuant to an agreement or undertaking (formal or informal) directly or indirectly (v) co-operate by acquiring or agreeing to acquire (vi) shares or voting rights in the target company or gaining control over the target company. He submitted that the common objective or purpose referred to in the definition should be common amongst all the persons acting in concert with the acquirer. The word ‘common’ is the common adjective for both the words viz. ‘objective’ and ‘purpose’ and ‘objective’ means something sought or aimed at and ‘purpose’ means an object to be attained, that as per the Allahabad High Court in Sridhar Misra v. Jaichandra (AIR 1959, All 498) purpose and object are synonymous words. Shri Kinikar stated that the Adjudicating Officer has truncated the regulation and interpreted the

same ignoring its very purpose to reach at a pre-meditated conclusion. In this context he also cited the Supreme Court decision in Raja Satyendra Narayan Singh v. State of Bihar (AIR 1987 SC 1390) to emphasise the need for giving plain meaning to the statutory provisions while interpreting the same. According to the learned representative, no person is a person acting in concert, bereft of the common objective or purpose as stipulated in the regulation. He submitted that in the instant case, the purpose of acquiring shares was to infuse funds, which purpose is not stipulated in the definition of "person acting in concert", that none of the Appellants, therefore, can be considered as person acting in concert and their collective shareholding cannot be accounted for the purpose. He further submitted that since none of them has acquired 10% or more shares or voting rights individually, the provisions of regulation 3(4) are not attracted as the same applies only to acquisition which taken together with shares or voting rights, if any held by the acquirer or person acting in concert with him would entitle the acquirer to exercise 10% or more of the voting rights in a company. In the absence of specific provisions with regard to the applicability of regulation 3(4) to an acquirer already holding more than 10% of the shares/voting rights, regulations 3(4) and 10 do not cover any acquisition by an acquirer who prior to the acquisition held more than 10% of the shares/voting rights of the target company. According to Shri Kinikar regulation 3(4) does not therefore apply to the instant acquisition since the acquirer held more than 10% of the shares/voting rights in the company prior to 15.9.1997. Since regulation 3(4) is not attracted regulation 3(5) is also not attracted.

Shri Kinikar submitted that compliance of the regulations had the approval of the Respondent with reference to listing of the shares of the company on the Hyderabad Stock Exchange in 1998 and as such the present adjudication and imposition of penalty are not called for. He pointed out that SEBI had issued a Show Cause Notice (SCN) on 13.7.1999. In response to the said SCN written submissions were made. Oral submissions were also made before the Chairman, SEBI on 20.6.2000. Chairman did not issue any order therein. But another SCN was issued in August, 2000 by the Adjudicating Officer making inter alia the same allegations covered in the SCN dated 13.7.1999. The Appellants responded to the same also. The Adjudicating Officer has now made an order levying monetary penalty, without meeting the Appellants' contentions. According to the learned representative the order lacks logical and convincing reasons. Shri Kinikar stated that the Appellants' request to grant a personal hearing before concluding the enquiry, made in their letter dated 8.11.2000, was not granted in defiance of the rules of the natural justice. Shri Kinikar submitted that infact the instant acquisition was beneficial to the shareholders as it resulted in gain to them, particularly the minority shareholders and loss to the promoters and this aspect has been ignored by the Adjudicating Officer. Shri Kinikar further submitted that the Adjudicating Officer has not considered the Appellants' submission that they had not done anything illegal warranting imposition of penalty and the order has been made ignoring the well established principle of sentencing policy that any offence must be punished after taking into consideration all attendant circumstances and also the motive and magnitude of the offence. In this context he cited Supreme Court decision in Adamji Umar v State of Bombay (AIR 1952 SC 14) and Modi Ram v State of MP (AIR 1972 SC 2493).

Shri Ananta Barua, representing the Respondent, in his attempt to defend the impugned order, made the following submissions. Since the Appellants acquired 18.82% equity, over and above their holding of 52.95% in a preferential allotment made on 15.9.1997, they were required to submit a report to SEBI within 21 days from the date of such acquisition under regulation 3 (4) alongwith the fee prescribed in regulation 3 (5), that having failed to do so, the penal provisions contained in section 15A of the Act, are applicable to them. Shri Barua explained the requirements of regulations 3(3), 3(4) and 3(5). He submitted that the regulation 10 requires any acquirer who acquires shares or voting rights which entitles him to exercise more than 10% (as it was then) of voting rights in the target company to make a public announcement, unless the acquisition passes through any one or more of the categories exempted vide regulation 3. Regulation 11(2) requires the acquirer to make a public offer when such acquisition entitle him to exercise more than 51% of the voting rights in a company. Here again, the acquirer enjoys exemption under regulation 3 provided the acquisition falls in any one of the categories mentioned therein. Acquisition of shares in a preferential allotment is one of such exempted categories, provided the conditions stipulated for availing such exemption are fulfilled. Shri Barua submitted that the appeal is based on the mistaken premises that in view of the Appellants holding 52.95% of the capital of the company and the Appellants being the company's promoters the mandatory requirements of the regulations requiring reporting to the authorities would not be applicable to them. He refuted the contention that the company is not a target company, on the ground that the subject matter of the acquisition was the equity shares of the company.

Shri Barua submitted that notwithstanding the contention of the Appellants that they are promoters of the company, they are acquirers as they had acquired shares. They had admittedly crossed the threshold limit of 51% laid down under regulation 11(2) and upon acquisition of 18.82% equity of the company on 15.9.1997, they increased their total holding in the company's capital to 71.77%. Shri Barua further stated that the spirit of the regulatory requirement is to ensure that even in case of preferential allotment of shares the shareholder having a significant stake in the target company shall not be allowed to acquire further shares of the said company without making necessary disclosures and reporting to the concerned stock exchange and the SEBI. According to Shri Barua, the Appellants' contention that they being the promoters of the company and holders of shares accounting for more than 51% threshold limit stipulated in regulation 11(2), and as such there was no question of their making a public announcement on account of

crossing the threshold limit specified therein has no basis in view of the fact that the regulations do not distinguish between a promoter and an acquirer per se, that any person who acquires shares/voting rights or control of another company would be an acquirer. In this context he cited the definition of the expression 'acquirer' in regulation 2(1)(a) and stated that it is an inclusive definition and does not exclude promoters from its purview. Shri Barua stated that though promoter and acquirer are two distinct entities under the definitions, the two terms are mutually exclusive to the extent, that it is possible that a promoter can also be an acquirer. He further submitted that the act of acquisition of shares or control of the Target Company or entering into an agreement for the purpose would be the sole criterion for identifying the acquirer, that a promoter could also be deemed to be an acquirer in the event of acquiring shares or voting rights or control of a company in excess of the specified limits by him. He submitted that objective or intention of acquisition does not have any relevance and what matters is the act of the acquisition. Therefore the Appellants' contention that it was not their intention to acquire the shares as an investing proposition and ultimately to gain control, but to infuse funds in the company, cannot be a ground to take them out of the scope of regulation11(2). Shri Barua submitted that regulation 11(2) brings within its ambit any further acquisition by an acquirer who holds 51% or more of the voting rights in the target company and therefore acquisition of 18.82% shares in addition to the 52.95% already held by the Appellants would attract regulation 11(2).

With reference to the Appellants' contention that none of them is a person acting in concern, Shri Barua re-iterated his version that the intention of acquisition does not have any relevance to the act of the acquisition, the contention that the purpose of infusion of funds has not been stipulated in the definition of persons acting in concert does not in any way mitigate the Appellant s action of collectively acquiring 18.82%in the company, beyond the threshold limit. According to Shri Barua, the concept of common objective referred to in the definition is exhaustive and the objective need not necessarily be limited only to substantial acquisition of shares or control of the target company that any common objective would do, such as the objective of providing funds to the company. Shri Barua further submitted that the Appellants contention that regulations 3(4) and 3(5) are not applicable to them as they held 10% shares even prior to the said acquisition and regulation 3(4) is only applicable when the acquirer crosses the threshold of 10% for the first time is not tenable as regulation 3 lays down the instances of acquisition which would not attract the provisions of regulation 10, 11 and 12 despite crossing the threshold limits stipulated under those regulations, that where exemption is available the benchmark figure of 10% in regulation 3 (4) should be read with the threshold limits provided in the said regulations 10, 11 and 12. According to Shri Barua regulation 3(4) is applicable to all the cases wherever the acquisition exceeds the limit prescribed in the regulations irrespective of the existing holding of the acquirer and regulations 3(5) would follow automatically to all cases attracting regulation 3(4).

Referring to the Appellants' version that they were served with two Show Cause Notices, inter alia stating the same allegations, Shri Barua explained the procedure followed by SEBI, that in case of a suspected violation of the regulation by the parties before the initiation of any inquiry proceedings, following the principles of natural justice, a notice is issued asking them to show cause as to why action should not be initiated against them, for the alleged violations, and thereafter on receipt of the reply, an opportunity for hearing is also given, to the affected parties and in the event of a prima-facie case of a violation is made out for levy of monetary penalty, an order is issued for adjudication. The Adjudicating Officer in turn initiates proceedings again by issuing a Show Cause Notice to the persons concerned to explain their viewpoint in the matter, that in the instant case also the same procedure was followed. Shri Barua stated that the Appellants were given enough opportunities to make written and oral submissions in the proceedings and the Adjudicating Officer has dealt with their submissions in detail in the impugned order and a reasoned order based on the findings has been passed, that it cannot be said that the Adjudicating Officer passed the order without following the principles of natural justice. Shri Barua, referring to the Appellants statement that there was gain to the investing public due to acquisition and loss to the Appellants, stated that increase in the stake of promoter in the company means lesser role for the public shareholders, and non disclosure of material facts virtually amounts to denial of information to the public shareholders to take appropriate decision as to continue in the company as a shareholder or exit from it, in the context of the change in the quantum of ownership holdings, that the requirement of submitting a report in respect of the acquisition which entitles an acquirer to exercise 10% or more voting rights in a listed target company is a very important material information having a bearing on the investment or dis-investment decision of the remaining shareholders of the company. Referring to the quantum of penalty imposed by the Adjudicating Officer, Shri Barua pointed out that the Adjudicating Officer has imposed only a sum of Rs. 1.25 lakhs as penalty collectively against 13 Appellants, taking into consideration the provisions of section 15J as well. Shri Barua submitted that sum of Rs. 1.25 lakhs imposed as penalty in this case cannot be considered unwarranted or unduly harsh in the light of the facts and circumstances of the case.

I have very carefully considered the rival contentions putforth by the parties in their respective pleadings and oral submissions.

SEBI is mandated to protect the interests of investors in securities and to promote the development of and to regulate the securities market by such measures, as it thinks fit. One of such specific measures is regulating substantial

acquisition of shares and take over of companies (Section 11(2)(h). To accomplish this mission, SEBI had put in position a set of regulations titled the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 through a notification dated 4.11.1994. Since this Regulation was found wanting in several aspects, an expert committee under the Chairmanship of Justice P.N.Bhagwati was constituted in November, 1995 "to examine the areas of deficiencies in the 1994 Regulations; and to suggest amendments in the Regulations with a view to strengthening the Regulations and making them more fair, transparent and unambiguous and also protecting the interest of investors and of all parties concerned in the acquisition process". The committee viewed that the Regulations for substantial acquisition of shares and takeovers should operate principally to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers. In the committee's words "The Committee also recognised that the process of take over 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 the shareholders

Protection of interests of share holders

…….

……..."

The Committee further stated that "in the event of any ambiguity or doubt as to the interpretation of the regulation, the concerned authority shall pay adequate attention to and be guided by any one or more of the aforesaid general principles having a bearing on the matter"

After taking into consideration the recommendations of the Committee a new set of regulations namely Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 was brought in position with effect from 20.2.1997 repealing the 1994 Regulations. The Regulation was amended again thereafter based on the recommendations subsequently made by Justice Bhagwati Committee. However, since the instant acquisition was on 15.9.1997, it is felt not necessary to go into the regulatory changes effected thereafter.

From the scheme of the Regulations and the background of the same, it is clear that it is a piece of beneficial legislation directed to protect the interests of shareholders in the context of substantial acquisition of shares and takeovers. The Regulation is meant to protect the interests of all the shareholders and not any particular class or category, at the cost of another. Therefore interpretation of the provisions of the Regulation should be done taking into consideration its broad objective and also the general principles formulated by the Committee.

In the instant case there is no dispute about the facts. The Appellants are the promoters of the company. Their holding in the company's capital prior to their acquisition of 20 lakh shares through preferential allotment was 52.95%. The company with a view to generate funds for its business activities, made a preferential allotment of 20 lakhs shares (18.82%) on 15.9.1997 to the promoters. As a result thereof the promoters' shareholding in the company increased to 71.77%. The Respondent is of the view that though the acquisition attracted regulation 11(2), it was saved of the need of complying with the requirement of making public offer required under the said regulation, as the transaction being preferential allotment, enjoyed exemption in terms of regulation 3(1)(c), but compliance of the reporting requirement provided under regulation 3(3), 3(4) and 3(5) attracted, and by not complying with those requirements, penal provisions of section 15A attracted. But the Appellants hold differently claiming that the regulations are not applicable to them as they are promoters and not acquirers and that as on 15.9.1997 their share holding had already crossed the bench mark level of 51% provided in regulation 11(2) and they being already in control of the company, the question of acquiring control by them also did not rise at that point of time. The Appellants had filed detailed reply in the adjudication, which has been extensively extracted in the impugned order. Shri Kinikar authorised representative of the Appellants made very exhaustive submissions in support of the Appellants stand. It was really enlightening. However for the limited purpose of deciding the present appeal, the basic question that need be answered is as to whether the acquisition under consideration is beyond the purview of the Regulation.

The Appellants' version that they are only promoters and not acquirers need be examined first. In this context it is also pertinent to mention that according to the Adjudicating Officer, the provisions of regulation 11(2) are attracted to the case. There cannot be two opinion on the issue that regulation 3 has no application to an acquisition not covered under regulation 10 or 11 or 12. Exemption provided under regulation 3 is from the applicability of the provisions of the said

regulation. To be more precise exemption is from the compliance of the requirements of making public offer required thereunder. It is to be noted that regulation 11(2) was drastically amended in 1998 (w.e.f 28.10.1998). Since the preferential allotment was made on 15.9.1997, the applicable provision to the instant case is the one, which was in force on 15.9.1997 and not as amended subsequently. Regulation 11(2) as it stood on 15.9.1997 reads as under:

Consolidation of holdings:

11 (1) "No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law not less than 10% but not more than 51% 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 2% 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.

(2) No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise more than 51% of the voting rights in a company, unless such acquirer makes a public announcement to acquire share of such company in accordance with the Regulations.

Explanation: For the purpose of Regulation 10 and Regulation 11, acquisition shall mean and include:

(a) direct acquisition in a listed company to which the Regulations apply;

(b) indirect acquisition by virtue of acquisition of holding companies, whether listed or unlisted, whether in India or abroad".

From the wording of the regulation it is clear that compliance of the requirements of regulation 11(2) is fastened on the acquirer or the persons acting in concert with the acquirer and the event is acquisition of shares which would entitle such acquirer to exercise more than 51% of the voting rights in a company. This leads to the question as to who is (i) an acquirer, (ii) a person acting in concert with the acquirer and (iii) a promoter. The Regulations provide definitions in this regard.

In terms of regulation 2(1)(b) "acquirer" means any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer.

According to regulation 2(1)(e) "person 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 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."

Regulation 2(h) defines 'promoter' to mean:

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

Target Company as per regulation 2(1)(o) means

"a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired".

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

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

According to Regulation 2(1)(c) "control shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding, or management rights or shareholders agreements or voting rights in anymanner. (emphasis supplied)

Thus it is clear from the definition that control of a company is not confined only to the extent of the shareholding, but it can be exercised through several means as stated in the definition. Therefore it is wrong to say that a promoter already in control of the company may not resort to acquisition of shares in that company. Recently this Tribunal had examined the concept of promoter and acquirer in a case (appeal No.34 – Modipon Ltd v. Securities and Exchange Board of India & others, decided on 31.7.2001) wherein, the Tribunal held as under:

> "It may be noted that the promoter as such need not be an acquirer automatically. Any person, shareholder 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 nor 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 expression ‘acquirer’ and the ‘person acting in concert with the acquirer’ have been defined in the regulation. There is no hard and fast rule that a promoter can never be an acquirer or person acting in concert. If a promoter acquires or agrees to acquire shares or voting rights or gains control over the target company he can be safely considered as an acquirer who in turn would be subject to the provisions of regulation 11. Likewise a promoter can be a person acting in concert provided he is found to cover within the scope of the definition under regulation 2(1)(e). Whether a promoter is also an acquirer or person acting in concert would depend on the facts of each case. It is to be noted that there is no blanket prohibition on the promoters acquiring shares etc. in the company."

I find no reason to take a different view in this case.

In the light of the factual and the legal position discussed above, I am of the view that the Appellants are acquirers. In this context the next question to be considered is as to whether the acquisition of additional shares forming 18.82% of the company's capital attracted the regulations.

Shri Kinikar had advanced an argument that since the Appellants' holding in the company's share capital having been crossed the benchmark prescribed in the regulation well before the acquisition of 18.82% shares on 15.9.1997, the Appellants cannot be said to have acquired shares which would entitle them to exercise more than 51% of the voting rights, is not getting support from the provisions of regulation 11(2). His argument is that the regulation deals with acquisition crossing the benchmark provided therein, and that benchmark can be crossed only once and not every time an acquisition is made. Since the Appellants were holding 52.95% shares on 15.9.1997, i.e. above the cut off figure of 51% stipulated in the regulation, acquisition of additional shares accounting for about 18.82% in the company's capital on 15.9.1997did not result in creating any fresh entitlement to exercise more than 51% of the voting rights of the company. In this context he had also referred to regulation 10 and the Adjudicating Officer's observation that regulation 10 is not applicable to the instant acquisition. Based on the said observation he had canvassed that if regulation 10 is not applicable regulation 11(2) also is not applicable as both the regulations, but for the quantum of percentage cut off, are in paramateria the same. For comparative purpose regulation 10 and regulation 11(2) are extracted below:

Regulation 10	Regulation 11(2)
(acquisition of 10% or more of the shares or voting rights of any company)	(Consolidation of holdings)
" No acquirer shall acquire shares or voting rights which (taken together with shares of voting rights, if any, held by him or by persons acting in concert with him) entitle such acquirer to exercise ten percent or more of the voting rights in a company, unless acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations.	No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him) entitle such acquirer to exercise more than 51% of the voting rights in a company, unless such acquirer makes a public announcement to acquire share of such company in accordance with the regulations.

On a perusal of the text of the said two regulations, it is seen that these regulations, but for the quantum of threshold limit, are identical. However, it does not stand to reason to believe that regulation 11(2) is redundant or superfluous in view of the provisions of regulation 10 that a case to which regulation 10 is not attracted regulation 11 (2) also would not attract. In this context it is necessary to find out the object of incorporating these two regulations. It is not proper or possible to jump to the conclusion that framers of the regulation had inadvertently put a regulation over looking the scope of another regulation. Attempt should be to find out the reason to incorporate those regulations rather than holding them redundant or superfluous. It is a settled principle of interpretations that the court should adopt a construction, which advances the policy of the legislation to extend the benefit rather than one, which curtails the benefit (Union of India Vs. Pradeep Kumari. (1995) 2 SCC 736). It is no body's case that the provision for making public offer in the cases of substantial acquisition and takeovers is not meant for the benefit of the public shareholders. In this context the observation made by Supreme court in Keshoram and Co v. UOI (1989) 3 SCC 151 is to be noted. In the said case the apex court while considering the validity of section 3 of the East Punjab Urban Rent Restriction Act 1949 and the notification dated Sept. 24, 1974, granting exemption from section 13 of the Act to buildings constructed in the urban area, observed as follows:

> "Interpretation of the Act and the impugned notification as suggested on behalf of the tenants if accepted would defeat the purpose of the beneficial social legislation. It is a settled rule of harmonious construction of statute that a construction which would advance the object and purpose of the legislation should be followed and a construction which would result in reducing a provision of the Act to a dead letter or to defeat the object and purpose of the statute should be avoided with out any violence to the language".

In this context yet another decision of the Supreme Court (Sultana Begum V Premchand Jain (1997) 1 SCC 373) is also referred to-

> "… the rule of interpretation requires that while interpreting two inconsistent or obviously repugnant provisions of the Act the court should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both provisions may be allowed to operate with out rendering

either of them otiose"

In para 15 of the said judgement the court further viewed:

"On a conspectus of the case law indicated above, the following principles are clearly discernible. It is the duty of the courts to avoid a head on clash between two sections of the Act and to construe the provisions, which appear to be in conflict with each other in such a manner as to harmonise them.

The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, inspite of its efforts, finds it impossible to effect reconciliation between them. It has to be borne in mind all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "harmonious construction".

The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.

To harmonise is not to destroy any statutory provision or to render it otiose.

Keeping in mind the above observations of the apex court one has to see the relevance of regulations 10 and 11 (2). Regulation 10 is on acquisition of shares beyond the benchmark of 10% stated therein. Said regulation 10 provides the threshold limit for public offer. Justice Bhagwati Committee has discussed at length the background in which the said regulation 10 was considered necessary to be put in the Regulations. The Committee has stated that " it was felt that under Indian conditions hardly any person as investor would invest in more than 10% in any company unless he has an intention of taking over the company at some point of time and the committee therefore decided to retain the existing threshold limit of 10%". Thus regulation 10 is on the "beginning of the beginning". Regulation 11 is for a different purpose. It is on consolidation of holdings. In this context the clarification given by SEBI vide its press release dated 30.1.1997 while adopting the Bhagwati committee report is considered relevant. According to the said press report "for the purpose of consolidation of holdings, acquirers holding not less than 10% but not more than 51% are allowed creeping acquisition up to 2% in any period of 12 months. Any purchase by a person holding more than 51% would have to be in a transparent manner through a public tender offer". In this context observation made by the Bhagwati committee in para 6.2 of its report is also relevant, as based on the said recommendation regulation 11(2) was redrafted.

> " The committee noted that the existing Regulations do not give any scope for consolidation of holdings by person(s) who already hold more than 10% of the shares or voting rights of the company without attracting the mandatory public offer. The Committee appreciated the fact that in a competitive environment, it may become necessary for person(s) in control of the company to consolidate their holdings either suo moto or to build their defences against takeover threats.
>
> The Committee also recognised the need to harmonise consolidation of holdings by persons already holding substantial shares with the need to protect the interest of shareholders in a competitive, free market environment. Indeed for the same reason, Regulations of other countries do not trigger mandatory public offers for all acquisitions and provide for consolidation of shareholdings within a band in a specified period. This only allowed for consolidation in a regulated manner without unduly affecting the interest of the shareholders.
>
> The draft Report had proposed a graduated limit of acquisition – depending upon whether the acquirers existing holding was between 10% and 25% or between 25% and 50%. The Committee felt that introducing such differential limit would not be in the interest of the shareholders and more over would not be justifiable on any rational basis. It was therefore decided to remove this differentiation and permit acquisition upto 2% in any 12 month period, to all persons who holds shares above the threshold limit of 10%.
>
> The draft report had also contained a proposal for clarification to the effect that the provisions of regulations will not be applicable to any person who holds 50% or more. But reservations were expressed from some quarters about this exclusion clause on the ground that if the regulations are intended to safeguard shareholders interest even in the event of substantial acquisition of shares not involving a takeover, there is no justification for excluding substantial acquisition by acquirers holding more than 50%. The question which arose in this regard is upto what point of time substantial acquisitions not involving takeovers need to be regulated. The committee decided that substantial acquisition till an acquirer gains absolute control lever of 75% may be brought within the scope of the Regulations".

As already stated, the promoters were holding 52.95% shares in the company. Acquisition of further shares was in effect consolidation of their holding.

If financing the business activities of the company was their sole objective, the Appellants would not have provided funds against the issue of shares in a preferential allotment. It would have been possible through other least risky and more remunerative modes. The argument that since the Appellants were already entitled to exercise more than 51% of the voting rights, further acquisition of shares did not attract the requirements of making public offer as provided in regulation 11(2) is not supported by the regulation. Any further addition to the voting right beyond 51% would attract regulation 11(2) as is clear from the wording of the regulation that 'no acquirer shall acquire shares……., which entitle such acquirer to exercise more than 51% of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company….". It is an absurd proposition that public offer is required to be made only when the acquisition is in the range of 10 % and 51% and on crossing 51% the acquirer is free to acquire shares without making public offer. Admitting such a proposition would be endorsing the view that the benefit proposed to be extended to the shareholders will not be available to those public shareholders holding 49% in a company where the acquirers held 51% shares. In this context one has to remember the objective of the regulation and the general principles laid down by the Committee discussed in this order above. The Regulation should operate principally to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers. The fact that the regulation was redrafted in 1998 making the intention clear does not mean that the pre-amended regulation 11(2) provided acquisition of shares without making public offer, once the 51% benchmark is crossed. As the Adjudicating officer rightly pointed out the words "more than 51%" in the regulation need be interpreted in a purposive manner. The Appellants contention that 51% benchmark can be crossed only once and repeated crossing is not possible is unsustainable in view of the scope of the regulation as could be gathered in the light of clarification provided by SEBI and the recommendations of Justice Bhagwati Committee. It is thus obvious that regulations 10 and 11 are put in position with different objectives. Therefore non-application of regulation 10 does not automatically exclude the acquisition from the ambit of regulation 11(2). In the light of the above discussion it is clear that acquisition of shares by the Appellants in the preferential allotment made by the company on 15.9.1997 attracted the provisions of regulation 11(2).

Having come to the conclusion that the Appellants are acquirers and that the acquisition attracted the provisions of regulation 11(2), the next question is as to whether the Appellants were required to comply with the requirements of regulations 3 (4) and 3(5).

Regulation 3 enumerates certain categories of acquisitions exempted from the compliance of the requirement of regulation 10, 11 and 12. One of such exempted categories is acquisition of shares in a preferential allotment made in pursuance of a resolution passed under section 81A of the Companies Act. The exemption is not automatic. It is subject to compliance of certain requirements. In any case it is an admitted fact that the instant acquisition was in a preferential allotment and the same enjoyed exemption under regulation 3. In this context it is to be noted that the acquisition enjoys exemption only from the compliance requirements of regulation 10, 11 and 12. They are not exempted from complying with the reporting requirements in terms of sub regulations (3), (4) and (5) of regulation 3. The said sub regulations require the acquirer to comply with certain reporting requirements with Stock Exchange and SEBI.

These sub regulations are extracted below:

> In respect of acquisitions under clauses (c), (e), (h) and (i) of sub regulation (1), the stock exchanges where the shares of the company are listed shall, for information of the public, be notified of the details of the proposed transactions at least 4 working days in advance of the date of the proposed acquisition, in case of acquisition exceeding 2% of the voting share capital of the company.
>
> In respect of acquisitions under clauses (a), (b), (c), (e) and (i) of sub-regulation (1), the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to the Board giving all details in respect of acquisitions which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him) would entitle such person to exercise 10% or more of the voting rights in a company.
>
> (5) The acquirer shall, along with the report referred to under sub- regulation (4), pay a fee of Rs. 10, 000/- to the Board, either by a bankers cheque or demand draft in favour of the Securities and Exchange Board of India, payable at Mumbai."
>
> Sub regulations (3), (4) and (5) were incorporated in the regulation for the reason as the committee put it "in order to ensure transparency in the transaction and assist in the monitoring, all the exempted transactions should be subject to reporting requirements to the concerned stock exchange in advance of the proposed acquisition and to SEBI".

As the Adjudicating Officer has viewed that the requirements of regulation3(3) has been substantially complied with and that penalty has not been imposed on that count, it is felt not necessary to examine the scope of the said regulation and compliance of the same by the Appellants. Regulation 3(5) is incidental to the compliance of regulation 3(4) as it is on payment of fee with the report referred to in the said sub regulation.

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

The Appellants allegations that the Respondent had issued two show cause notices and that they were not given opportunity to explain their viewpoint in the proceedings before the authorities are baseless. Learned representative of the Respondent has explained the procedure followed by SEBI in the investigations/inquiries and the circumstances in which the said two show cause notices were issued. The explanations are found satisfactory. It is evident from the order itself that the Appellants were given sufficient opportunities to make written and oral submissions before the adjudicating officer and they had availed of the opportunity. Therefore attack of the impugned order on the ground of failure to comply with the rules of natural justice does not sustain. The impugned order runs to 37 closely typed pages, wherein the Adjudicating Officer has explained each and every ground adduced by the Appellants. It is therefore incorrect to say that the order is not a reasoned speaking order.

The Appellants had submitted that quantum of penalty of Rs.1.25 lakhs levied on them is unwarranted and that in any case, they had not committed any serious offence to attract such a penalty, that in all fairness, if at all any penalty is leviable the same be restricted to a nominal penalty of Rs. 10, 000 i.e., to the extent of the fee payable under regulation 3(5) with the report to SEBI under regulation 3(4).

In terms of section 15I of the Act, it is for the Adjudicating Officer on being satisfied after inquiry that the person has failed to comply with any of the specific provisions of the Act, to decide as to whether any penalty need be imposed and if so what should be the quantum thereof in terms of the concerned provisions In this regard he is required to take into account the following factors stated in section 15J

> "15J while adjudging the quantum of penalty under section 15I the adjudicating Officer shall have due regard to the following factors, namely:
>
> (a) the amount of disproportionate gain or unfair advantage wherever quantifiable, made as a result of the default;
>
> (b) the amount of loss caused to an investor or group of investors as result of the default
>
> (c) the repetitive nature of the default"

In the instant case, the Adjudicating Officer has invoked the penal provisions of section 15A(a) which provides imposition of a maximum penalty of rupees one lakh and fifty thousand for failure to submit reports etc., to SEBI within the stipulated time. In para 7.2 of the impugned order the Adjudicating Officer has explained what weighed in his mind in deciding the quantum of penalty in the following words

> "7.2: Section 15J of SEBI Act, Gain to the Acquirers and loss to Investors. In the light of what is stated above, penalty is leviable against the Acquirers and persons acting in concert. For levy of such penalty, the provisions of Section 15J of SEBI Act will have to be taken into account. For that purpose it is seen that this is the first case of default as per the record. The Notices' submitted that they have obtained the shares for purpose of infusing capital into a loss making company. The allotment was made on 15.9.1997 for Rs. 10/- per share. It is seen from the letter dated 8th November, 2000 of the Notices, that around that period the shares were traded in BSE, at below par value, and there was no trading on Hyderabad and Chennai exchanges. That means there was no loss to investors and gain to the Acquirers. This aspect was taken into account, therefore maximum penalty is not levied."

The fact that the acquisition price was more than the then prevailing market price would have induced the investors to avail of the public offer and exit from the company gainfully may not be ignored. However, this benefit was in any case not available to the shareholders as the acquirers were exempted from making public offer under regulation 11(2) as the acquisition was in a preferential allotment. Since the Adjudicating Officer has taken into consideration the relevant factors while deciding the quantum of penalty, I do not consider it necessary to interfere with his decision in this regard.

For the reasons stated above the appeal is dismissed.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: August 17, 2001