BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO. 34/2001

In the matter of:

M/s. Modipon Limited **Appellant**

Vs.

Securities and Exchange Board of India **Respondent 1**
Modi Rubber Limited **Respondent 2**
Dr. Bhupendra Kumar Modi **Respondent 3**
Mr. Vinay Kumar Modi **Respondent 4**
Modi Fashions and Securities **Respondent 5**
Modikem Limited **Respondent 6**
Shri K.K.Modi **Respondent 7**
HSBC Securities and
Capital Markets (I) Pvt. Ltd **Respondent 8**
Modi Spinning & Weaving Mills Ltd **Respondent 9**
Punjab National Bank **Respondent 10**

APPEARANCE

Mr. Saleh H Doctor
Senior Counsel

Mr. Abeezar E Faizullabhoy
Advocate

Mr. Dhirendra Negi
Advocate

Ms Prarthana Awasthi
I/b. J. Sagar Associates

Mr. P.K.Sinha
Representative of the Appellant **for Appellant**

Mr. Kumar L. Desai
Advocate

Mr. K.K.Billimoria
Advocate
I/b. Maneksha & Sethna

Mr. Ananta Barua
Jt. Legal Advisor,
SEBI **for Respondent 1**

Mr. Christopher D'Souza
Advocate
I/b. Shrirang Shrimani **for Respondent 2**

Mr. Arun Siwach
Advocate

Ms N Jaykar
I/b. Gagrat & Co., for Respondents 3 & 6

Mr. Harish Pandya
Advocate
I/b. Mr.Prem Ranga for Respondents 4 & 5

Mr. Virag Tulzapurkar
Advocate

Mr. M.P.Rao
Advocate

Mr. Gautam Doshi
Advocate

Mr. R.K.Mehta
Advocate
I/b. Crawford Bailey & Co., for Respondent 7

Ms Jasmine Batliwalla
Director –Compliance & Legal
HSBC Securities &
Capital Markets (I)Pvt.Ltd for Respondent 8

None for Respondent No.9

Mr. Bami Patel
Advocate for Respondent 10

(Appeal arising out of the order dated 16.7.2001 made by the Chairman, Securities and Exchange Board of India)

ORDER

The present appeal is directed against the order dated 16.7.2001 made by the Chairman, Securities and Exchange of India, Respondent No.1 (SEBI). In the said order, it was held that the Appellant, apart from being a promoter of Respondent No.2 (MRL) was also acting in concert with the acquirers, and directed that the Appellant shall not be eligible to participate in the public offer made to the shareholders of MRL by the acquirers, vide letter of offer dated 30.5.2001. Appellant filed a Writ Petition (1536 of 2001) in the Hon'ble Bombay High Court challenging the legality and validity of the said order. The Hon'ble High Court disposed of the said Writ Petition vide its order dated 23.7.2001 with the following observation/direction.

> "In our view, since an appeal has been provided before the Appellate Authority, the proper course for the petitioners is to prefer an appeal. Mr. Doctor for the petitioners states that an appeal will be filed on or before 25th July 2001. In as much as the date by which the acceptance/rejection was to be intimated under the letter of offer was 2nd August, 2001., the Appellate Authority will decide the appeal and, in any case, the stay application of the petitioners, on or before 31st July, 2001"……. …. All parties will co.operate with the Appellate Authority for the disposal of the proceedings within the time limit as specified in the order".

The Appellant filed the appeal in the Tribunal on 24.7.2001. Briefly put, the facts leading to present appeal are as under:

The Appellant is a public limited company stated to be in the group of companies of the Modi family. Modi family owned and controller several companies. Members of the said Modi family entered into a

Memorandum of Understanding on 24.1.1989 (MOU), where under the control and management of all the Modi Group of 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 ShriK.K.Modi (Respondent No.7) and brothers namely, S/Shri V.K.Modi (Respondent No.4), B.K.Modi (Respondent No.3), U.K.Modi and S.K.Modi. The Appellant has two business divisions, the fibres division initially owned by it, and a chemicals division acquired in 1985 as a result of merger of another company namely Indofil Chemicals Ltd. Thus since 1985, it has two business divisions known as – Modipon Fibres Company (Fibres Division) and Indofil Chemicals Company (Chemicals Division). As per the scheme under the MOU Group 'A' was to manage own and/or control of "Modipon (minus Indofil + selling agency)" and few other companies and Group 'B' was to manage own and or control "Modipon Ltd (Minus Modipon Fibre) and few other companies. As per the scheme, MRL was put under Group 'B'. As per the MOU the scheme of arrangement of splitting up of the Appellant into two divisions, namely Fibres and Chemicals Divisions was to be prepared by M/s. Bensi Mehta and Co., Chartered Accountants, after taking into consideration the valuation done by another Chartered Accountant's firm M/s. Billimoria & Company. In terms of the MOU, the management of units of Modipon was required to be shifted to/restored, as agreed to under the MOU, to respective managements of each group, simultaneously with the appointment of an independent Chairman as provided for in the MOU. The MOU provided that the common activities of the company relating to the Board etc., will be co-ordinated by the independent Chairman of the company, assisted by the Managing Directors, and all matters which are to be dealt with by the company not to be related to individual unit on day today basis shall also be dealt by the Chairman assisted by the Managing Directors. It has been stated that pending the split of the Appellant company a corporate office was set up to look after the secretarial and other laison work of the company, where as the Fibres Division and Chemicals Division operated as two independent units under the control and management of Shri M.K.Modi and Shri K.K.Modi, respectively. M/s. B.S.Billimoria and Company prepared the requisite valuation report for the purpose of preparing the scheme of arrangement. But M/s., Bansi Mehta & Co while preparing the scheme of arrangement suggested certain changes inter alia affecting the investments in the group companies. In the process, it has been stated, that M/s. Bansi Mehta changed the valuation of both Fibres Division and Chemicals Division, and as a result disputes arose. These disputes were referred to the Chairman, IFCI for decision as provided for in the MOU. The Chairman, IFCI gave his report recording his findings. It has been stated that in the report, the Chairman, had directed Group B to pay a sum of Rs. 2, 135.55 lakhs to Group 'A' on account of short fall in valuation of assets of companies allocated to Group 'A', and that it was also held that shares of Group B companies held by Fibre Division and its subsidiaries could be transferred to Group B as per extant law as per market price prevailing at the time of actual transfer. Since the said decision was not acceptable, Shri K K Modi filed a suit bearing No. 1394/96 in the Hon'ble Delhi High Court challenging the decision. The said suit is still pending.

The present management of MRL decided to consolidate their holding in the company by acquiring about 35% capital, through a public offer. On 31.3.2001 the Respondent No.8 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 4, 3, 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 acquirer, 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 the Appellant 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 is in compliance with the said direction of the Hon'ble High Court.

In the light of the Hon'ble High Court's order dated 23.7.2001 mentioned earlier, appeal was filed in the

Tribunal on 24th July 2001 around 5.p.m. Notices were issued to the parties on the same day listing the matter on 27th July, 2001. Even though the matter was listed to consider the Appellant's prayer for interim order, the learned Counsel for the parties present, expressed their willingness and readiness to argue the appeal itself, without filing any written reply. Accordingly the appeal itself was taken up for final disposal.

Shri S.H.Doctor, learned Senior Counsel appearing for the Appellant explained briefly the background leading to the appeal and also stated the chronology of events. Learned Senior Counsel stated that the Appellant is neither a promoter nor a person acting or deemed to be acting, in concert with the acquirers that it is not connected or associated with the acquirers in any manner, and the Appellant or its directors are not concerned in any manner with the management or control of MRL. According to him the Appellant is keenly interested in selling the shares of MRL. Referring to the decision taken in the BOD meeting of the Appellant regarding participation in the public offer, Shri Doctor stated that Shri K.K. Modi had not objected to the same but only dissented to the decision without getting prior written approval from Financial Institutions and Banks. Since the consent has already been obtained from the Financial Institutions and the Banks the objection no longer remains. In this context the learned Senior Counsel also referred to the statement recorded by the Hon'ble Delhi High Court in its order dated 2.7.2001 in the OS 277/2001 filed by Shri K.K. Modi that "learned Counsel of the parties are agreed that they will have no objection if the title of these shares is not transferred till the question is decided by the learned judge". Learned Senior Counsel also referred to a letter dated 18.5.2001 from Respondent No.8 to SEBI, wherein it has been stated that "the Deemed PACs are, as per the requirements of section G of your (SEBI) letter, governed by the provisions of Regulation 20 (4) of the Takeover Regulations i.e. if any one of them purchases any shares of MRL from the market at a price higher than the offer price, the said purchase price would be applicable to the entire offer. This would consequently rule out the participation of the Deemed PAC in the open offer". In this context the learned Senior Counsel read out the following extract from a letter dated 21.5.2001 from the acquirers to Respondent 8 that " we are hereby pointing out to you and in turn would require that this should be communicated to SEBI that the acquirers have no Board or Management or Shareholding control over the three companies referred to above (i.e. Modipon Ltd, Modi Spg.& Wvg. Mills Ltd and Modi Industries Ltd). Consequently any action taken by them would be independent of the acquirers and the acquirers should not be bound by their actions, and required on that basis to comply with the consequences of Regulation 20 (4). "Shri Doctor submitted that in view of the clear admission of the acquirers that the Appellant can participate in the public offer, they are now precluded from taking a different stand objecting the Appellant's participation. Learned Senior Counsel submitted that the pending litigation in the Delhi High Court and Debt Recovery Tribunal has no bearing on the decision of SEBI disqualifying the Appellant from participating in the public offer.

Shri Doctor stated that SEBI's order is not based on correct factual and legal position. He also stated that conclusion drawn by SEBI based on which the direction was issued is legally untenable. Shri Doctor emphatically refuted SEBI's version that the Appellant is a promoter of MRL or that it is a person deemed to be acting in concert with the acquirers.

With reference to the SEBI's conclusion that the Appellant is a promoter of MRL, learned Senior Counsel referred to paras 8.3 to 8.7 of the impugned order and stated that none of the grounds referred to therein supports the said conclusion. He submitted that the MOU dated 24.1.1989 clearly establishes the bifurcation of the companies belonging to each group and that the MOU has been substantially acted upon to the extent the same relates to change in management/ownership and control of the companies are concerned. There is no dispute about the fact that Fibre Division of the Appellant is owned by Group 'A' and the. Chemical Division is owned by Group 'B', that it is the Fibre Division, which is holding investment in MRL. According to Shri Doctor the existing dispute is on the valuation and the apportionment of the value of the assets between the groups, there is no dispute on the ownership of the units. The fact that the name of the Appellant has been shows as a promoter group company of MRL along with the acquirers in an offer document dated February 27, 1992 and that the Appellant has not disputed the said statement should not be construed as a factor to treat the Appellant as a promoter of MRL. Referring to SEBI's observation that MRL has been regularly filing declarations with Stock Exchanges in terms of regulation 8 (3) of the 1997 Regulations, showing the Appellant as a promoter, the learned Senior Counsel submitted that these declarations are filed in a routine way by the corporate office without properly examining the factual position. He also took the same stand with reference to SEBI's observation that the Appellant has been shown as a co-promoter in the statements furnished to the financial institutions. Referring to the observation in the order that there was an informal understanding between the Groups that the Appellant will always support the promoters of MRL, the learned Senior Counsel stated that there was no such understanding as alleged and no such informal

understanding can survive in view of the legal position set out by the Hon'ble Supreme Court. In this context he cited a decision of the Hon'ble Supreme Court in V.B. Rangaraj v V.B. Gopalakrishnan (AIR 1992 SC 453) that a restriction which is not specified in the Articles is not binding either on the company or on the shareholders. ShriDoctor submitted that showing the Appellant as a part of the promoter group and considering its shareholding as a part of the "promoter group holding" in the offer document was a deliberate action by the acquirers, solely with an intention to deny participation in the offer, by the Appellant. He stated that the declarations or disclosures made by MRL are not binding upon the Appellant, that there was also no need for the Appellant to challenge these declarations/disclosures as the same did not affect any of its rights, the fact that the Appellant did not object to or challenge the declaration made by the MRL does not mean that the Appellant is still a promoter of MRL. Learned Senior Counsel pointed out 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 MRL, in the category of promoter group shareholding, that its name was not even shown as a promoter in the said public announcement, that it was only when SEBI gave directions, the acquirers included the shareholding of the Appellant under the category of persons deemed to be acting in concert, and more pertinently even in the final offer document, the Appellant was not shown as a promoter of MRL.

Learned Senior Counsel submitted that even assuming that the Appellant is a promoter of MRL, still the acquirers are bound to issue the letter of offer to the Appellant as the Appellant is entitled to participate in the public offer because public offer is open to all the shareholders of the target company and there is no bar against a promoter selling its shares to the acquirers in response to a public offer and SEBI has no power to disqualify a shareholder from participating in the public offer. Shri Doctor stated that the object of the 1997 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 effected, is entitled to dispose of his shares in the public offer and exit, that this opportunity is available to all the share holders of the target company be it a promoter or not. He further submitted that in the definition "public share holding" as defined in regulation 2 (1) (j)_ means shareholding in the hands of the persons other than the 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. Shri Doctor further submitted that the concept of 'promoter' is relevant only for the purpose of Chapter II of the 1997 Regulations on disclosures and it has no relevance to substantial acquisition of shares covered under Chapter III of the Regulations.

Learned Senior Counsel submitted that a statute must be read as it is and its provisions cannot be given a different meaning than what is provided for on 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, that even if participation of the Appellant in the public offer results in proportionate reduction in the quantum of offer by the other shareholders, the same cannot be a ground for excluding the Appellant from the public offer.

Referring to SEBI's view that the provisions of regulation 3 (1) (e) (iii) providing an alternate exit route to relatives, promoters etc., justifies their exclusion from the public offer, the learned Senior Counsel stated that the said regulation does not envisage any exit route, that it merely provides exemption from the compliance of the formalities of a public offer in case where there is an interse transfer of shares amongst the promoters of the company, such an exemption would be made use of only in cases where the promoters are agreeable for such interse transfer. The regulation neither prescribes a compulsory mode of transfer of shares amongst promoters nor does it provide an alternative to the public offer. He submitted that the transaction referred to in 3 (1) (e) (iii) is contractual.

Learned Senior Counsel submitted that the Appellant is not an acquirer in terms of the definition available in regulation 2 (1) (b), as it is not directly or indirectly acquiring or has agreed to acquire shares, voting rights or control in MRL. He further submitted that the Appellant is also not a person acting in concert in terms of 2 (1) (e) (1) with the acquirers as it does not share any objective or purpose with the acquirers or is co-operating with the acquirers for acquiring or agreeing to acquire shares or voting rights in, or control over MRL. He pointed out that the Appellant is a seller in the instant case and not a purchaser.

According to the learned Senior Counsel the Appellant is also not a person deemed to be acting in concert with the acquirers within the meaning of the regulation 2 (1) (e) (2), as the Appellant does not fall under any of the categories mentioned in Regulation 2 (1) (e) (2) so as to make it a person acting in

concert with the acquirers. The Appellant is not the holding company or subsidiary of Modi Fashions and securities P.Ltd or of Modikem Ltd (the two acquirer companies), the Appellant and the two acquirer companies are not under the same management, the Appellant is not a director of either of Modi Fashions and Securities P. Ltd or Modikem ltd, nor is it entrusted with the management of their funds, the Appellant is not a director of the acquirer companies nor an associate of Shri B.K.Modi and/or Shri V.K.Modi who are the directors of the said two acquirer companies. The rest of the categories at (iv) to (x) have no relevance in the present case and the same are inapplicable. The Appellant is not an investment company to attract clause (x) of regulation 2 (1) (e) (2), that it is not SEBI's case also that the Appellant is an investment company, that an investment company can only mean a company whose principal business or main object is to deal in investments.

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.

Shri Arun Sewach, learned Counsel appearing for Respondents 3 & 6 submitted that the Respondents stand by what was stated in the affidavit filed in the Delhi High Court and the Board Resolution passed by the Appellant in the matter.

Shri Harish Pandya, learned Counsel appearing for Respondents 4 and 5 raised certain preliminary objections on the maintainability of the appeal. Referring to the provisions of section 15T of the Securities and Exchange Board of India Act, 1992 (the Act) Shri Pandya stated that the Appellant is not an aggrieved person and as such not entitled to prefer the appeal. According to him the shares under sale belong to Modipon Ltd and not to the Fibre Division. He further submitted that the resolution dated 24.3.1998, based on which Shri P.K.Sinha has filed the appeal, does not empower Shri Sinha to file an appeal on behalf of Modipon Ltd. In this context he cited the Board resolution of Modipon Ltd dated 13.5.1989 and 25.2.1989 filed with the appeal. According to him since the appeal is filed without proper authority the same should not be entertained. Learned Counsel raised another preliminary objection that the Appellant no longer holds the shares in question in view of the order dated 28.6.2001 made by the Debt Recovery Tribunal, Delhi, appointing a Receiver to sell the assets of the Appellant. According to the learned Counsel, since the Receiver has stepped in, for the purpose of section 15T of the Act, the Receiver appointed by the DRT is the aggrieved person and he is the person entitled to file the appeal and not the Appellant.

Shri Pandya referred to the preamble of the Act and stated that the broad objectives stated therein should not be lost sight of. He submitted that the acquirers have already informed the shareholders of MRL that the Appellant holding 4.5% shares in MRL will be ineligible to participate in the offer. Any reversal of this position would adversely affect the interests of the ordinary public shareholders as the Appellant would eat in to the public shareholders' quota resulting in reduction in the quantum of sale of their shares to the acquirer. Learned Counsel referring to the Balance Sheet of the Appellant as on 31.3.1999 (annexed to the appeal) stated that the company's investment in securities is valued around Rs.8 crores as against its total paid up capital of RS 9 crores and therefore the Appellant is an investment company falling under category (x) in regulation 2 (1) (e) (2) (x). Learned Counsel also referred to the letter dated 11.7.2001 from LIC to the Appellant wherein it has been stated that "all the outstanding dues against Term Loan of Modi Rubber Ltd are cleared by the company. As a result, undertaking given by you for non disposal of Modi Rubbers shares held by you stands revoked herewith",

and stated that this statement clearly shows that the Appellant is a party associated with MRL, otherwise it had no need to give such an undertaking to LIC.

Shri Virag Tulzapurkar, learned Counsel appearing for Respondent 7 submitted that the present exercise is a futile one as the Hon'ble Delhi High Court vide its order dated 2.7.2001 had already barred transfer of title of the shares held by the Appellant pursuant to the offer to the acquirers, that since the title cannot be transferred to the acquirers, no purpose would be served by allowing the Appellant to participate in the public offer. Shri Tulzapurkar reiterated the basis on which SEBI had concluded that the Appellant is a promoter and also justified SEBI's decision disqualifying the Appellant from participating in the offer reiterating the viewpoint of SEBI in the order. He stated that the promoter concept is applicable not only to chapter II but also to Chapter III. In support of his contention that the promoters should not be allowed to participate in the offer, he read out para 8. 9 and 8.10 of the SEBI's order. He emphasised the observation in para 8. 9 in the order that "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%". Shri Tulzapurkar also supported the observation in para 8.10 of the order that "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 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 promoters". He also supported SEBI's version that the availability of alternate exit route to relatives, promotes etc., under regulation 3 (1) (e) (iii), without triggering public offer, justifies exclusion of persons belonging to the promoter group from the public offer. According to the learned Counsel, if a different view is taken, the public shareholders would suffer.

Ms Jasmine Batliwala, representing Respondent No. 8, submitted that the Appellant is a promoter of MRL, that it is also a person deemed to be acting in concert with the acquirers and as such ineligible to participate in the public offer, that in case the Appellant is allowed to participate, small shareholders of MRL will suffer as their offer will proportionately reduce. According to her the Appellant can even without participating in the public offer exit from MRL in terms of regulation 3 (1) (e) (iii).

Respondent No.9, vide its letter dated 26.7.2001 had informed the Tribunal that it has preferred a Civil writ Petition (CW 4374/2001) before the Hon'ble High Court at Delhi, seeking permission to participate in the public offer made by the acquirers, that the matter is now listed before the Hon'ble High Court on 21.8.2001, that the matter is subjudice and therefore it may not be appropriate for it to submit to the jurisdiction of the Securities Appellate Tribunal in the appeal under consideration at this stage.

Respondent No.10 has filed written submission, stating interalia that "keeping in view of the deteriorating financial position of the company and urgency to induct long term funds, it will be just that the Appellant may be allowed to participate in the public offer….. The participation of the appellant in the said open offer will ensure that the Banks and financial institutions will be in a position to recover their dues from the sale of the said shares, proportionately as per the decision of the consortium". Shri Bami Patel, the learned Counsel who appeared for the Respondent re-iterated the said submissions.

Shri Christopher D'Souza, the learned Counsel for Respondent No.2, though present, did not make any submission supporting or opposing the appeal.

I have very carefully considered the submissions made by the learned Counsel for 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 16th July 2001 made by SEBI's Chairman. The dispute relating to title to the ownership of the shares involved or the claim of banks and financial institutions are pending before the Hon'ble Delhi High Court and Debt Recovery Tribunal, Delhi. These issues are not under adjudication before me in the present appeal. I do not consider that the temporary prohibition on the transfer of the title of the shares offered in the public offer, made by the Hon'ble Dlehi High Court has resulted in the appeal proceedings becoming redundant. It is made clear that this Tribunal is not considering in the appeal the post offer developments, but only the question of the threshold entry to the public offer. By the impugned order the

Appellant has been made ineligible to participate in the public offer made by the acquirers, on the ground that the Appellant is a promoter of the target company (MRL) and that the Appellant is deemed to be acting in concert with the acquirers. The participation of the Appellant is also viewed against the interest of the public shareholders.

Before going into the merits of the appeal, I would like first to deal with the preliminary objections raised by Shri Pandya. The argument that the Appellant is not an aggrieved person by the order of SEBI is not correct. On a perusal of the impugned order it is seen that the Appellant had represented to SEBI against its direction to the acquirers to state in the offer document that the Appellant, being a part of the promoter group of MRL and also person deemed to be acting in concert with the acquirers is not eligible to participate in the instant open offer. The acquirers are ready to purchase the shares in the public offer at a price, which is higher than the prevailing market price. In this context it is to be noted that the 11, 33, 333 shares in question are held by the Appellant, though its ownership is under dispute. These shares if sold at the price quoted by the acquirers would fetch a big amount. Therefore it cannot be said that the Appellant as on date has no role and that it is not aggrieved by SEBI's order, denying it to fetch a high price for those shares held by it. Further, it is also to be remembered that it was in the Writ Petition filed by the Appellant in the Hon'ble Bombay High Court, the Court held that the proper course for the petitioners is to prefer an appeal before the Appellate Authority and the appellate authority was directed to decide the appeal early and in any case the stay application of the petitioners on or before 31st July 2001. There is no force in the learned Counsel's argument that the Appellant has no locus standi to file the present appeal. On the alleged deficiency of the Board Resolution, it is seen that it was the Modipon's Board of Directors who had in their resolution authorised Shri Sinha to file the petition etc. The resolution is dated 24.3.1998 and is specific on the subject. Therefore it cannot be said that the appeal has been filed without authority. The argument that since the Debt Recovery Tribunal, Delhi has appointed a Receiver, to take care of the assets, the Receiver so appointed is the aggrieved person to file the appeal is also of no force. Receiver is not an interested person concerned about the generation of funds etc., In nay case we are not dealing in the present appeal the disposal of the assets of the Appellant, the question as to whether the Appellant, being the holder of the shares of MRL is entitled to participate in the public offer is under consideration. For the reasons stated above, the preliminary objections do not hold good. Therefore the objections are over ruled.

Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997 made under the SEBI Act, is the governing regime for takeovers. 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 dispatched 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:

(h) "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) bank 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 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 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 defenses 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 the SEBI's decision holding the Appellant ineligible to participate in the public offer made vide letter dated May 30, 2001.

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.

I cannot part with this case without expressing my gratitude to the learned counsel on all sides who have co-operated with me extremely well for the disposal of the appeal within the time limit as specified in the order of the Hon'ble Bombay High Court.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: MUMBAI
Date: July 31, 2001